

CHILDREN AND THE LAW IN KENYA

Edited by

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INTRODUCTION

The United Nations' General Assembly in its 106th Plenary Meeting on 21 December 1976 adopted a Resolution (A/RES/31/169) designating 1979 the International Year of the Child. Among other things, the Resolution signified a general call on the international community --individual persons, associations, governmental and non-governmental organisations - to re-activate their consciousness in, and efforts geared primarily towards enhancing the welfare and protection of children in all respects. Of specific concern to lawyers are those efforts targeted towards the promotion and implementation of ideals expressed in the United Nations Declaration on the Rights of the Child of 20 December 1959, other declaratory standards generated under the U.N. system, and national laws and policies.

The Law Society of Kenya, a statutory body corporate established under the The Law Society of Kenya Act (Chap. 18, Laws of Kenya), in furtherance of its statutory objects afore-mentioned Act, initiated the idea of holding a Seminar on Children and the Law through the Women, Children and the Law Committee under the chairpersonship of Ms. Grace W. Githu. Not only was this an effort to help the public in understanding and improving on its understanding and concern with the laws affecting children but also as the society's contribution to the International Year of the Child.

With the co-operation of the Institute for Development Studies, and the University of Nairobi, the Law Society of Kenya was able to organise the seminar in which seven (7) commissioned papers were presented and discussed. The papers covered the following areas:

1. Marriage Break-down and the Law of Custody and Maintenance of Children.
2. The Law of Inheritance and the Child
3. The Law of Adoption
4. Legal Aspects of Children's Homes and Institutions
5. Law Governing the Employment of Children
6. Juvenile Delinquency and the Law
7. Medical and Legal Aspects of Offences Against Children.

These papers were written by lawyers — predominantly university teachers and practicing advocates —, a social worker and an academic medical doctor. A sitting Resident Magistrate and a recently graduated law student also contributed.

The seminar was held at the University of Nairobi on 13th and 14th July 1979 and was attended by, among others, two cabinet ministers, the Vice Chancellor of the University, the Dean of the Faculty of Law, and the Chairman of the Law Society of Kenya. Other participants were drawn from more than fifteen organisations, government departments concerned with the protection and Welfare of the Children, and interested individuals from the University of Nairobi. This multi-disciplinary and specialist group frankly analysed and discussed the papers and made useful additional points of view, some of which appear in this Volume as "proceedings".

This volume represents in independent Kenya a maiden effort to review, critically, various legal regimes that affect the welfare and protection of children. The first and last major effort to provide a wide-ranging examination of the laws affecting the status and role of children in society was undertaken by the colonial regime in 1953 when the Report of the Committee on Young Persons and Children was published. Since then, however, neither the government nor private efforts have undertaken such a major task. It is within this laissez faire atmosphere that the present contribution is to be measured and evaluated.

It ought to be axiomatic to say that any worthwhile analysis of laws can only be done in the context of particularised cultural formations within specific political-economic structures. Within the 20th Century, Kenya's political economy has **dramatically** changed from communal social formations based on essentially subsistence oriented mode of production to a dominantly private property forms of ownership with an essentially capitalist mode of production. This social transformation has seen the withering away of egalitarian social norms on the one hand and on the other the ascendancy of individualistic norms that have greatly undermined the status of a large section of society with children being put in most precarious positions. Most of the "rights" and "privileges"

that children exercise or may enjoy are derivable from those of the larger society with the family being the smallest unit. The Essays in this Volume reflect this fact and underline the need of addressing the problems of Children within a whole social context.

Of course, by their physical, mental, and social immaturity, the plight of children deserve special attention and redress. One need not wait for the whole transformation of society in order to ameliorate certain glaring injustices attendant on children. Some of the limitations in the papers in this volume can be ascribed to this concern with the obviously limited improvements so that children may maximize their welfare and protection within the existing structure. As observed above, the volume represents only a maiden effort and much more should and remains to be done even in the legal sphere.

It is the hope of the organisers and participants in the seminar that most of the recommendations for reforms in the law and its administration as reflected in individual author's view points and in the general "proceedings" will be acted on by the Government on priority basis. It is only such response that will indicate the level of our society's commitment to the ideals put forward for the International Year of the Child.

An attempt has been made in editing the papers to minimize as much as possible changing the style and manner in which the papers were originally written. This not only helps to preserve the contributions and sentiments of the authors' but also provide diversity of opinions. There is obvious areas of over-lap in some of the papers and this has not been interfered with in the interest of emphasis and in an effort to underscore the levels of inter-relations and connectedness of particular legal regimes.

The purpose would be achieved if the Volume provokes and influences legislators and other policy makers and implementors in designing and executing improved institutional and other social and economic services that will primarily help children.

In closing it is necessary to record thanks for those who assisted in the organisation and running of the Seminar and in the preparation of this final collection of papers. Special mention must be made here to:- the Law Society of Kenya, in particular members of its Women, Children and the Law Committee; the University of Nairobi in particular the administration of the Institute for Development Studies and the Faculty of Law. Of individuals the following deserve very special mention: A.W. Wako, Lee Muthoga, G.W. Githu, Chesaina (Law Society of Kenya); Dr. S.E. Migot-Adholla, members of the typing-pool and "Machine Room", Mrs. J. Muchura (Publication's editor) (I.D.S.); Dr. H.W.O. Okoth-Ogendo (Ag. Dean, Faculty of Law), Messrs. A.G. Ringera, S.O. Ongondo, G.K. Kamau (Faculty of Law); Prof. J.M. Mungai, V.C., University of Nairobi, for welcoming the Minister to the Campus; Honorables Dr. Z.T. Onyonka M.P., Minister for Housing and Social Services, and Mr. D. Mutinda M.P., Minister for Information and Broad-casting; and, last but not least, my fellow contributors to this volume.

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MARRIAGE BREAK-DOWN AND THE LAW OF CUSTODY AND MAINTENANCE IN KENYA

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I. INTRODUCTION: BASIC CONCEPTS AND SCOPE

This paper is divided into 3 major sections. The present section provides a general overview of the problem as well as underlining the various theories, concepts, and laws governing marriage and marriage break-downs. A brief synopsis of what these relations are given in order that the juridical bases of some of the contradictions and/or inconsistencies in custody and maintenance laws and practice be appreciated contextually. Section 2 covers a textual analysis of the legislative provisions of the various statutes with direct relevance to custody and maintenance, including the Marriage Bill 1976, amended in 1979. Section 3 provides a detailed critical and analytical review of judicial decisions in a historical context. The last section, Section 4 provides a brief conclusion and recommendations on the basis of the findings in the study.

It is the view of the authors that matters pertaining to custody and maintenance of children are consequential upon a variety of incidents which include, inter alia divorce, nullification of a marriage, separation, death of one or both spouses in a marriage, or the consummation of leviratic unions - the latter being a customary law device for continuing or salvaging otherwise broken union of a husband and a wife. It is in this broader conceptualisation of marriage break-down that the custody and maintenance of children under Kenya law is discussed in this paper.

The Guardianship of Infants Act (Cap. 144) which is the principal legislation on the subject of custody and maintenance anticipates this broader perspective of incidences preceding custody and maintenance. It states in Section 17:

Where in any proceeding before any court the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income

thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, up-bringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of father.

1.1 DIFFERENT MARRIAGE FORMS RECOGNISED UNDER KENYAN LAW.

Generally legal marriage can be contracted under:- a) the Marriage Act (Cap. 150) - with civil and/or Christian religions ceremonies; (b) Hindu Marriage and Divorce Act (Cap. 157); (c) Islamic religious system through Mohamedan Marriage, Divorce and Succession Act, (Cap. 156) read in Conjunction with Article 66 of the 1969 Constitution; and, (d) the various African customary systems. Marriage contracted under (a) and (b) above, are monogamous while those under (c) and (d), above, are potentially polygymous.

The position of African customary marriages warrants some further comment since there is no single legislation directly and solely concerned with the same and also because such marriages have undergone considerable jurisprudential battery during and after the colonial administration. There even exist express provisions in the other legislations permitting "conversion" or "up-grading" of these supposedly legal African customary marriages to the status of either Islamic<sup>1</sup> or monogamous Christian<sup>2</sup> forms.

It can be conceded that judicial opinion favourable to African customary law marriages have undergone some appreciable degree of legitimisation since the famous negative opinion expressed by the late Chief Justice Hamilton in the 1910s when he said that he did"...not think that it can be said that the native custom approximates in any way the legal idea of marriage."<sup>3</sup> We shall now identify the incidental statutory references and court decisions that have recognised and given legal legitimacy to marriages contracted under African customary laws.

1. Cap. 156, Section 6
2. Cap. 151, Section 9
3. Rex V. Amkeyo, (1917) K.L.R. 14.

The constitution which, in theory at least, embody the highest legal norms and standards in the state to which all laws must conform provides general recognition to customary laws.<sup>4</sup> However, within the very Article, it allows for promulgation of discriminatory laws with respect to "adoption, marriage, divorce.....or other matters of personal laws". While differential laws may be proper in certain areas in plural society as that obtaining in Kenya, such provision may also permit prejudicial categorisation of legal standards as the ones to be found in the statutes that make African customary law of marriages subordinate to the other systems.

The legality of African customary law marriages is recognised by the Judicature Act of 1967<sup>5</sup> which provides in Section 3 (2) that the courts in Kenya in determining disputes brought before them:

shall be guided by African Customary law in Civil cases in which one or more of the parties is subject to it.....so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law.....

This conditional recognition of African customary laws is of general nature; and marriage, divorce, and other personal laws are assumed to be covered therewithin.

The next statutory recognition of the legality of African customary marriage laws of a more specific and relevant nature is to be found under Section 2 of the Magistrate's Courts Act of 1967<sup>6</sup> which states: "claim under customary law" means a claim concerning any of the following matters under African customary law:-

- (a) .....
- (b) marriage, divorce, maintenance or dowry;
- (c) seduction or pregnancy of an unmarried women or girl;
- (d) .....
- (e) matters affecting status, and in particular the status of women, widows and children, including guaradianship, custody adoption and legitimacy;
- (f) succession....."

The Evidence Act of 1963 in Section 130 (2)<sup>7</sup> provides that marriage are recognisable:

Whether or not monogamous, which is by law binding during the lifetime of both parties unless dissolved according to law, and includes a marriage under native or tribal custom.

4. The Constitution of Kenya, 1969, Article 82 (4) (c)  
 5. Act No. 16 of 1967  
 6. Act No. 17 of 1967  
 7. See also section 127, 59 and 60 of the Act.

Another statute, the Marriage Act, (supra) recognises the legality of African customary marriage under Section 37. However, this is made superfluous since Section 35 (1) and 11 (d) permit conversion (presumably for the "better" system) of marriages contracted under customary law and Islamic law, respectively, to the monogamous Christian-cum civil type. We have already noted that Mohammedan Marriage, Divorce and Succession Act also provides for conversion of native-African customary - law marriages to the Islamic form.

It becomes apparent then that marriage systems are grouped in a hierarchy with the monogamous systems (civil, Christian and Hindu) occupying the higher echelons and the potentially polygamous (Islamic and African customary law) types filling the subordinate positions. In the final count, the African customary law marriage occupy the lowest degree of respect under the positive law.

Perhaps the area where African customary laws of marriage have found more clearer expression and recognition are in the courts.

In *Mwagiru v. Mumbi* [1967] E.A. 639. Justice Miller stated that:

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

In another case, in which the Judge gave other wise controversial observations<sup>8</sup> Justice Miller also observed that:

It is settled law that marriage properly contracted under customary law are of legal effect and matters appertaining to promises and preparations for such marriage are in my view cognisable by the courts depending upon the circumstances.<sup>9</sup>

It is important at this juncture to underscore the fact that, except for formal religious dogma, the level of social stratification resulting from the increasing spread and nationalisation of capitalist force, aided by state intervention, the differences in family institutions and structures anticipated by the different existing laws, are becoming less real. Extended family structures and patrilocality are two areas where major changes are taking place as relations of production upon which social

8. See comment by Kamau, G.K. "Customary Marriages Between Europeans and Africans in Kenya", 1971, 4, E.A.L.R. 217.

9. Case V. Ruguru (1970) E.A. 55.

relations are predicated change. The African family has been hit the hardest.

1: 2 MARRIAGE BREAK-DOWNS.

Marriage break-downs arising from civil, Hindu, and Christian unions (monogamous) are not consensually decided by the parties. In theory only the courts may decide on their dissolution except, of course, in cases of death of one or both of the parties. Provisions for these are in the Matrimonial Cause Act (1939), a statute closely modeled on the old Matrimonial Causes Act of 1939 of the United Kingdom (now repealed and replaced by the Divorce Reform Act, 1969, U.K., which became operative in 1971), the Hindu Marriage and Divorce Act, and the African Christian Marriage and Divorce Act.

The distinctive ideology and philosophy governing the dissolution of monogamous marriages is reflected in the heavy reliance on proof of matrimonial offences. This is in contrast to the doctrine of irretrievable break-down of marriage where matrimonial offences are merely of evidential rather than dispositive standing. The old English law upon which the existing Kenyan law largely drew was changed by the above reform in 1969. The new English law has adopted the concept of irretrievable or irreparable break-down of a marriage as the only criterial for awarding divorce. The proposed Marriage Bill of 1976, as amended in 1979, seeks to introduce in the Kenyan law this more progressive approach. In the present authors' view the new approach comes more close to the African customary principles.

There exist well publicised differences in opinion whether or not there existed marriage dissolution in traditional (i.e. pre-colonial) African societies event of death of one of the spouses. What is indisputable is the fact that there never existed rigid and inflexible rules and practice in the area. The ideology supporting marriage as a union more of two families rather than that between two individuals was supported by institutional arrangements and dispute settlement machinery that made divorce extremely rare. Upon death of the husband, the practice of levirate unions in many societies not only lent evidence to the view of non-dissolvability of marriages but also lends support to the notion of "family" marriages as opposed to marriage between man and wife which presupposes the existence of nuclear family structures. Some cases reviewed in Section 3, below do provide enough indication that instances of marriage-breakdowns were known in African societies, at least in the 20th century.

At the present time many Africans have adopted, either in whole or in part, legal ideology surrounding "Western type" of marriages as well as those of Islamic variety. The modes of production have changed from those of traditional pre-capitalist societies in Kenya. The emergent social relations are of necessity different from those previously supported by the pre-capitalist relations of production. The present transition period is characterised by conflicting ideologies and practice and any form of generalisation can only be done with numerous caveats and caution.

In Islamic marriages the dominant form of divorce or talaka is that consisting of triple repudiation of the wife by the husband. Other forms include the Khul in which a wife initiates the divorce by requesting the husband to repudiate her on condition that she pays her "freedom" fees. The faskh which consists of the wife petitioning the Kadthi to dissolve the marriage is also practiced.

Upon a successful marriage breakdown the different sub-systems of marriages provide for different arrangements for the custody and guardianship of the issues. Left alone, there is no evidence and guarantee that the non-judicial dissolution systems would provide adequate protection to the issues of the marriages. Indeed this is becoming even more uncertain given the rapid changes in family patterns and social obligations governing the society. It is within this underlying fact that the State has intervened and should intervene to integrate the law relating to custody and maintenance of children. To the extent that there is unequal level of state intervention in supervising the assignment of custody and maintenance of children, it is the purpose in this paper to try and show the theory and practice of what differences there are and the implications of these for the best interest of the children, and how the law ought to be modified so as to remedy the weaknesses.

## 2: LEGISLATIVE PROVISIONS ON CUSTODY AND MAINTENANCE.

The various legislations on marriage already mentioned (excluding the Matrimonial Causes Act (Cap. 152) and the Subordinate Courts (Separation and Maintenance) Act, (Cap. 153) make no provision for custody and maintenance is governed by provisions in the Guardianship of Infants Act, Matrimonial Causes Act, Subordinate Courts (Separation and Maintenance) Act, the Adoption Act, (Cap.143) and Children and Young Persons Act (Cap.141). Provisions of the latter two statutes are to be covered in the other papers and will not be reviewed herein.

In contrast the new bill, The Marriage Bill 1976, as amended in 1979 Sections 128 to 138 makes specific provision for custody and maintenance of children. This Bill is a consolidatory one in that it puts together the law relating to marriage, matrimonial causes and maintenance and custody of children. As will be indicated below, it seeks to repeal and replace all the legislations on these subjects except that relating to custody and maintenance.

A look at the relevant Key sections in the present enactments will give us an approximate idea of the current state of the law but one has to view it in the light of judicial decisions / see, Section 3, Below / and the general socio-economic conditions in Kenya to determine whether or not it is satisfactory.

2: I Matrimonial Causes Act.

The Matrimonial Causes Act (Cap. 152) Section 2 defines "children" to the effect that African, Arab and Baluchi children mature at 16 years and 13 years according as to whether they are male or female respectively. All other children ( and this basically means European children) mature at 21 years. Section 30 of the same Act provides for the custody and maintenance of 'children' as defined in the Act; consequently the Act gives longer protection to that class or category of children who mature at 21 (namely the non-African non-Arab and non Baluchi children). There is no logical nor reasonable basis for this discriminatory provision.

The Act does not specify the factors which may disentitle a spouse to custody of children but leaves this issue to what "the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children the marriage of whose parents is the subject of the proceedings, or if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the court" / section 30 (1) /

Probably, the legislature thought that this Act would be mainly invoked in proceedings at the High Court level where the judges are **presumed** to be competent without specific legislative guidance to know what is in the best interest of the children. The Act does not exclude the applicability of the Guardianship of Infants Act (Cap. 144) in proceedings under it. Hence, the conclusion is that the court shall have recourse to the provisions of Section 17 of Cap. 144 in deciding on the issue of the custody and maintenance of children. (The procedural details of how a spouse may proceed to court under the Matrimonial Cause Act

are contained in the schedule to the Act and are not part of the scope of this paper).

2: 2 Subordinate Court. (Separation and Maintenance Act.)

The subordinate Courts (Separation and Maintenance) Act (Cap. 153) commences with a preamble which suggests that it is for the protection of women against their husbands. It applies in matrimonial applications made by the wife in sub-ordinate courts for separation from her husband and for maintenance for her and the children of the marriage with her and the husband.<sup>10</sup>

Applications to court under this Act may be made by any woman against her husband (Sec.3). The Act does not give men equal opportunity under this section as it is women and not men who may apply. But Section 6 entitles either the husband or the wife to apply for variation of any order given pursuant to an application under Section 3.

Of direct relevance to this paper is section 3(1) (c) which reads:

"Any woman may apply to the court for an order or orders under this Act on any of the following grounds namely-----

( ) .....

(b) .....

( ) .....

(c) that her husband has been guilty of persistent cruelty to her or her children or of wilful neglect to provide reasonable maintenance for her or her children whom he is legally liable to maintain

Section 3 (4) provides:

For the purposes of this Ordinance, 'children whom he is legally liable to maintain' includes, in addition to children of the marriage, any child of the wife born before such marriage (whether such child is legitimate or illegitimate) until such child attains the age of sixteen years or until the death of its mother, whichever event first occurs.

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10. See the ruling in Wasan v. Wason (1967) E.A. 682.

This subsection implies that such a child as is included by the Sub-section would be left unprotected by the law should its mother die before it attains 16. The Sub-section further assumes that at 16 a child matures and is not entitled to parental care - which is rather unrealistic.

Section 4(b) provides that the court may order that:

"the legal custody of any children of the marriage between the applicant and her husband while under the age of sixteen years be committed to the applicant".

Section 5 deprives courts jurisdiction to make orders under the Act if the wife (applicant) has committed adultery unless the husband has condoned or connived at the adultery. This is an extension of the matrimonial offences doctrine used in the dissolution of marriages.

Where the court is requested by the husband to discharge a maintenance order on grounds of the wife having adultery then,

in the event of the order being discharged, the court may make a new order that the legal custody of the children of the marriage shall continue to be committed to the wife, and that the husband shall pay to the wife or to any officer of the court or third person on her behalf such monthly sum as the court considers reasonable in the circumstances of the case **for the maintenance of each such** child until the child attains the age of sixteen years: provided that the total monthly sum ordered to be paid under this paragraph shall not exceed four hundred shillings; and in making such an order the court shall have regard primarily to the interests of the children S. 6(2) (ii).

Under Section 10, an interim maintenance order for a duration of three months may be made pending the final determination of the case.

Section 12 of the Act gives the Attorney General as agent of the State authority to apply for orders for custody and maintenance of the children of a marriage where the wife is dead or, if she is alive, has disentitled herself to any orders under the Act by reason of her committing adultery.

Section 15 purports to exclude from the protection of the Act children born to marriage contracted under customary law for it reads: (This Ordinance shall apply only in cases where the husband and wife have been married within the definition of the term "marriage" contained in Section 2 of the Matrimonial Causes Act.) The Section referred to defines marriage as being a monogamous union.

The court's authority to make provisions for the maintenance and custody of children born of marriages contracted under customary law derives from the Magistrate's Court Act which empowers the Magistrate's courts of the 3rd class to determine all matters relating to customary law.

There is no provision under the Matrimonial Causes Act (which applies primarily in proceedings before the High Court) corresponding with the above mentioned provision of the Subordinate Courts (Separation and Maintenance) Act at Section 12.

In effect the two Acts by and large leave it to the spouses to initiate proceedings relating to the custody and maintenance of their children thus assuming that at least one of the spouses will be responsible enough to do so when the marriage encounters problems. The power given to the Attorney General in the Subordinate Courts (Separation and Maintenance) Act, has not in the authors' knowledge ever been exercised by the Attorney General. It would in practice require a surveillance machinery within the Attorney General's Office to track down the cases deserving treatment under Section 12.

2: 3 Guardianship of Infants Act.

As mentioned above and as will be made more clearer in the Court decisions discussed in Section 3, below, the Key section of this Act (i.e. Section 17) stipulates for the equality of rights as between parents towards children, gives welfare and interests of children paramount consideration, and rules out any other contending legal doctrine that may conflict with the ones in the Act. Each spouse has equal right in initiating court proceedings in the interests of the welfare of children (Section 6 and 7).

Third parties (viz., those who are not the parents of the children) may recover any reasonable costs of upbringing of a child from its parents (Section 13). The Act bars the mother of the child the right to obtain any maintenance from the child's father unless she is separated from him (Section 7 (4)). This latter section encourages physical separation **and** makes reconciliation of the parents difficult and may be open to criticism as to whether this is necessarily in the interest of the marriage or the children.

Section 13 (supra.) appears to encourage "strangers" to take interest in the welfare of children. It is interesting to note that prior to the enactment of this legislation, judicial opinion in one instance

rejected this principle<sup>11</sup> whereas in another it was favourable.<sup>12</sup>

It is important to reiterate that of all the above statutes analysed, it is only the Guardianship of Infants Act which is not to be repealed and replaced in entirety by the Marriage Bill (1976, 1979) when it ultimately becomes law.<sup>13</sup>

2: 4 Marriage Bill, 1976 ( as amended in 1979).

Section 128 to and including 138 of the Bill reiterates most of the principles regarding custody and maintenance of children as is contained in the legislations discussed above. It defines "child" in broad terms to include illegitimate child of any of the parties to a marriage (Section 128) and stipulates that children are those below the age of twenty-one. There is a contradiction, however, since Section 137(1) allows for discontinuation of periodical payments of maintenance monies when the child attains the age of 18 years or marries.

The Bill also encourages parents to separate and desist from residing together whenever any one of them is under a court order to pay maintenance for the children (Section 137(2)). It has been pointed out earlier that such a provision needs to be debated and its propriety properly determined.

Section 128(2) reiterates but in a limited manner the provisions in Section 17 of the Guardianship of Infants Act. It also adopts the fixed-age Islamic rule and practice that a child under the age of seven years shall ordinarily remain in the care of his/her mother. The current status of practical application of this principle is provided in this paper in Section 3, below.

3: JUDICIAL DECISIONS ON CUSTODY AND MAINTENANCE

From the time Kenya was a protectorate and then a colony to the time that she acquired the present status of a republic, there has been persistent inconsistency in decisions of record regarding the proper principles applicable in custody and maintenance cases. Historically several factors can be identified that may have contributed to this, viz:

- a) the existence of separate judicial systems--African and central---within the legal system prior to 1967,

12. Ole Ntutu v. Ole Sinderia (1953) 1, C.R.L.R. 8

13. See section 155 and First Schedule to the Bill

- b) the absence of a single binding substantive legislation prior to 1959, governing custody and maintenance of children
- c) the apparent neglect of proper legal research by the bench before ruling on cases, particularly where parties are not represented by advocates, and
- d) the obviously confusing cultural norms involving conflicts between the received law and the numerous indigeneous customary laws and religious rules.

Happily in the 1970s, there began to show some consistency in the application of the Guardianship of Infants Act, with three principles emerging as dominant. These being the two principles embodied in Section 17 of the Act regarding the paramountcy of the interest of the child, and the equality of rights as between mothers and fathers on claims to custody over children. The third principle is that a child of tender years is, in the absence of any negating special reasons, to be in the custody of the mother.<sup>14</sup> In the latter case, like any other case of custody responsibility for provision of material factors required for the maintenance of the child is shareable by the mother and the father. / See Appendix "A" for the Comparison with the international legal standards 7.

In analysing judicial decisions as a source of law and practice notice should be taken of the fact that numerically only a few cases involving issues of custody and maintenance ever reach the courts. The currency of extra **judicial Settlement of custody and maintenance disputes** ought to be empirically studied and established using sociological research techniques. It can reasonably be hypothesised that a good number of cases settled out of court may not be in harmony with the letter and/or spirit of the law as established by statute or court decisions. The analysis presented here is however unfortunately limited to the few cases that have gone and are determined by the courts of higher categories.

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14. See for instance the ruling of Sheridan, J. - of 23 June, 1978 in Taabu W3o Kazungu v. Kalama, Misc. Civil Case No. 12 of 1977 (High Court Unreported), and also the very able judgement of I. Dow, D.M. III, in Wanjiku v. Hinga, Maintenance cause No. 2 of 1976, D.M.'s Court Nairobi, upheld by Miller, J. in Hinga v. Wanjiku, Civil Appl. No. 1977 (High Court) (unreported).

It needs to be emphasised that the absence of a binding single legislation on the subject of custody and maintenance prior to 1959 was contemporaneous with the division of the court system into the central system, which adjudicated in accordance with basically received criminal and civil laws, and the "native" court system, which adjudicated over civil disputes involving Africans. Appeals from decisions of the latter system were made to the Court of Review which had a reporting system.

3:1 Decisions of the Central Courts systems upto 1959.

In Abdulla Bin Mohamed v. Zuena Binti Abedi,<sup>15</sup> a case involving native Muslims of Shafei Sect, the court in applying Mohamedan law observed that Mohamedan law has very strong law in favour of legitimacy and hence in the case where the wife had deserted her husband and ceased cohabitation with him for over 2 $\frac{1}{2}$  years, within which period she got a child by another man, the child was to be considered legitimate and belonging to the deserted husband unless he specifically disavowed it. The court went further, however, and denied the husband custody of the child stating that, "the mother under Mohamedan law has the undoubted right to the custody of an infant / of about a year old, in this case / which it is her duty to nourish".<sup>16</sup>

But in Sidik s/o Mohamed v. Ima Binti Mohamed,<sup>17</sup> another case involving Muslims, the rights of the mother so well stated above was shown to be limited. The court in this case awarded custody to a paternal uncle of a female child of 5 on the principle that in Mohamedan law, a paternal uncle is the rightful natural guardian of the child and on change of domicile from Mombasa to Pemba had right to take the child with him. Ehrhardt, J. went on to observe that "The mother would be entitled to the custody of the child if the Plaintiff / the child's paternal uncle / was returning to or residing in Mombasa".<sup>18</sup>

This "rights" as opposed to welfare and interest of the child approach was again soon reiterated in Abubakar Bin Omar v. Mtongweni Bin Moosa.<sup>19</sup> In this case a paternal uncle to a girl child had sought guardianship

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15. (1912) 4, E.A. Protectorate L.R. 86.

16. Ibid., at 88

17. (1915-16) 6, K.L.R. 43

18. Ibid.

19. (1917-18) 7, K.L.R. 43

and custody of his niece whose father had died and for 13 years had stayed, together with her mother, with a stranger who had maintained her. Hamilton, C.J. in awarding custody to the paternal uncle said that ".....according to Mohamedan law a stranger who voluntarily maintains and brings up an orphan child has, in the absence of any special agreement no claim on account of such maintenance against the rightful guardian. What he has done is meritorious but will not support a claim for compensation.<sup>20</sup> The Hon. Chief Justice was honest enough to add that the ruling he made ".....may seem hard, but hard cases make bad law and the law on the subject is clear".<sup>21</sup> Again in Mbaruk Bin Diwansap v. Hamsini Bin Kimemeta<sup>22</sup>, about a decade later, the High Court denied a counter-claim for maintenance compensation to a "stranger" who had, for over 8 years, taken care of a female child. In this case the child's paternal grandfather was awarded custody in accordance with Mohamedan law without in any way considering the interests and welfare of the child.

The "hard cases make bad law" was once again encountered and applied by the High Court in a case where Masai customary law was applied.<sup>23</sup> In that case the plaintiff sought maintenance and custody of his deceased brother's children, widow and cattle. The brother had died several years earlier leaving his children, widow and cattle in the care of a non-Maasai friend who was Muslim. The widow had three additional children after her husband's death and all her children were brought up as Muslims. The cattle had also multiplied many times. Sir Jacob Barth, C.J., however followed abstract "rights" approach and gave the plaintiff custody of the children and the cattle while expressing opinion that he was influenced by the fact that **hard cases make** bad law and that he was compelled to follow Maasai customary law.

The above latter case was decided in the same year by the High Court as Hamisi Bin Ali v. Mariam Binti Ali.<sup>24</sup> In this case, Thomas, J. purported to be confirming the application of English common law of guardianship as opposed to any other law, to all persons in Kenya. He dismissed the application of the paternal uncle of a young girl who was claiming custody from the mother of the girl on grounds that the mother was of low morals and also that he had the right of custody under Islamic law. Justice Thomas said that, "...upon the death of the father the mother

20. Ibid. at 44

21. Ibid.

22. (1927-28) XI, K.L.R. 56.

23. Arap Leseret v. Ibrahim, (1929-30) 12, K.L.R. 50.

24. (1929 - 30) 12, K.L.R. 51.

has a common law right to the custody of a child of tender years as natural guardian, unless she has forfeited it by misconduct."<sup>25</sup> It should be noted that apart from the rather contentious holding that English common law of guardianship applied to Kenya, particularly to Muslims, Hindus and Africans,<sup>26</sup> the principle applied was quite similar to the Islamic laws and practice, since the judge found as fact that the mother of the girl was not a common prostitute, as was alleged.

The Court of Appeal had its share at the beginning of 1940s when in Bibi v. Bibi and Another<sup>27</sup> it reiterated that "questions of guardianship are to be determined according to English law". The Court of Appeal in this case refused to apply the alleged Mohamedan law to the effect that the right of a mother to the guardianship of her child, in this case of about 7 years old, is lost by her remarriage. The Court of Appeal reasoned that it would be inhuman to so deprive the mother custody of her child in the absence of any "proof of unfitness" in her part.

In the same year the Court of Appeal in rejecting an appeal from a decision of the Kenya High Court, on technical procedural grounds, refused to accept the claim of father for custody of his daughter who was then 12 on the ground that he had superior rights over the child's maternal grand-mother.<sup>28</sup> The mother of the child in this case, had died. The claim under Islamic law that at any rate the mother of the child would only have had the right of custody until the child attained the age of 7 was also not entertained by the Court of Appeal.

It was already apparent by the beginning of 1940s that the jurisprudence of central courts was developing in favour of the interests of the child irrespective of the dictates of rigid personal laws. There was also beginning to show a tendency to bestow rights of custody of young children to mothers or their female next of kin. Principles of English law were being used increasingly over other laws, whenever conflict of laws arose. In spite of these changing judicial moods, the decisions of the High Court in the 1950s showed lack of clarity and lack of unequivocality

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25. Ibid., at 52.

26. Mr. Gibson Kamau Kuria has challenged, in entirety, the constitutional propriety of application of English personal laws to Africans, Hindus, or Muslims particularly those governing custody and maintenance, see G.K. Kuria, "Religion, the Constitution and Family Law and Succession in Kenya", paper prepared for Faculty of Law Seminar, October 28, 1977, at pp.82-84.

27. 8, E.A.L.R. 200 (C.A.)

28. (1941) 8, E.A.C.A. 12.

in the principles as shown in the following two decisions.

In Krishan v. Kumari,<sup>29</sup> where the High Court decided mainly on preliminary points of law rather than on merits of the case, the court made several observations. Of relevance here were the observations that: neither the Custody of children Act, 1891 (u.k.) nor the Guardianship of Infants Acts, 1868 and 1925 (U.K.) were statutes of general application to Kenya - thus implying that only English customary (common) law may have been received in Kenya; neither the Hindu Marriage, Divorce and Succession Act (Cap. 149) nor the Custody of Children Ordinance, 1926 (Kenya) provided substantive law on custody, and; in Kenya, the "general" law-- implying common law---was applicable. After stating the traditional common law position to the effect that "...a father has a natural jurisdiction over the infant's welfare and a right to the custody of his child during infancy". [and that this] "...a right **exists even against the mother**",<sup>30</sup> the court declined to rule in favour of the father. In effect then, the court accepted the Islamic practice which generally favours mothers regarding custody of children of tender years. The contradictions in the court's jurisprudence is however apparent in this case.

A few years before the enactment of the Guardianship of Infants Act, the High Court made a ruling purporting to apply the harsh English common law--which some commentator has asserted to be in concert with Kikuyu custody law<sup>31</sup> with the effect that a paternal uncle was awarded custody of a 4 year old female child in an admitted contravention of canons of justice which may have dictated that the child be left in custody of "a strange" Nandi woman who had taken very able care of the child. Miler, C.J. categorically stated that:

.....if it were merely a question of weighing the comparative advantages to the child the scales would come down heavily on the side of the respondent, / "stranger" /, but, as I have said, it is contended that the applicant in this case has rights which cannot be override....<sup>32</sup>

The Judge went on to assert that in English law

the welfare of the child is the paramount consideration as between parents inter se or between strangers inter se. As between a parent and a stranger, however, the parent has a right, which has been subject of judicial definition more than once.<sup>33</sup>

29. (1955) 26, K.L.R. 32.

30. Ibid: at 36

31. See, Kamau Kuria, op.cit. at 82

32. In Re G.M. (An Infant) [1957] E.A. 714, at 715.

33. Ibid.

3: 2 Decisions of the Court of Review (for Africans) 1951-1959.

In Nyabeir v. Nyaboga,<sup>34</sup> the court of Review stated the general rule of Gusii customary law to the effect that in question of custody, where a woman is married and not divorced but separates from the husband without his consent and irregularly "re-marries" and begets children in the new union, all the children of the regular and the irregular union "belong" to the legal husband. However, in the present case the court refused to award custody of the children of the "irregular" union to the legal husband on the basis of "natural justice" since it found as fact that the woman concerned had unsuccessfully demanded divorce from the legal husband. It seems that the court was concerned more with the determination of "right of possession" of the parties rather than the welfare of the children concerned.

In the same year, the Court ruled that although the Maasai law, which it applied, dictated that a legal husband has rights of custody of children conceived and born to his deserting wife during an "irregular" union, the putative father of such children was entitled to recoup the maintenance monies spent on such children.<sup>35</sup>

Two years later the Court of Review was invoked to decide a case of custody in which a Gusii woman had deserted her legal husband and during that period she conceived and gave birth to two children, one with unknown father and another with an identified lover who wished to marry her and she him. The court ruled that the legal husband had the right of custody of the child with the an unidentified father. The court here refused to follow the ruling in Nyaberi's case on the ground that the latter was decided "upon facts of the particular case". It stated:

The customary law on this subject is clear and long-established, namely, that the children of any irregular union between the wife and a man other than the husband, as well as the children of the marriage, belong to the husband of the regular union.<sup>36</sup>

The court, however, gave custody of the second child the woman had with the identified lover to the woman because he wanted to marry the lover and also because "natural justice demands that she should keep the custody of that child".<sup>37</sup>

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34. (1953) I.C.R.L.R. 5.

35. Ole Ntutu v. Ole Sinderia, (1953) 1, C.R.L.R.8

36. Nyandiko v. Kerubo D/O Motanya, (1955) 3 C.R.L.R. 2, at P.2

37. Ibid. at p.3

In the same year the Court followed "with some hesitation and reluctance", its ruling in the above case as regards the child born to the woman with the identified lover whom she wanted to marry, Ochero D/O Oigo v. Mogoi<sup>38</sup>. Here, the woman had a child with her husband before he died leaving her to be "inherited" through a leviratic union to the deceased husband's brother. She was so "inherited" against her will and she deserted and had a second child with a lover she wanted to marry. Her father also consented to refunding the bride price to the levir so that she could marry the new lover. The court gave custody of her first child to the levir and the second to her. This was again a compromise solution not based entirely on consideration of the interest of the children concerned.

Again in Moraa D/O Obare v. Nyakong'o<sup>39</sup>, a mother was given custody of her 3 children born in an irregular marriage that she entered into while her first marriage was still legal and subsisting. She could not get a child in the first marriage and, although technically in Gusii customary law as then established by the court any issues would have "belonged" to the first husband, she had wanted to stay with her second "husband". The court ruled that "principles of natural justice" dictated that she keep custody of her children.

The second half of 1950s saw a wave of cases coming before the court in which the real motive of the legal husbands was not so much demand for custody and assumption of responsibility for maintenance of the children born to their wives but which they did not father but rather anticipated material benefits that would accrue once the children were married, in case of female children.

Saitenui v. Maiba<sup>40</sup>, a case involving the Taveta, set the trend in this direction. Here the legal husband had paid only "trivial bride price" and had a child with his wife. The wife then deserted and lived with another man. They had 3 children in this irregular union. After about 7 years of desertion the legal husband filed a successful petition for custody of children of the irregular union. He never sought for enforcement of the order. ~~51~~ **13 years later**, about 13 years after the wife had deserted, he took a court action demanding custody of all the children. The court

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38. (1955) 3 C.R.L.R. 4.

39. (1955) 3 C.R.L.R. 10

40. (1956) 4 C.R.L.R. 5

however reasoned, rather incorrectly, that the legal husband had "forfeited his rights when he failed to complete the initial bride price." Failure to complete bride price is not a ground for vitiating a marriage under African customary law.<sup>41</sup>

Onchoke v. Kerebi d/o Ondieki,<sup>42</sup> a case from Kisii followed closely on the nyayos of Saitemu v. Maibu (supra). In the former case, a wife deserted her husband before she had any child with him and for 13 uninterrupted years she lived an adulterous life from which she had 6 children 3 dead and 3 surviving. Her lover with whom she had the children wanted to marry her and the custody of the children. The court, in awarding her and her lover custody of the children noted that her legal husband's intention was the potential receipt of bride-price from marriage of the children. It stated: "strictly according to customary law the applicant / husband / has a claim to the respondent's illegitimate children.", however, given the circumstances of the case, "natural justice demands that /the putative father/ should be allowed to keep the children, of which he is admittedly the father".<sup>43</sup> The Court went on to observe that "the conduct of the applicant amounts to an abuse of the customary law and is repugnant to natural justice".<sup>44</sup> That is, his indifference to the adulterous union of his wife and lack of concern for the welfare of "his" children.

In Maivura v. Anginda,<sup>45</sup> another case from Kisii, the issue was whether a legal husband - having married the wife under the African Christian and Divorce Ordinance - had the right of custody of children born to his deserting wife in a purported customary marriage entered into by the wife 17 years earlier. The wife had deserted and had one illegitimate child and then purported to marry someone else under customary law and had 8 more children. Evidence was given that in the interim period when the wife had only 3 children the husband had successfully applied for custody but did not seek enforcement of this order for several years. Taking judicial notice of the inaction on part of the legal husband in seeking execution of the earlier order and also finding as fact that his real interest was in the dowry to be paid on marriage of the children, the court awarded custody to the wife. The wife was not condemned by the court for contracting the illegal "second" marriage as the husband himself had illegally "married" another 3 wives. Natural law was used to justify the

41. See the Magistrate's ruling in Wanjiku v. Hinga, footnote 14, above.
42. (1958) 6, C.R.L.R. 2.
43. Ibid.
44. Ibid., p.3
45. (1958) 6 C.R.L.R. 4

court decision. It ought to be noted here that such double-decker marriage were and are still common in Kenya.

The Court of Review by 1959 moved along from the strict "right of possession" approach in setting custody issues and started looking at the interest of the children. In Kadogo v. Gohu<sup>46</sup>, a case involving the Giriama, a paternal uncle sought custody of 4 children of his deceased brother. His brother's widow, the mother of the children, however preferred to stay with and be maintained by the deceased husband's friend who had earlier maintained her husband as a child and had helped in the marriage. In a 3 to 1 decision the Court ruled that although the children's paternal uncle had the customary right to them, it was necessary for the children to remain with their mother who had decided to remain with the man who was maintaining her - "having regard to their ages" and that the wishes of the mother was to be taken into account. R.M. Sundor (dissenting) contended that on a point of law it was the paternal uncle who had the right of custody although the mother was free to make a choice of who to live with. This case is important for its recognition of the interests of the mother as well as the welfare of the children.

3: 3 Decisions of the Central Courts: 1959 - 1967.

1959 saw the introduction of the Guardianship of Infants Act, with its Section 17 (supra.) setting the principles of general application in custody and maintenance issues in Kenya. Mere legislating on an issue however does not guarantee an instant or even a uniform conformity with the new desired goals. This is clearly demonstrated in the practice of the Courts with respect to issues of custody and maintenance since 1959.

Between 1959 and 1967 when the court structure became unified, the Central Court system gave one reported major ruling which relied squarely on and applied principles of the new legislation. This was in Bazmi v. Sultana.<sup>47</sup> The issues here were first, whether Mohamedan law or the Guardianship of Infants Act applied to questions of custody and maintenance of a child born to separated parents who professed Islamic religion and belonged to the Hanafi sect and, secondly, if the latter statute was applicable, whether the father was entitled to custody of a child whom he had been in custody of for a period of 3½ years. Expert evidence established that the child had stayed very happily with the father

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46. (1959) 6 C.R.L.R. 8

47. [1960] E.A. 801 (C.A.).

for 3½ years although it could be expected to cover from the definite disturbance it was going to suffer were the mother to be given custody. The Court of Appeal, in affirming the decision of the High Court ruled that in all matters of custody the Guardianship of Infants Act applied. In its language:

....that Ordinance / Act / applies with full force to Mohamedan, not less than to other, infants, and, under S.17, the welfare of the infant and not the right under Mohamedan law of either parents is a paramount consideration in deciding questions of custody.<sup>48</sup>

The Court of Appeal went even further to eliminate all remnants of Islamic rules and practice by ordering the deletion of that part of the High Court ruling that had stated that the mother was to take custody of the child only until such child attained the age of 7 years after which the father would **presumably** assume custody of the child. The Court of Appeal ordered, in accordance with provisions of the Act, that either party was entitled to apply for revision of the order.

A rather disturbing part of the Court of Appeal's decision was that which insisted that the mother was better placed than the father in having custody of the child although expert evidence established that the child had lived very happily with the father for 3½ years of its infancy and that it would suffer, albeit briefly, when separated from the father. This rather unfortunate patriarchal prejudice which tends to perpetuate the myth that mothers are inherently better than fathers when it comes to bringing up of children has led to the now established rule that children of tender years are best left with the mothers. Such unscientific prejudice has very devastating implications for the role of women in society. Elaboration of this point would, however, go outside the scope of this paper.

### 3: 4 Decisions of the Court of Review (for Africans) Post 1959.

The Court of Review gave custody to a mother of her 3 living adulterines she had mothered with an unspecified lover while staying with her brother, Ole Kamairo v. Ole Pardiyo.<sup>49</sup> She had earlier married and deserted her husband from whom she had no child. The husband however, after about 14 years of separation, claimed the custody and maintenance of his wife and children. From the cases in Section 3.2 above, it is clear that

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48. Ibid. at p. 807, per Grawshaw, J.A.

49. (1961) 9, C.R.L.R. 7.

the decision in this case was typical of the others. It made no reference to the new legislation which was by now binding on all the courts.

The Court of Review however adopted the spirit of and made an indirect reference to the new legislation in Olenja v. Kenya,<sup>50</sup> as case involving Luhyas. The parties in this case were married in accordance with Christian rites although dowry was paid to the woman's parents as in the common practice. Before the wife had deserted there were two issues of the marriage and one had died. The wife then deserted and no return of dowry was demanded. The wife had 3 more adulterine children, 2 boys and a girl. The husband demanded, according to the Luhya customary law of his location, custody of the girl child out of the 3 adulterines. The Court stated the applicable customary law to the effect that:

....a male child born as a result of a wife's adultery is deemed to be the lawful child of the adulterer, whereas a female child is deemed to be the lawful child of the husband.

However, the Court decided that customary law must be modified so that they must "consider the interests of the child concerned". The Judges continued:

....we do not think it is in the interest of that child, which in ~~another~~ jurisdiction [i.e. Central Courts] are regarded as paramount, that she should now be removed from the care of her mother and the company of her two brothers, as-well as her elder sister, the respondent's [legal father's] daughter, and compelled to live with the respondent.<sup>51</sup>

The Court then awarded "legal custody" of the girl to the father and "physical custody" to the mother on condition that the father would only reap the brideprice of the "daughter" if he paid maintenance for the child. Maintenance was here conceived to include school fees, uniforms, and all other expenses connected with the child's education.

### 3: 5 Decisions of the Unified Court system 1967 to the Present.

The integration of the Court system in Kenya in 1967 by the enactment of the Judicature Act (supra.) should be conceived more as involving institutional structural reform rather than one entailing the unification and generalisation of substantive laws. A reading of Article 82 of the Constitution, Section 3 of the Judicature Act, Section 2 of the Magistrate's Courts Act, and the Kadhi's Courts Act (1967), among

50. (1962) 10, C.R.L.R. 8.

51. Ibid.

others, clearly shows the continuity of legalised application of multiple personal laws within the Kenyan Courts. It is outside the scope of this paper to expand on this point, interesting as it may be.

We have already noted in the preceding sections that both the Central Courts system and the African Court system had, starting in 1959, adopted either in full or in part the provisions in the Guardianship of Infants Act. The fact that in Karuru v. Njeri<sup>52</sup> the High Court completely disregarded the case law as well as the existence of the legislation cannot be over emphasised. The parties were married under Kikuyu customary law and the parties were divorced although the return of the bride-price was never demanded nor affected. There were 4 issues of the marriage,. Prior to the unification of the court system the wife had successfully applied for divorce in the African Court. A fresh application seem to have been lodged in the Magistrate's Court who had given the woman custody of 2 elder children and the man 2 younger children. An appeal was made against this order in the High Court. Neither party was represented by an advocate. Simpson, J. after stating the applicable customary law that:

...on divorce the children go to the father unless the father demands the return of the bride-price in which case they go to the mother provided the bride-price is returned in full.<sup>53</sup>

and went on to assert, quite surprisingly, that this customary law which denied women any claim to custody of the children on return of the bride price was not contrary to Sec. 3(2) of the Judicature Act which gave authority for the use of natural law or justice to override or modify customary law. This by itself was a significant departure from most of the decisions already reviewed herein. But the Hon. Justice went farther. He correctly noted that the "paramount consideration in custody matters is the welfare of the child" but then stuck to the rigid customary law even though he noted that this would cause "emotion disturbance" to the children as well as "possible interruption of their education". Because of apparent lack of reasonable homework and the absence of legal representatives, the Hon. Justice declared not only that the stated customary law was not repugnant to justice but also that it was not inconsistent with any written law! Had the Judge's attention been drawn to Sec.17 of the legislation he may have had a different opinion. It has been noted by the East African Law Reports that the ruling was indeed inconsistent with the said section,<sup>54</sup> and E. Contran (now Justice of the High Court) also noted

52. 1968 E.A. 361.

53. Ibid.

54. Ibid., "Editorial Note.

that the case was decided per incuriam.<sup>55</sup> The Justice however went even farther. He declared with rather unfortunate disregard for personal freedom and dignity of the woman that she did "have a remedy if she chooses. She is free to accept the applicant's offer to take her back"<sup>56</sup> perhaps as his slave ?

No wonder then that two years later the High Court noted some of the inconsistency in the above ruling and refused to follow it. In Wambwa v. Okumu,<sup>57</sup> Mosdell, J. declined to follow the ruling of Justice Simpson by stating that the "decision I suspect was reached per incuriam as the case was not argued by counsel"<sup>58</sup>. The issue here was whether, as was the position in Bagishu (Luhya) customary law, a father of an illegitimate child was entitled to the custody of such child in preference to the mother of the child and the mother's father with whom she was staying. The Court categorically declared that the Bagishu customary law as stated was contrary to Section 17 of the Guardianship on Infants Act, that therefore it was inconsistent with a written law as provided for under Section 3 (2) of the Judicature Act and, lastly, that "in the absence of exceptional circumstances, the welfare of a female infant aged four years..demands that the infant be looked after **by** its mother rather than its putative father",<sup>59</sup>

In Nzoka v. Mwikali d/o Mule<sup>60</sup> the High Court (per Justice Chanan Singh) rejected the stated Kamba customary law which decrees that on divorce, custody of children of a marriage is at the "wishes of the husband". This was found to be in conflict with the Guardianship of Infants Acts, section 6,7 and 17. The Court stated that these sections were unambiguous and that "an unambiguous statutory provision which covers circumstances of a case always overrides custom".<sup>61</sup> In this case the issue was really not that of custody since the wife was already having custody of the children but rather that of maintenance for the wife and the children of the dissolved marriage. The court rejected the wife's claims for maintenance for her self while accepting that for the children.

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55. **Gentran, E. "Custody of Children Under Customary Law", (1968), E.A.L.J. vol. IV, No.3, 153-154.**

56. Supra., at 362.

57. [1970] E.A. 578.

58. Ibid, at 579.

59. Ibid.

60. (1971) K.H.C.D. 79

61. Ibid., at 80.

In Mohamed v. Yasmin<sup>62</sup> a marriage agreement between the wife and the husband stipulated, inter alia, that in the event of disputes arising with regard to custody of the issues of the marriage, the Shia Imami Ismailia Provincial Council was to be the forum for decision. The High Court rejected this and declared that in all custody and maintenance disputes, the High Court had overriding jurisdiction over any other fora. The Court of Appeal upheld this decision and specifically ruled (with one dissenting opinion) that matters involving custody cannot properly be the subject of arbitration under the Arbitration Act (Cap.49). The Court of Appeal conceded that "indeed any other body or person, can act between the father and mother and with their consent endeavour to arrive at an amicable settlement of the dispute"<sup>63</sup>, but this can not exclude the jurisdiction of the High Court. The High Court may give full consideration to any views or principles of any religious body but must act within Section 17 of the G.I. Act which makes the first and paramount consideration the welfare of the child.<sup>64</sup>

The principle of paramouncy of the child's welfare and also the presumption in favour of mothers for custody of younger children was applied by the Court of Appeal once more in Karanu v. Karanu.<sup>65</sup> Here the parties had married in accordance with Church rites and had 2 issues aged 7 and 6 years. They were separated and divorce proceedings were pending in the Courts. The Court of Appeal in a unanimous decision approved and applied Wambwa v. Okumu (supra.) and stated that welfare of the children was of paramount consideration. Since both the father and mother were working, the children sickly, and the mother had an ayah for them, the children needed constant care and attention, which the court had "no doubt" they are more likely to get from their mother than their father".<sup>66</sup> Earlier on in the decision the Court observed that it is a "generally accepted rule that, in the absence of exceptional circumstances, the custody of young children should be given to the mother."<sup>67</sup> As usual, the father was given the right of access to see the children.

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62. [1973] E.A. 533 (C.A.).

63. Per Sir William Duffus, P. at 536.

64. Ibid. at 537.

65. [1975] E.A. 18 (C.A.).

66. Ibid. at p.20.

67. Ibid. at p. 19.

In Wanjiku v. Hinga, endorsed by the High Court in Hinga v. Wanjiku,<sup>68</sup> the District Magistrate ruled that where a mother is given custody of children, the father is under a duty of maintaining the children, and that where a father appears hostile to the children, the custody should be given to the mother. The only criticism of this decision is that the learned Magistrate committed all the children, 5 of them, the eldest being only 11 years old, to the mother until each attains the age of 16. Usually the law requires that orders of Custody are revisable at instance of either party although one may agree with the Magistrate's sentiments since the father had attempted to assert, that the children were his.

Lastly, in Taabu Kazungu v. Kalama,<sup>69</sup> a case decided by the High Court last year, Justice Sheridan noted that even in customary law disputes -----in this case Giriama -----the mother of the children forming the subject of the dispute ought to be made parties to the suit so as to meet the requirements for fair trial within the meaning of Article 77 (9) of the Constitution. In rejecting a claim by a father that under Giriama customary law, the father alone is entitled to custody of the children except the very young ones, the Court specifically ruled that the said customary law".....is repugnant to justice and morality and inconsistent with the written law contained in the Guardianship of Infants Act (Cap.144) within the meaning of Section 3(2) of the Judicature Act (Cap.8) and should not be enforced". It also observed that: "it is the generally accepted law that the interests and welfare of the children are the paramount consideration and that it is natural for a young child, particularly a girl, to remain with her mother during the formative years". The second part of the Hon. Judge's ruling may, of course, be open to criticism from sex equalitarians and some radical child and education psychologists.

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68. See footnote 14, above.

69. Ibid.

#### 4: CONCLUSION AND RECOMMENDATIONS

Various conclusions have been reached in the main body of the paper and there is no intention to repeat them here. A general summary will suffice in conclusion.

Both in legislative and judicial opinion development there is a definite bias towards making the interest and welfare of children factors of paramount consideration in making custody and maintenance orders. There is a limit to which such position can be, in practice, universalised since only a few disputes reach the courts, especially the higher courts. Even where cases reach the Courts not all the Courts are properly educated in the law to be able to apply the proper principles unless assisted by advocates. This trend is true also of the implementation of the concept of equality between men and women. There is still a tendency in the Courts to take "rights" approach at the expense of the welfare of the children. This will not be aided amelioratively by provisions of Section 128 of the Marriage Bill.

Another principle which has gained legitimacy in practice and is even stipulated in the Marriage Bill is that favouring mothers with the custody of children of tender ages. This tends to institutionalise and perpetuate the image of women as "child bearers" and fails to take adequate changes in family relations particularly among the "working class" and above.

The law as it stands on paper provide the state with sufficient room for intervention in order to ensure that children get the best whenever there is marriage breakdowns but this role is unfortunately not played by the state. There is therefore need for studies to be initiated which may determine not only to what extent the state should intervene in the interests of the children in all disputes on custody and maintenance but also to determine what the extra-judicial practices may be. It is quite clear that even in Courts wards for custody are not usually followed by maintenance orders.

On the basis of the foregoing conclusions and the wider analysis in the paper the following recommendations are proper. There are not in any way to be considered as comprehensive.

4:1 Recommendations.

- A) That cheap procedures for custody and maintenance should exist to be invoked by mothers and fathers alike whatever the form of marriage.
- B) That adultery of mothers may not solely form a ground for disentitlement of the children to maintenance orders, although these may determine whether or not custody should be given to the mothers or not. At any rate whatever rules are preferred should apply both to mothers and fathers.
- C) Maintenance orders should compulsorily accompany custody orders.
- D) An independent judicial body with active surveillance powers should be formed to track down cases of default in maintenance payments, and to deal exclusively with cases of custody and maintenance. It should ensure that no marriage break-downs may occur without proper intervention to ensure that custody and maintenance arrangements conform with the law.
- E) The presumption that mothers are better left with custody of children of tender years needs to be reviewed.
- F) Studies should be initiated to determine the incidence of marriage breakdowns where custody and maintenance of children are arranged extrajudicially and whether the practice conforms with the law. The practice of the lower courts also need to be studied.
- G) The amounts of monies paid for maintenance ought not to be fixed statutorily but should be flexible and determinable within the circumstances of particular cases.
- H) There should be consistency in the law - regarding the definition of "Child" for purposes of custody and maintenance.

International legal standards and the laws of custody and Maintenance of Children in Kenya.

The basic legislation pertaining to custody and maintenance of children in Kenya, the Guardianship of Infants Act (Cap. 144) was promulgated in the same year as the United Nations Declaration on the Rights of the Child.<sup>1</sup> Principle 2 of the latter embodies the policy stipulated in Section 17 of the above Kenyan legislation by requiring states, when enacting laws for the purpose of affording children special protection and opportunities to develop physically, mentally and morally, to ensure that "the best interests of the child shall be the paramount consideration.

Section 17 of the Kenya legislation, apart from making the interests of the child a factor of first and paramount consideration, also provides for the principle of equality of men and women in matters pertaining to rights and duties over children. This is in concert with Article 16(1) of the Universal Declaration of Human Rights, 1948<sup>2</sup> as well as a provision in the more recent International Covenant on Civil and Political Rights, 1966.<sup>3</sup>

Various court pronouncements<sup>4</sup> have also reiterated and endorsed African, English and Islamic customary practises which favour mothers, in the absence of exceptional circumstances, with the custody of children of tender years. This too finds expression under Principle 6 of the U.N. Declaration of the Rights of the Child which decrees that".....a child of tender years shall not, **save** in exceptional circumstances, be separated from his mother".

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1. U.N. General Assembly Resolution 1386 (XIV) of 20th November, 1959.
  2. U.N. General Assembly Resolution 217 A(III) of 10th December, 1948.
  3. U.N. General Assembly Resolution 2200A (XXI) of 16th December, 1966, Article 23 (4).
  4. See, for instance, in Taabu W/O Kasungu v. Kalama, Misc. Civil Case No. 12 of 1977 (High Court) (Unreported).

THE LAW OF INHERITANCE AND THE CHILD IN KENYA

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1. INTRODUCTION

In every society the Law of inheritance enables man to live "the good life" as it is seen by **that particular society. It endeavours** to see that the needs of the child as seen by that society are met. A society's perception of the good life changes as social organisation and values change. An illustration from the English Society whose legal thought is dominant in Kenya makes this point clear. In 19th Century England the laissez-faire philosophy was accepted as the one that guaranteed everybody the opportunity of leading a 'good life' or a 'happy life'. It was rooted in the view that all that man needed to live a good life was liberty to do what he chose. The government's sole duty was that of maintaining law and order. The law of inheritance gave effect to it. Any person who had property could will it to whoever he choose. He could disinherit such close relatives as a spouse, children, brothers and sisters and parents. Where he failed to make a will, the property devolved according to rules which assumed that he wanted the spouse and children if any to take irrespective of any needs of his other relatives. This idea of a good life is the one embodied in the Indian Succession Act, 1865 which applies to Europeans and Parsees and to those other people to whom neither customary law nor Hindu law nor Islamic law applies. It is the curtailment of man's liberty by feudalism, the divine right of the Kings and **that the brand of Christianity then enforce that led man in England** and Europe to clamour for that extreme form of liberty. When it was discovered in the 20th Century that the liberty caused injustices, the legislature and the courts started curtailing it to protect the economically weaker people.<sup>1</sup>

The freedom of contract was qualified and new obligations imposed on industrialists and other people who injured or harmed others in exercise of their liberty in the area of inheritance the testator

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1. Patrick Devlin, The Enforcement of Morals, O.U.P., 1968, chapters 2 and 3. The common Law, Public Policy And the Executive in (1956) Current Legal Problems, p.1

being denied in 1938, the liberty to disinherit his close relatives whom the legislature called dependent.<sup>2\*</sup> Law had embodied the new view of good life. The Law of Succession Act 1972, seeks to introduce to all Kenyans, the 1938 concept of liberty. Different concepts of a good life exist amongst Africans, Hindus and Moslems who have different laws of inheritance. In this paper, we show how the **present law of inheritance** of the Africans and the Europeans prevents the child from realising the good life as seen from the perspectives of the present laws own ideals and the new ideals which have not found expression in law. Time does not permit us to look at the position of the child under both the Islamic law or Hindu law of inheritance.

## 2. THE LAWS OF INHERITANCE IN FORCE TODAY

Until the Law of Succession Act<sup>3\*</sup>, 1972 comes into operation the law of inheritance of the child will continue to vary with its Sociological Community. The expression "Sociological Community" is used here because it is the Sociological test as opposed to an ethnic one which is used in determining who belongs to a particular community for the purposes of personal law.<sup>4\*</sup>

The four Kenya's Sociological Communities with different marriage and inheritance laws which are equally protected by the supreme law<sup>5\*</sup>, the Constitution<sup>6\*</sup>, are Africans, Moslems, Hindus and Europeans. Their four systems of inheritance laws dealing with both the administration of

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2\* See The Inheritance (Family Provision) Act, 1938.

3\* No. 14. It has been amended by the following Acts; **No.8** of 1976, No.16 of 1977, No. 7 of 1975.

It will come into operation on such date as the Minister may by notice in the Gazette appoint. (.SI.). Even when it comes into operation, it will not necessarily apply to the whole country at once. See Sections 32 and 33.

4\* See S.4 of Cap. 156, The Mohammedan Marriage, Divorce and Succession Act, S. 66 (5) of the Kenya Constitution, Section 2 of Hindu Succession Act Cap. 158, S.2 of the Hindu Marriage and Divorce Act Cap. 157, S.2 of the African Christian Marriage and Divorce Act Cap. 151 and S. 82 of the Kenya Constitution, Act No.5 of 1969.

5\* S. 3 of the Constitution.

6\* Section 66, 78, 82(4) (b).

estates and distribution are customary law, Islamic law, Hindu law and the Indian Succession Act, 1865, respectively. The extent to which English rules of inheritance will be applied as either the "Substance of the Common law", or as "the doctrines of equity" or as "statutes" which were in force in England on the 12th August, 1897, under the Judicature Act<sup>7\*</sup>, 1967, either to all the Communities or to the Europeans has not been determined by the courts. It is clear that some English inheritance rules apply to the Europeans under the Judicature Act where the Indian Succession Act is silent. The reception clause in Section 3(1) of the Judicature Act, 1967 which first appeared as article 11 of the 1897 order-in-Council, was intended to enable the colonists to live an English way of life in Kenya.

Although the Constitution respects and treats as equal the ways of life reflected by the different laws of inheritance, the courts apply the law they think is better to the Africans at times. In the area of administration of estates, they have chosen not to apply customary law<sup>8\*</sup> which the Magistrate's Courts Act<sup>9\*</sup> 1967, requires to be applied and instead applied the English type of law which is contained in the Probate and Administration Act, 1881 of India which applies to the Hindus and some Moslems<sup>10\*</sup>.

In Re Maangi<sup>11\*</sup>, the court which did not refer to the Magistrate's Courts Act, 1967 and the relevant customary law, Kamba customary law, held that a provision that disapplied the Probate and Administration Act, 1881 was discriminatory and consequently unconstitutional. The Superiority of the 1881 Act was assumed. The court did not know that the relevant customary law serves non-material needs of the heirs which the Western Secular Society does not recognise today<sup>12\*</sup>. In re Kibiego<sup>13\*</sup>, the Nandi customary law which governs administration of estates was rejected because it was medieval. To the court which did not

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7\* No. 16 of 1967, S.3 (1).

8\* Re Maangi (1968) E.A. 637

Re Kibiego (1972) EA 179

9\* Act No. 17 of 1967, S.2

10\* Chadha v. Chadha (1961) E.A. 637

The Indian Succession Act 1863 which applies to Europeans contains rules governing both administration and distribution of estates.

11\* Supra.

12\* E. Contran's Restatement of African Law, Volume 2, Kenya, Law of Succession, Sweet & Maxwell, 1969, reveals the non-material needs in his statement of the law governing administration of estates under customary law. Also see John S. Mbiti, African Religious and Philosophy infra, Chapter 14.

13\* Supra.

examine the rationale of the relevant rule amongst the Nandi, it discriminated against women who are not eligible for appointment as administratrixes. The desire of the Courts to reform customary law which they have viewed with a racial bias even after the "civilising mission" has come to an end politically, manifests itself in the treatment of rules of distribution too. In the matter of the Estate of Hopewell Gacharamu, deceased<sup>14\*</sup>, the court which thought that the Kikuyu customary law rule which requires the estate of a polygamous man to be divided equally amongst his houses was good, modified it a little. Before the equal division takes place, a part of the estate not exceeding 50% of the estate must be kept aside for use by children irrespective of the house they come from. In another case the same court modified this rule differently. It held that the land left by a Kikuyu is to be divided equally amongst the sons irrespective of the houses and that the widows are to have life interests<sup>15\*</sup>.

In Wanja Waichong'e v. Mwangi<sup>16\*</sup>, the same court modified this further. It held that where the rule of equal division of the land amongst the houses has been applied, the childless widow gets absolute proprietorship in her share and not to a life interest as is the case under customary law<sup>17\*</sup>. Inadequacies have not been found in Hindu, European and Islamic rules of inheritance.

### 3. THE GOOD LIFE AND THE TWO SYSTEMS OF INHERITANCE

#### (i) Under the Indian Succession Act, 1865

As it has been observed above, the Indian Succession Act, 1865, applied where it is believed that the individual will lead a happy or good life only if he is given the maximum liberty to do what he chooses. The Government's role in such a social setting is merely to maintain law and order. At the level of the society, liberty is expected to provide the greatest happiness to the greatest number of the members of the society. The individual who is taken to be motivated entirely by material incentives is to be allowed to engage in any lawful economic opportunity, accumulate as much wealth as he is able and to use that wealth in any way he chooses. It is only this kind of situation that will ensure abundance for all and liberty. This view of liberty ignores the social structure of the society at the time it is accepted as the society's

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14\*. High Court of Kenya at Nairobi Miscellaneous Case No.139 of 1974.

15\*. The Daily Nation, September 21st 1978 at p.4.

16\*. High Court of Kenya, Nairobi, Civil Appeal No.78 of 1976, unreported.

17\*. E. Conran, Restatement of African Law, Kenya, Volume 2, Law/Succession, Sweet & Maxwell, London, 1969, p.12./of

guiding principle or it is to be deemed to have been accepted. At any time in society's stage of development there is a group which has been favoured by history. Such a group will be wielding political power and controlling the economic activities of that society. The liberty ideal accepted is a sanction of the status quo and therefore condemns some to perpetual misfortune and guarantees continued privilege to the advantaged. **If** this concept of liberty were to apply to a society where the material and social conditions were equal to all, for instance at the time the society is founded or after equalisation of fortunes by a state, it would **enable** man to live a really good life.

Again as it was observed above, where the good life is seen in the preceding paragraph, the individual has the liberty to will his property as he chooses<sup>18\*</sup>. Where he dies intestate his property is distributed to his relatives<sup>19\*</sup> where they exist according to his presumed intentions<sup>20\*</sup>. The law of inheritance assumes that man in such a society has property which can be disposed of. Looked at from a historical perspective, the ideal creates a situation where many people will not have any property to dispose of. The supply and demand rules of the economy that go with this ideal expect that situation to occur as a part of the way of providing man with the incentive to work. A tension is created at a theoretical level between the need to maintain the life which the value of liberty presupposes and the need to give man maximum liberty by keeping the government intervention to a minimum. This ideal which applies to those governed by the Indian Succession Act, 1865, takes out of the law of inheritance those who do not own property. Their children too are taken out of the law of inheritance by the same condition of the poverty of the parents.

Where a person owns property the Indian Succession Act, 1865, which is a codification of English law of inheritance as it was in 1860s<sup>21\*</sup>, will perpetuate the fortune and life style of the family.<sup>22\*</sup>

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18\*. This is the position under the Indian Succession Act, 1865

19\*. Sections 20 - 25.

20\*. Sections 25 - 42.

21\*. Manteakis v. Manteakis (1954) 27 K.L.R. 32. In the matter of the Will of Edward Watts (1955) 28 K.L.R. 236 .

22\* James M. Morton, The Theory of Inheritance (1894-95)8 Harvard Law Review, 161, pp.164 & 167.

The property left will often help the heirs to maintain a life-style identical to that of the deceased or close to it. Where such a person acts capriciously - and this will be rarely considering the ties that develop in a family - the close relatives will be denied the life-style they expect if he wills the property to strangers to the family. Children whose **inheritance** law is Indian Succession Act, 1865, are exposed to this danger too. Where no will is made, the law assumes that he would have liked his relatives to inherit and it arranges the heirs in a number of categories<sup>23\*</sup>. First it assumes that infact and according to the ideal the family is made up of the other spouse and their children<sup>24\*</sup>. The heirs of such a man are the widow who gets a third of the estate and the lineal descendant i.e. his children, grand-children and great grand-children who take the remaining two thirds. The ideal therefore goes with the western nuclear family. The deceased's brothers and sisters and parents to say nothing of other relatives are considered to be too distant to be made objects of his bounty. Secondly it assumes that the individual has been so liberated from the society that he does not recognise the duty to raise a family which duty Africans consider to be both religious and ontological.<sup>25\*</sup> Consequently the children of the deceased get equal shares of the estate irrespective of the sex. Under customary law, women get a floating life interest from the father as they are expected to get another life interest when they marry. It is suspended by the marriage and revive when they come back to the family. Where the deceased is survived by a widow and no lineal descendants, the former takes a half of the estates and the other half goes to the other relatives.<sup>26\*</sup> Where he is survived by the widow, the father, mother and brothers and sisters, the father takes the half alone.<sup>27\*</sup> The Act recognises man as the head of the family. It assumes that the father can be counted to act fairly amongst his relatives in connection with the inheritance. Where the father does not survive the deceased, the mother, brothers and sisters share the estate equally.<sup>28\*</sup> Where some brothers

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23\*.. SS. 26 - 42

24\*. S. 27

25\*. John S. Mbiti, African Religions and Philosophy, Heinemann, 1969, p.133.

26\*.. S."7

27\*. S.35

28\*. S.36

and sisters have died but have been survived by children, these will take their parents' shares.<sup>29\*</sup> Where the deceased is survived by the widow and the mother of the deceased, each of these takes a half of the estate. Other relatives of the deceased take if those mentioned above do not survive him.

The Act further assumes that **the people it applies to have** a very secular way of life. It states rules governing the administration of estates and distribution. It has no rules indicating how the death is faced by the bereaved. It concerns itself with primarily material needs of the people. The writer take the view that man has material and non-material needs that call for satisfaction. The "good life" that goes with the Indian Succession Act, 1865 today raises the following questions in Kenya:-

- (i) Should the situation be allowed to continue where some people including children should be kept out of the law **of** inheritance?
- (ii) If the answer is in the affirmative, shouldn't the state provide for those kept out **of support that will** enable them to live in dignity if not the way that those within the purview of the law of inheritance do?
- (iii) Should the law of inheritance continue to pay little attention to the non-material needs of the individual?
- (iv) Should the family structure envisaged by the Act be enlarged and if so, to what extent?
- (v) What kind of freedom of testation is required today?
- (vi) Should the Act continue to be sex-blind?

Some possible answers to questions (iv), (v) and (vi) are to be found in Sections 26, 5, 29 and 35 - 42 of the Law of Succession Act, 1972. We do not think that satisfactory answers have been found. There is a need for legislation that protects the child who cannot lead a normal life because **the** parents do not leave any property that could permit a life style that enables it to live a good life. The welfare state which has rejected the 19th Century liberty has in principle accepted a broader function of the state. The question is whether or not it will come to the protection of the child now.

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29\* S.37 and 38

(ii) Under Customary Law

Customary law of inheritance embodies a view of good life which is different from the one embodied by the Indian Succession Act, 1865. First the Africans believe that human equality and dignity cannot be realised by everybody unless the material equality of some kind is maintained. Crucial resources like land<sup>30\*</sup> were communally owned and therefore were taken from the entire realm of inheritance. One's membership to a tribe, a clan or family was all that was needed to give one access to land. It is worthy of note that in socialist countries, the same belief is given effect by the policy which either prevents certain resources from being owned by individuals or restricts, as in **Yugoslavia**, agricultural land and Societ Union, the dwelling houses, that the individual can own. Second they believed that it is the family that helps man to discover his own identity.<sup>31\*</sup> Life centred around the endeavour to maintain personal immortality<sup>32\*</sup>. It is only through marrying and having children that one can maintain this personal **immortality**.<sup>33\*</sup> Thirdly they believed that it was only through the institution of extended family that the individual could realise the good life. When he died the family mourned his or her death and chose the administrator or confirmed one at a family gathering<sup>34\*</sup>. The heirs were members of the family<sup>35\*</sup>. The privately owned property could be disposed of by means of an oral will but in most of the Kenyan communities, the testator did not have power to give property to those who did not belong to the family<sup>36\*</sup>. He could not disinherit the children and other relatives the way a testator can under the Indian Succession Act, 1865. Where he died intestate the members of the family inherited<sup>37</sup>. Death and infertility at times drastically reduced the chances of one maintaining personal immortality through procreation. This threat together with need to satisfy other human needs led the Africans to have the levirate union, the Sororate Union, Widow inheritance, and woman to woman marriages as supplement to

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30\* Muluwa Gwanombi v. A Alidina Visram. (1913-1914) 5 K.L.R. 145, (1915-1916) 6 K.L.R. 31. J.K. Nyerere, National Property and Ujamaa. The Basis of African Socialism in Freedom and Unity, O.U.P. 1967, pp.53-58, pp.162-171.

31\*. John S. Mbiti, African Religions and Philosophy, chapter 10.

32\*. Chapter 3.

33\*. Chapter 3 and 13.

34\* See generally E. Cotran, Restatement of African Law, Supra.

35\*. N.A. Ollenu, The Changing Law and Law Reform in Ghana in (1971) Journal of African Law 132 at p. 150. E. Contran, Restatement of African Law, Supra.

36\*. Supra.

37". Supra.

the marriage which was either polygamous or potentially polygamous<sup>38\*</sup>  
Their understanding of human nature led them to reject monogamy which  
is based on the existence of perfect men and women. The ideal life  
customary law embodies ensures (i) that the social arrangements do not keep  
out any class of people out of the law of inheritance: Certain forms of  
property belong to all, the dead, the living and those to come; (ii) that  
the individual is not given power to weaken the family through disinheri-  
ting relatives: (iii) that man's non-material needs are met by the  
family structure and the way the estate is administered. Man is insured  
against material and emotional deprivation.<sup>39\*</sup>

This view of life has come under pressure from the free enter-  
prise economy, its value system and the institutions which were introduced  
during the colonial rule and retained after independence.

The child and the adult are protected in all respects by this  
ideal which is now under pressures. The following two questions arise  
today:-

- (i) to what extent are some of the principles of this ideal  
reflected by the customary law in force today?
- (ii) to what extent, if at all, can today's Kenya benefit from  
the pre-colonial ideal?

The conflict between customary law governing administration of estates and  
the English type of law contained in the Probate and Administration Act  
and the different court attitudes towards the customary law rule that  
requires the estate of a polygamous man to be divided equally amongst the  
houses reflect the conflict between the two ideals discussed here and the  
respective institutions that go with them.

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38\* John S. Mbiti, African Religions and Philosophy, Supra.  
Chapter 13 and E. Cotran, Restatement of African Law, Kenya, Volume 1,  
Marriage and Divorce, Sweet & Maxwell, 1968.

39\*. N. Songuemas, Social Security Among Traditional Societies  
in Africa in East Africa Journal, May 1968, pp.13 - 18. J.K. Nyerere,  
Ujamaa. The Basis / African Socialism in / of Freedom and Unity,  
O.U.P. 1967 pp. 162 - 171.

4. THE LAW OF INHERITANCE AND THE CHILD IN KENYA

(i) Under the Indian Succession Act, 1865

Our discussion of the good life that goes with this system of inheritance, reveals two problems that the state ought to solve. The first one is that of keeping some adults and their children out of the law of inheritance through not giving them an opportunity to own property. Such people are discriminated against within the meaning of Section 82 of the country's constitution. If it is conceded as we believe all will concede that everyone has a right to life and means to support it, two options exist. The first one is ordering the society in a way that ensures that one can own some property. The second one is to enact welfare legislation that enables those who do not inherit to get assistance from the state that enables them to maintain a decent standard of living. Either of them will protect both the child born out of marriage and the one born within marriage. The second problem stems from the inadequacy of the Act in two respects; firstly by giving the property owner the "liberty" to disinherit the child and other close relatives through a will and secondly by adopting a narrow concept of the family. The second problem has been solved by the Law of Succession Act, 1972, to a large extent. Every testator must make a provision for his dependants who include children and where he fails to do so, the Court will make it if the dependant applies to the Court.<sup>40\*</sup> The class of dependants include members of the extended family.<sup>41\*</sup> The Act still gives the nuclear family greater protection than it deserves.<sup>42\*</sup> Relatives of the deceased other than the spouse and child are dependants only if they were being maintained by him at the time of death.<sup>43\*</sup> Flexibility should be introduced to cover those who become dependant after the death of the property owner. The draftsman forgot that it is naturally to these relatives that the nuclear family turns to in the event of dependency after death of the property owner.

(ii) Under Customary Law

Today, the child whose law of inheritance is customary law may face problems at four levels. A fifth level will be added to these if proposed changes in law governing inheritance and marriage come to fruition.

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40\*. S. 26  
41\*. S. 29  
42\*. Supra  
43\*. 29 (b)

First, many **children** have parents who do not own property which they can inherit under customary law because the free enterprise economy has affected their families adversely. The communal holding of land in precolonial Kenya has been replaced by family and individual holding of land in Kenya.<sup>44\*</sup> The general weakening of the pre-colonial ideal has created a situation where some people do not have a stake in the economy at all. Where family or clan land has been registered under the Registered Land Act in the name of one person following the family understanding, heirs have been disinherited by an interpretation of the Act that ignores the habits of thought that existed at the time of registration.<sup>45\*</sup> It has been erroneously held that the land belongs to only those whose names appear in the land register.<sup>46\*</sup> Two studies show clearly that the correct position is that the proprietor is a trustee who holds the family land upon trust for himself and other members sometimes.<sup>47</sup> There are now more decisions that support this view than support the erroneous view.<sup>48\*</sup> Where a child belongs to a family whose name does not appear in a register, the danger exists that it will be disinherited if the wrong interpretation of the Registered Land Act is adopted. Such a child will be in the same position as the one whose parents do not own property. It is this class of people to be found also in ideal of the Indian Succession Act, 1865,

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44\*. See Generally, Gibson Kamau Kuria, The Role of Customary Land Tenure in Rural Development in Kenya, a paper presented at the Seminar on Law and Rural Development, July 18-22, 1977 at Kisumu.

45\*. Obiero V. Opiyo (1972) E.A. 227

46\*. Supra, Mary Wanjiku V. Nganga s/o Mary Wanjiku, High Court of Kenya at Nairobi, Civil Case No. 2497 of 1977 (unreported).

47\*. Gibson Kamau Kuria, The Role of Customary Land Tenure in Rural Development/Kenya unpublished paper presented at the / in Seminar on Law and Rural Development held at Kisumu, July 18-22 1977, Mathew Muli, Problematic Aspects of Land Law, a paper presented at the Law Society Conference, April 1978.

48\*. Mung'ora Wamathai V. Muroti Mugweru, High Court of Kenya at Nyeri, Civil Case No. 56 of 1972, Muguthu V. Muguthu (1971) K.H.D. 16 The Standard, January 3, 1979 p.7

Samuel Thata Miskek v. Priscilla Wambui, High Court of Kenya at Nairobi, Civil Case No. 1400 of 1973, Mani v. Mani, High Court of Kenya at Nairobi, Civil Case No. 34 of 1977. A few more are referred to by Justice Muli in his paper.

which requires financial assistance from the state. Localisation of the judiciary and industry on the part of the Bar can also help in getting the correct position understood.

The second level is the determination of who is a child for the purposes of the law of inheritance. At this level, there is property to be inherited. Generally speaking, the child in law of inheritance is the legitimate child. Under customary law there are three classes of legitimate children for the purposes of the law of inheritance. The first class is that of the many children who are born in wedlock. The second class is that of the children born outside wedlock by unmarried mothers but are recognised as the children of deceased. This is the case under the Luhya and Kisii customary laws.<sup>49\*</sup> Under some customary laws like Kikuyu customary law, children born out of wedlock belong to the woman's family and that is where they can inherit property.<sup>50\*</sup> The third class is that of the children born within marriage but fathered by a man other than their mother's husband. Except where rules of natural justice demand that they stay with their biological father, they are recognised under customary law as the children of the regular union.<sup>51\*</sup> The children who have faced the problem of recognition belong to the first class where their parents either have married under customary law after the father has married another woman under either the African Christian Marriage and Divorce Act or The Marriage Act<sup>52a\*</sup> or have married through

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49\* E. Contran, Restatement of African Law, Kenya, Volume 1, Marriage and Divorce, Sweet & Maxwell, 1968 pp. 55, 68.

50\* E. Contran, Restatement African Law, Volume 1 Supra, See for instance pp.18, 30, 42, 55.

51\* Momanyi Nyamberi v. Onwonga Nyaboga (1953) 1 Court of Review Reports p.5.

Ngoko Nyandiko v. Kembo D/O Motanya (1953) 3 Court of Review Reports p.2.

Moraa d/o Obare v. Maina Nyakong'o (1953) 3 Court of Review Reports, p.10.

Maurono Onchoke v. Kerebe d/o Ondieki (1958) 6 Court of Review Report, p.2

Timina Oienja v. Elam Keya (1962) 10 Court of Review Reports, p.8

Although these cases dealt with custody, it is submitted that the results would have been the same if the inheritance issues arose.

52a\* In the Matter of The Estate of Ruenji, deceased, High Court of Kenya at Nairobi, Miscellaneous Case No. 136 of 1975 (unreported) and In the Matter of the Estate of B.H. Ogola, deceased, High Court of Kenya at Nairobi, Miscellaneous Civil Case No. 19 of 1976.

elopement under customary law.<sup>52b\*</sup> They start cohabiting and then undertake to fill customary requirements later. The Courts have held that these marriages are void and consequently that the children are not **children for the** purposes of the law of inheritance.<sup>52\*</sup> As the writer has argued elsewhere,<sup>53\*</sup> the Kenya constitution and the common law analogy of domicile permits the conversion of a marriage from one character to another in Kenya and many people who marry under either of the above mentioned Acts subsequently convert these marriages by the operation of law into customary ones and later marry other wives under customary law which allows polygamy. There is one decision which supports this view.<sup>54\*</sup> If the Courts recognise conversion of a marriage by operation of the law many children will be protected. Legislation today permits conversion of a customary marriage through a ceremony into a western type of monogamous marriage.<sup>55\*</sup> It also permits the conversion of a customary marriage into a Moslem marriage.<sup>56\*</sup>

The third level is where the estate of a deceased who had two or more wives is to be divided amongst the members of his houses. The Africans take the view that polygamy supports human nature better than monogamy. Although most of the customary marriages are monogamous in fact, customary law has not endeavoured to discourage it the way the commission on the Law of Marriage and Divorce chose to do.<sup>57\*</sup> The Africans take the

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52b\* Yawe v. Public Trustee, Court of Appeal for East Africa, Civil Case No. 19 of 1976.

52c\* Yawe v. Public Trustee, Court of Appeal for East Africa, Civil Appeal No. 13 of 1976.

53\*. Gibson Kamau Kuria, The Law of Succession in Kenya, a paper presented at the Kenya Law Society Conference, April 1978 pp.31 - 35.

54\* Omwoya Mairura v. Bosire Angida (1958) 6 Court of Review Reports at p.4.

55\*. Cap. 151, S. 9 and possibly ss. 11 and 35 of the Marriage Act, Cap. 150. There is no express reference to conversion in The Marriage Act.

56\* Cap. 156, S.6.

57\*. Report of the Commission On the Law of Marriage and Divorce, Government Printer, Nairobi, 1968, Paragraphs 73-81.

view that like the monogamous marriage, the leviratic union, widow inheritance, the sororate union and woman to woman marriages, polygamy enabled them to lead the good life as they saw it.<sup>58\*</sup> The customary law of inheritance gives effect to the principle of equality of spouses. In most of the Kenyan Communities, livestock that comes to the household apart, the property is divided equally amongst the houses.<sup>59\*</sup> The livestock that comes to a house as dowry belongs to that house. Amongst the Luhya and Teso,<sup>60\*</sup> the size of a house's share varies with the number of sons in each house. Amongst the Kisii,<sup>61\*</sup> the Elgeyo, Marakwet and Tugen,<sup>62\*</sup> the size of the house's share varies with the seniority of the widow. The seniority is established by the time the marriage takes place. The court decisions there are indicate how the rule of equal division has been applied amongst the Kikuyus. In the Matter of the Estate of Gacharanu deceased,<sup>63\*</sup> as seen above the Court which considered this rule to be good modified it with a view to protecting children. It held that before equal division took place, a part of the estate, in that case 40% ought to be set aside for the use by children alone. As only one house of the two which had children, one house got 30% of the estate whilst the other got 70%. The Court did not appear to realise that this decision departed from the principle of equality of spouses. It also appears to have forgotten that the childless widow might be "inherited" by a brother of the deceased and have as many children, **if not more than** the one who had children. The children born after the deceased dies will not be protected by this decision. The other two decisions that have applied this rule are based on the ignorance of the rule that says that women who are expected to marry have a life interest in property of a deceased either in the family they are

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58\*. John S. Mbiti, African Religions and Philosophy, Chapters 3 & 13.

59\*. E. Cotran, Restatement of African Law, 2, Kenya, The Law of Succession, Supra, Kikuyu, p.13, Kamba, p.23, Meru, p. 35, Kuria, p.68, Giriama, p.78. Taita, p.103, Taveta, p.111, Nandi & Kipsigis, p.120, Pokot, p.137, Luo p.162.

60\* pp. 46 and 145.

61\* p. 56.

62\*. p. 128

63\* Supra

born in or in the family they join after marriage.<sup>64\*</sup> As seen above,<sup>65\*</sup> in one case, the court has held that land is to be divided equally amongst the sons of the deceased. The report available is silent about the position of life interests of the daughters of the deceased. The widows it indicated retain the life interests. In Wanja Waichonge v. Mwangi Waichonge, Supra, it was held that where the deceased divides during his time-following Kikuyu Customary Law - his land amongst his wives, the widow with no child gets an absolute title as opposed to a life interest. The effect of this decision was to reduce the shares of the other sons of the deceased who are entitled to equal shares if the widow dies childless. These are the children who are entitled to inherit land after the life interest of the widow determines. The Court did not address its mind to the possibility of the widow having children belonging to the deceased's family. These three decisions reflect a reforming zeal which is not informed by the view of life held by the communities concerned. The place of polygamy and the various forms that the marriage takes after the death of the deceased have been ignored.

The **fourth** level is the administration of estates. The way that the estate is administered under customary law is tied up with the way the bereaved family faces death.<sup>66\*</sup> The children participate in the funeral rites. The family elders who help them in life either confirm or appoint an administrator. Besides it is only the family elders who best understand the family situation, the wishes of the deceased and the peculiar needs of the members of the family. The family solidarity cements the family unit and contributes to the emotional development of the child. Whereas in Re Maangi, Supra, and Re Kibiego, Supra, customary law is replaced by Probate and Administration Act, the child is forced to live its life in an emotionally deprived nuclear family background. It is the materialism and racism of the Court among other factors that explain this trend.

The fourth level will exist when the proposed changes come to fruition as noted above. The definition of a child in the Law of Succession Act, 1972 does not tie a child to the union of its mother

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64\*. pp. 12 - 15.

65\*. See generally, Restatement of African Law Kenya, Volume 2, Law of Succession, Supra.

66\*. John S. Mbiti, African Religions and Philosophy, Chapter 14.

and father **which** union may be a marriage or mere cohabitation. On the face of it this is a good move. A child under it includes a "child whether born or not as long as the latter is born alive, any child recognised or in fact accepted by the father as child of his own, and any child for whom the father has in his lifetime voluntarily assumed responsibility."<sup>67\*</sup> Children born both within and without marriage are therefore protected. One hopes that the word "recognised" refers to those children recognised as children of the deceased by customary law. If this is done, even the children of the leviratic unions, that come into existence after the man dies will be covered. The danger however exists that the marriage institution will be used as a yardstick to determine the children the deceased "recognised or accepted in fact as his own". If this is done, many children will be disinherited when the Act comes into operation.

If it becomes law the Marriage Bill 1979 also will create problems for the children if the marriage is used to determine the children that belong to the deceased. These will come from provisions that will govern conversion of marriages from potentially polygamous to monogamy and the vice versa and some of those which will seek to discourage polygamy.<sup>68\*</sup> **As** seen above children have faced problems where their father has converted his first monogamous marriage into a customary one and subsequently married their mother under customary law. This conversion by the operation of law has not been recognised by the Courts. Consequently the children are considered to be illegitimate for the purposes of the law of inheritance.<sup>69\*</sup> Section 19 of the Bill which will allow monogamous marriages to be converted into potentially polygamous marriages makes it clear that the conversion will be effected only by a joint declaration that they agree to change.<sup>70\*</sup> Since those wishing to convert often contract marriages

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67\*.. Act No. 14 of 1972, S. 3.

68\*.. Sections 19 and 23.

69\*.. In the Matter of The Estate of Ruenji, Deceased, Supra and In The Matter of the Estate of B.H. Ogola, deceased, Supra.

70\*.. 19 (3).

\*through elopement<sup>71\*</sup> this provision will be ignored and the children will not be considered to be legitimate for the purposes of inheritance. Section 23 of the Bill which reads as follows make this clear:-

- 23 (1) No husband ~~while~~ married by a monogamous marriage shall contract another marriage.

##### 5. CONCLUSIONS

Our discussion which assumes that our society today believes that every child in Kenya ought to be enabled to live in human dignity and human equality shows that the ideas of good life reflected by the Indian Succession Act, 1865 and the customary law of inheritance keep out of the law of inheritance those children whose parents are so disadvantaged that they leave no property on death. Without material provision made either by their late parents or the state the lives or lives with dignity of the children of the **disadvantaged are threatened**. **There is a** need for the state (i) to review the vision of the good life as seen by everyone, adult or child today and (ii) to pass legislation that provides financial assistance to the children of the disadvantaged so that they too have as good an opportunity to enjoy life as the other children. The discussion also shows that the courts' application of the customary law of inheritance is causing great problems. **They** have interpreted the Registered Land Act in a way that takes away children's inherited land rights. They have failed to understand the way in which monogamous marriages are converted into customary ones which permit polygamy. They do not understand the basis of the rule that requires that the property of

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<sup>71\*</sup> This customary mode of bringing a customary marriage into existence has been referred to expressly Omondi v. Nyafula (1972) K.H.D. 91. For its discussion see Gordon Wilson, Luo Customary Law and Marriage Laws, Government Printer, 1968 p.122, Stanley Kiama Gathigira, Miikarine ya Agikuyu C.M.S. Bookshop, 1942, Nairobi, p.17. It has been applied in the following Tanzania decisions:-

- (i) Bernard Bayikafundi v. Tamayali (1970) H.C.D. 11,
- (ii) Nyakanga v. Mehego (1971) H.C.D. 270.
- (iii) Adam Kharid v. Amina Rajabu (1968) H.C.D. 405. It explains well the results in Zipporah Wairimu v. Paul Muchemi, High Court of Kenya at Nairobi, Civil Case No. 1280 of 1970, Peter Hinga v. Mary Wanjiku, High Court of Kenya at Nairobi, Civil Appeal No. 94 of 1977, Yawe v. Public Trustee, Court of Appeal for East Africa, Civil Appeal No. 13 of 1976.

polygamously married man be divided equally amongst his houses irrespective of the number of the children in each and of sex. They do not know that emotional deprivation occurs when the administration of the estate takes place outside the African family. Their ignorance of vital customs like elopement creates a situation where law is rendered uncertain and some children are denied their rights because the courts do not understand that they are children in law. It is clear from the way the courts have approached inheritance disputes discussed above that they are both socially and psychologically insulated from the African **reality**. Localisation of the courts appears to the writer to be the only true solution to these problems.

Whenever **it** comes into operation, the Law of Succession Act, 1972 will not solve the problems faced by those governed by customary law of inheritance discussed above because the legislature did not address its mind to these problems at the time it enacted it.

SEMINAR PROCEEDINGS ON THE LAWS OF INHERITANCE AND THE CHILD IN KENYA

Rapporteur: A.H. KHAMATI

Many comments and queries were raised on Mr. Kuria's paper. Seminar participants expressed concern that where a person dies intestate the Public Trustee's Department holds the estate of the deceased for far too long with the result that many children have lost an opportunity to education because they have no funds to pay school fees. It was observed that the delays are typical of the general administrative and judicial process in the Attorney General's Office and in the Judiciary and for the latter it is hoped that the Law Society Committee that is supposedly examining the matter will come out with helpful recommendations. As for the former it was suggested that the Attorney General be requested to consider the expansion of the office of the Public Trustee and increase its personnel throughout the country in order to make information more readily available so that funds in the Public Trustees custody are not held too long.

There was some differences of opinion on Mr Kuria's criticism of the Law of Succession Act, 1972 of Kenya which introduced the individual liberty concept. Mr. Kuria was of the opinion that this ~~causes~~ injustices as it does not protect **those protected** by our customary law of inheritance. One seminar participant expressed the view that the Registered Land Act has not introduced new rights to land proprietors as registration under this Act is preceded by an adjudication process in accordance with customary law. This view was rejected by another seminar participant who observed that the concept of indefeasibility of title was introduced by the Act in favour of the registered individual proprietor and this is foreign to the customary law. The Act has introduced individual aspects to override the customary law communal aspects so that individuals are able to dispose of the lands liberally and mortgage them as they wish. It is for this reason that the new Marriage Bill is introducing the concept of Matrimonial Property although in a limited form which is akin to the customary law ownership system barring an individual member of a family from disposing of family property in **disregard** of the welfare interests of the other family members. Another Seminar participant wanted to know how liabilities of a deceased person devolve as Mr. Kuria's paper dealt only with the assets.

It was generally observed that:-

as regards the Public Trustee's Department, its origin was from the belief that customary law representatives of deceased Africans Estates could not fairly administer such estates, however the crucial point now is to expedite the procedures of that Department and this is a matter which should be drawn to the Attorney General's attention.

as regards devolution of liabilities it was observed with concern that families cannot expect protection against financial institutions intending to exercise their powers of sale in respect of properties charged with loans from the institutions, unless the family is prepared to pay the debt incurred by its deceased member in whose name the property in question is registered.

1.2. Legal Adoption is not to be confused with "fostering"; which means the temporary care of a child, over a period of any length of time, without any change of its legal status, any permanent separation from its natural relatives, or any right of inheritance from the foster parents.

1.3. Traditional forms of adoption are recognised by the customary law of some African tribes, though fostering by relatives is more common custom; and it is thought that such customary adoptions will have legal effect whether or not the tribe concerned has expressly exempted from the general law (see paragraph 1.7 below).

1.4. De facto "adoptions", not sanctioned either by Court Order or by customary law, though sometimes taking place, have no legal effect whatsoever on the status of the parties concerned, beyond responsibility of the "adopters" for the welfare of the child while in their care.

Importance Of Adoption.

1.5. Though there has been a law of adoption in Kenya since 1933, it is only in recent years that it has been required for African children

THE LAW OF ADOPTION IN KENYA

By

Sir. Humphrey Slade,  
Former Speaker,  
National Assembly of Kenya.

THE LAW OF ADOPTION IN KENYA

1. Meaning Of "Adoption"

1.1. In legal parlance, "Adoption", with reference to children, means a process whereby children are separated finally and completely from their natural parents (if any) and other relatives, and become the children of adopting parents for all legal purposes, including inheritance.

1.2. Legal Adoption is not to be confused with "Fostering"; which means the temporary care of a child, over a period of any length of time, without any change of its legal status, any permanent separation from its natural relatives, or any right of inheritance from the foster parents.

1.3. Traditional forms of adoption are recognised by the customary law of some African tribes, though fostering by relatives is a more common custom; and it is thought that such customary adoptions still have legal effect whether or not the tribe concerned is expressly exempted from the general law (see paragraph 17 below).

1.4. De facto "adoptions", not sanctioned either by Court Order or by customary law, though sometimes taking place, have no legal effect whatsoever on the status of the parties concerned, beyond responsibility of the "adopters" for the welfare of the child while in their care.

2. Importance Of Adoption.

2.1. Though there has been a Law of Adoption in Kenya since 1933, it is only in recent years that it has been required for African children

on any scale. That is because in the past all homeless African children were cared for by customary fostering or occasional customary adoption, and there was neither need or place for legal Adoption Orders so far as they were concerned.

2.2. However, changing social conditions, and particularly the much greater cost of providing for children (including their education), urbanization, increasing detribalization, and a regrettable increase in the number of children born out of wedlock, have now produced hundreds of unwanted children for whom traditional methods of fostering or adoption no longer provide.

2.3. Adoption is a factor of vital importance in our efforts to find homes for these homeless children.

2.4. Though we have many institutional homes for such children, which do all that they possibly can for them, those homes cannot house more than a very small percentage of all who are in need. In any case, a true home with adopting or fostering parents, which can give to the child a real sense of belonging to identifiable people, is obviously preferable to the comparatively impersonal institutional home, however beautifully built and managed. Also it costs much less.

2.5. It is difficult, however, to find many people, other than relatives, who are willing to act as foster-parents, because they do not like the idea of being given merely temporary care of the children concerned. Having once looked after them, they cannot bear to part with them. Moreover, foster-parents usually have to be paid for maintenance of the child, and resources for that purpose are limited.

2.6. Therefore legal adoption, involving permanent attachment to adopting parents who will treat the adopted child in every way as their own child, is the only way of providing for the majority of these children who have no other homes.

### 3. The Present Law

3.1. The Adoption Act 1933 was modelled very closely on the English Adoption of Children Act 1927; being designed and then needed mainly for adoption of non-African children (see paragraph 2.1. above).

3.2. It was replaced by the present Adoption Act (Cap.143) in 1959, but without much substantive change.

3.3. In 1973 the President appointed a Commission to review the existing law and practice in relation to adoption of children, with regard in particular to traditional customs and current public opinions, and to possible simplification and reduction of the cost of adoption proceedings. That Commission reported in 1974, its recommendations were accepted by the Government, and the existing Adoption Act was amended accordingly in 1978.

3.4. The Act, as so amended, is described by the following paragraphs.

4. Who May Be Adopted?

4.1 The Act allows, subject to its provisions, adoption of any unmarried person under the age of eighteen years who is resident in Kenya (see section 3(1), definition of "infant" in section 2(1), and section (4) (4).

4.2. There is no provision for legal adoption of adults or married persons.

5. Who May Adopt ?

5.1 An application for an Adoption Order can, subject as stated below, be made by any man or woman or married couple resident in Kenya (see section 3 (2) and (3), and 4 (4).

5.2 This is conditional on:-

(a) the applicant, or one of married applicants, being:-

- (i) at least twenty-five years old, and twenty-one years older than the child concerned; or
- (ii) at least twenty-one years old and a relative of the child (as defined by section 2(1)); or
- (iii) the mother or father of the child (see section 4 (1)); and

(b) the child having been continuously in the care and possession of the applicant for at least three months preceding the application (see section 4 (5)).

- 5.3. However, an Adoption Order is not to be made in favour of:-
- (a) a sole applicant who is a male; or
  - (b) a spouse or spouses of a polygamous marriage; or
  - (c) an applicant who is of difference race from the child;

unless the Court is satisfied that there are special circumstances which justify it (see section 4(3)).

6. Consents Required

- 6.1. An Adoption Order cannot be made without the consent of:-
- (a) the parents or guardians of the child, or  
or other persons liable to contribute towards its maintenance;
  - (b) the father of an illegitimate child, if he acknowledged paternity and is contributing towards its maintenance;
  - (c) the parents of the mother of an illegitimate child, if she is under eighteen years of age; or
  - (d) the wife or husband (if any) of the applicant;  
unless the Court dispenses with such consent (see section 4 (6)).

6.2 The Court is empowered to dispense with consent:-

- (a) in the case of a parent or guardian who has abandoned, neglected or persistently failed to maintain or persistently ill-treated the child, or failed to exercise the normal duty and care of parenthood;
- (b) in the case of a person liable to contribute towards the maintenance of the child who has persistently failed to do so;
- (c) in the case of any person who cannot be found or is incapable of giving consent (and still incapable at the time of making an Adoption Order);
- (d) in the case of any person, other than the wife or husband of the applicant, if satisfied that consent is unreasonably withheld;

- (e) in the case of a wife or husband of an applicant where they are living apart and their separation is likely to be permanent (see sections 5(1) and (2), and 8(d)).

6.3. There are presumptions of :-

- (a) abandonment, if the child appears to have been abandoned at birth, or the person having care and possession of the child has not heard ~~from its parent~~ or guardian for at least six months; and
- (b) persistent failure to maintain, where no parent or guardian has contributed to the maintenance of the child for at least six months, and such failure is not due to poverty (see provisoes to section 5(1) (a)).

6.4. Consent may be given, either unconditionally or subject to conditions concerning religious up-bringing, without knowing the identity of the applicant (and usually is so given); and subsequently withdrawal of consent so given on the ground that the identity of the applicant is unknown is deemed to be unreasonable withholding of consent (see section ~~5(3)~~).

6.5. Where a child is in the care and possession of an adoption society, there can be valid consent to its future adoption by anyone approved by that society, provided that an adopter is found by the society within the next twelve months. (see section 7B).

6.6. In the absence of any person whose consent is required, such consent may be proved by a document signed by that person in the prescribed form, and attested by someone of a prescribed class; except in the case of consent by the mother before the child is six weeks old (see section 6).

6.7. In considering whether or not to dispense with the consent of any person, the Court must regard the interests of the child as paramount; and, subject thereto, the interests of its parents and relatives in preference to those of the applicant (see section 5(6)).

6.8. With regard to **all consents, the Court must be satisfied that the consenting party fully understands the nature and effect of an Adoption Order** (see section 7 (1) (a)).

6.9 Consent may be withdrawn, without leave of the Court, at any time before an Adoption Order is made (see section 5(7)).

7. Custody Pending Application

7.1. Where consent has been given by a parent or guardian, he may not, without leave of the Court, remove the child from the care and possession of the applicant (see section 5(4)).

7.2. The applicant may in any case, at any time while his application is pending, apply for custody of the child until decision thereon (see section 5(5)).

8. Matters To Be Considered By The Court

8.1. Before making an Adoption Order, the Court must be satisfied, not only in accordance with the requirements stated by paragraphs 4,5, and 6 above, but also that:-

- (a) the Order is in the best interests of the child, with due regard to both its wishes (according to age and understanding) and the applicant's ability to maintain and educate it;
- (b) the applicant is not receiving any payment or other reward for the adoption; and
- (c) where the applicant is not a relative of the child, reasonable steps have been taken to inform its relatives (as defined by section 2(1)) of the proposed adoption, and no relative able to accept its care has expressed willingness to do so (see section 7 (1)).

9. Conditions Of Adoption Orders

In making an Adoption Order, the Court may impose such conditions as it thinks fit, and may in particular:-

- (a) require the adopter to secure financial provision for the child; or
- (b) order that the child remains with the jurisdiction of the Court for two years or less; or

- (c) require the adopter to accept supervision by and advice from an adoption society for two years or less; or
- (d) where consent has been conditional on religious upbringing, require compliance with that condition; and
- (e) require the adopter to furnish security for due performance of any conditions imposed by the Court. (see section 7(2)).

10. Interim Adoption Orders

10.1. In any case of doubt as to suitability of the applicant or the interests of the child, the Court may, subject to compliance with all the requirements stated by paragraphs 4,5 and 6 above, make an Interim Order for the applicant to have custody of the child for any probationary period not exceeding two years, on such conditions as regards maintenance, education, and supervision as it thinks fit (see section 8).

10.2. An Interim Order has no effect as an Adoption Order (see section 8(4)).

11. Registration Of Adoption Orders.

Part III of the Act provides for registration of Adoptions, with substitution of Adoption Certificates for Birth Certificates; but those matters are of more interest to the Registrar-General and Adoption Societies than to practising lawyers.

12. Effect Of Adoption Orders

12.1. An Adoption Order transfers from the parents or guardians of the child to its adopters permanently all rights and obligations of parenthood (see section 16).

12.2. For all purposes of the Workmen's Compensation Act, the adopter under an Adoption Order becomes the parent of the child, and vice versa (see section 17).

12.3. Also, for all purposes of intestate succession, or any disposition of property whether by will or inter vivos, an Adoption Order makes the child a child of the adopter (see sections 19 and 20).

12.4. An Adoption Order does not, however, alter the nationality of the child (there being no legal provisions as yet to that effect).

12.5. Adoption Orders made in other countries of the Commonwealth are recognised, if having substantially the same effect as our Adoption Act (see section 21).

### 13. Jurisdiction

13.1. A Resident Magistrate has jurisdiction to make an Adoption Order where all necessary consents have been given, and where the Order does not require to be justified by proof of special circumstances (as to which, see paragraph 5.3. above) (see section 3A(1)).

13.2. Otherwise only the High Court has jurisdiction (see definition of "the court" by section 2(1)), and cases before a Resident Magistrate in which there is a question either of dispensing with consent or of special circumstances as above have to be referred to the High Court (see section 3A(2)).

### 14. Procedure.

14.1. Applications for Adoption Orders are made by way of originating Summons, served on all persons whose consent is required by the Act, and on any Adoption Society which has arranged the adoption (see Rule 4 of the Adoption Rules 1972, as amended in 1978).

14.2. Application must then be made for appointment of a guardian ad litem, to safeguard the interests of the child (see section 12A and Rule 8A).

14.3. All proceedings are in Chambers (see section 3(4)).

14.4. Officers of Adoption Societies are empowered to conduct applications, but without reward (see section 3(5)).

14.5. Other matters of procedure are governed by the Adoption Rules 1972 as amended in 1978.

### 15. Adoption Societies

15.1. Part V of the Act provides for approval of Adoption Societies (see section 23), and prohibits the arrangement of adoptions by any local authority or other body of persons which is not approved as such (see section 22(1)).

15.2. The Minister is empowered also by Order to prohibit arrangement of adoptions by individuals other than parent or guardian of the child concerned (see section 22(2)), though no such Order has yet been made.

15.3. Other provisions of this Part regulate the functions and responsibilities of Adoption Societies.

#### 16. Miscellaneous Provisions

16.1. All dealings with adoptions are strictly confidential (see section 28).

16.2. Payments to anyone in relation to the arrangement of an adoption (with very limited exceptions), and all advertisements in any way relating thereto, are prohibited and made punishable as offences (see sections 29, 30 and 31).

#### 17. Customary Adoptions

The Minister is empowered by Order to exempt tribal customs from the application of the Act (see section 36), but no such Order has yet been made.

#### 18. Regulations

In addition to the Adoption Rules, there are Adoption Regulations made under the Act, mainly for the guidance of Adoption Societies. These are in the process of revision at the present time, consequent upon the Amendment Act of 1978 and recommendations by the Report of the Commission (see paragraph 3.3. above).

#### 19. General

19.1. This is based on the assumption that legal practitioners attending the Seminar will be interested mainly in the underlying purpose of our Law of Adoption, and in the Law as it now stands.

19.2. Anyone who is interested also in discussion of the reasons for any particular provision of the present Act is invited to study the Report of the Commission (see paragraph 3.3. above); which, to the best of my knowledge, is still available from the Government Printer at the price of Shs.6/-

19.3. Nevertheless, I shall be happy to discuss with the Seminar any suggested improvements of this Law.

SEMINAR PROCEEDINGS ON ORPHANS AND ADOPTION LAW.

Rapporteur: S.B.O. GUTTO

The author treated the seminar to a wealth of background information as he was the Chairman of the Commission on Adoption of 1974 whose recommendations were drafted and enacted into law in the Adoption Act, 1978. In preparing its Report, the Commission gathered and considered information from the public through questionnaires and on-spot interviews particularly in the rural areas.

The Commission found as fact that in the EXTENDED FAMILY institution which predominated in traditional society, issues of orphans **were** almost irrelevant since children were deemed to belong to and assumed rights within the family and its material conditions. This, unfortunately is changing fast and has done so in many families. In the rural areas in particular the interviewees rejected the modern concept of adoption as symbolising buying and selling of children. This view is based on the aforementioned traditional social structure.

There existed in traditional society, however, certain instances of what approximates the modern concept of adoption. For example, during wars when the victors permanently took care of women and children of the losers and absorbed them. Also evidence was given that the Kipsigis sometimes abandoned their children by leaving them along the Kisii borders whereupon the latter would take them and "adopt" them. This practice has now ceased.

The nature of the 1978 changes in the law were limited. The most significant was the changes that made procedures simpler by giving magistrates jurisdiction to hear and determine adoption cases as opposed to the earlier **law when only the High Court had such jurisdiction.**

The Seminar noted that generally there is anomaly in adoption procedures since there is high demand than actual supply of children for adoption while at the same time there exist alot of children that require and are waiting to be adopted. Some of the explanations for this include (a) the strictness in legal procedural requirements before orders of adoption can be awarded, and (b) the expenses involved in searching for children's background and origin.

It was noted that infertility is a serious problem in Kenya as some statistics collected a few years ago indicated that almost  $\frac{1}{2}$  million out of 3.2 million women within the productive age were considered infertile. A good number of ~~males~~ are also infertile. Female infertility is further exaggerated by the fact that some are "voluntarily" infertile--meaning that in some social circumstances a woman who has not given birth to a child of a particular sex especially male, is considered infertile. It was noted, however, that a good number of infertile women who visit the Kenyatta Hospital's Special Clinic are receptive to **possibilities of adopting children**. The World Health Organisation is trying to help in the treatment of infertility in Kenya and this will be operational soon.

The seminar noted that the provisions in the law that discriminate against single males, polygynous families, and persons of different race from the child in adoption cases seem to be based more on prejudice than reality and ought to be reviewed.

Whereas the Constitutional provision that does not give an adopted child automatic citizenship of the adoptor parent helps in not imposing citizenship on a child it also works to restrain acceptance and assimilation of the child. It is a controversial provision that requires a review.

The seminar suggested that ways ought to be devised whereby children could be fostered until such a time that they were grown enough to decide for themselves whether they prefer to be adopted or not although this has the problems of restraining relations between the intending adopting parents and the orphan child should the child decide not to be adopted.

The seminar could not agree on whether or not children ought to be told that they are adopted children. The current practice is in favour of disclosure.

The seminar further noted that physically handicapped children are adopted but not as readily as the others. It was also noted that few adoptors require that the children they want to adopt should be of the same ethnic group or to resemble them.

LEGAL ASPECTS OF CHILDREN'S HOMES AND INSTITUTIONS.

By

M.M. Akola,  
Children's Department,  
Ministry of Home Affairs.

INTRODUCTION.

The number of Children's homes and institutions today in the republic total 106. Of these, five are established by local authorities and the rest by societies and voluntary institutions.

In practice, any local authority or society, can establish a children's home or institutions without the necessity for legal clearance. All the above said children's homes and institutions began in this way. It is possible that even at this time we are discussing this subject, a new children's home is coming up somewhere in some part of the Republic.

Need for Legal Clearance.

There are advantages in this practice. Naturally societies and any voluntary organizations would want to make decisions and immediately act on them without having to consult lawyers or legal institutions. In this way desperately needy children get support readily as no time **is** wasted in legal consultation.

On the other hand should it happen that the institution or Children's home is established without due regard to the provision of adequate life requirements e.g. enough accommodation, food etc., then it becomes a big problem to close it as no alternative place renders itself readily available to the children already in the home. There are a number of children's homes presenting such problems to-day.

Provisions of legal clearance before an organization starts to establish a children's home; I feel would be a welcome solution.

Establishment.

It should not be concluded, however, that there is no legal check on the establishment and running of children's homes. The Children and Young Persons Act, (Cap. 141) as you may well know, makes provision for the protection and discipline of children, juvenile and young persons, and for matters incidental thereto and connected therewith.

The children's homes and institutions cater for all needy children who require care, protection and in many cases discipline. Education and training are provided in preparation of the children for a better and gainful adult life. Part III (Section 22) of the Act, defines the children and Juveniles who may be identified as being in need of protection or discipline.

Appointment of Local Authorities. Part VIII of the Act, Section 58 (1) provides for the appointment of Local authorities, either individually or jointly as an Appointed Local Authority for the purposes of promoting the welfare of needy children, juveniles and young persons in its area of jurisdiction. This Appointment, which leads to registration and gazettelement under the Act, confers to the particular local authority legal powers in operating welfare and social services schemes.

These schemes are given in the second schedule in the Act as nurseries and children's homes. Provision is also made for employment of children's officers to handle matters pertaining to the welfare of the needy children.

Out of a total of 65 local authorities in the Republic, only the following have been appointed. Of these, only 5...have established a total of 5 children's homes.

Owing to lack of field personnel, it is not possible to say how many day-care centres or nursery schools have been established by these authorities. As for children's officers, a total of 24 have been employed.

RIFT VALLEY PROVINCE.

| <u>MUNICIPALITIES</u> | <u>COUNTY COUNCILS</u>   | <u>TOWN COUNCILS.</u> |
|-----------------------|--|-----------------------|
| NIL                   | County Council of Kipsigis<br>County Council of Pokot<br>County Council of Narok | NIL                   |

EASTERN PROVINCE.

|                       |                            |  |
|-----------------------|----------------------------|--|
| Municipal C. of Embu  | County Council of Embu     |  |
| Municipal C. of Meru, | County Council of Isiolo   |  |
|                       | County Council of Kitui    |  |
|                       | County Council of Masaku   |  |
|                       | County Council of Marsabit |  |
|                       | County Council of Meru,    |  |

MUNICIPALITIES

COUNTY COUNCILS

TOWN COUNCILS.

WESTERN PROVINCE.

County Council of Bungoma  
County Council of Kakamega.  
County Council of Busia.

Municipal Council of  
Thika

County Council of Kirinyaga  
  
County Council of Murang'a  
County Council of Nyandarua

NYANZA PROVINCE.

Municipal Council of  
Kisumu

County Council of Gusii                      Kisii Town C.  
County Council of Kisumu  
County Council of South  
Nyanza  
County Council of Siaya

COAST PROVINCE.

Municipal Council of Mombasa  
Mombasa.

County Council of Kilifi.  
County Council of Kwale.  
County Council of Lamu.  
County Council of Taita  
Taveta

NORTH EASTERN PROVINCE.

County Council of Garissa,  
County Council of Mandera.  
County Council of Wajir.

NAIROBI AREA.

City Council of Nairobi

Approved Societies. Section 63 of the Act provides for approval of any society or voluntary institutions working for the care, protection or control of children, juveniles and young persons. Any such society or voluntary institutions may establish institutions or children's homes for the care of such persons as may be committed to their care under the Act.

However, under the same section, no more children or juveniles may be committed to the care of the society or voluntary institution once a notice to surrender or withdraw the certificate of approval has been served.

Records in the Children's Department show that a total of 33 societies and voluntary institutions have been approved and registered under the Act. The list is given below. More than 90% of the children's homes and institutions are established, managed and run by approved societies.

Approved Officers:- Many social/welfare and manial workers are employed by these approved societies either as filed staff of residential staff in children's homes and institutions.

Section 64 of the Act provides for the appointment and gazettelement of some of these social/welfare workers as approved officers. The appointment and gazettelement empowers these officers to process needy children's cases through law courts. So far 8 approved societies have had 24 appointed and gazetted approved officers and obviously play an important good samaritan role.

Voluntary Societies

1. The Child Welfare Society of Kenya
2. Dr. Barnardo's Homes in Kenya
3. Edelvale Trust, Kenya
4. The Society of Deaf Children
5. Kenya Society for the Blind
6. The Save the Children Fund, Kenya
7. Salvation Army
8. The Franciscan Sisters of Oudenbosch
9. The Church Missionary Society
10. The Red Cross Society (Kenya)
11. The Kisumu Diocese of the Mill Hill Catholic Mission
12. The Presbyterian Church of East Africa

Voluntary Societies Cont:

13. The arya Pratinidhi Sabha, East Africa
14. The Diocese of Nairobi in the Church Province of E.Africa
15. The Diocese of Kisii, Mill Hill Catholic Mission
16. The Diocese of Nakuru in the Church Province of E. Africa
17. The African Inland Mission
18. The Young Muslim Association
19. Diocese of Kitui
20. Diocese of Maseno North in the church province of Kenya
21. The Kenya Society for Mentally Handicapped
22. The Kenya Women Organisation
23. National Christian Council of Kenya
24. The Institute for Rural Development
25. Diocese of Meru
26. Christian Children's Fund Inc.
27. Testimony Faith Homes
28. Islamic Charitable Services Ltd
29. The Islamic Foundation
30. Diocese of Nyeri
31. Consolata Sisters
32. S.O.S. Children's Village, Kenya
33. Undugu Society of Kenya

Registration.

By the provisions of legal Notice No.289/1965, all children's homes and other children's institutions are required to be registered. The penalty for failure to do so is a fine not exceeding two thousand shillings. Happily for those concerned, the children's Department so far has not taken any one to court under these provisions although many children's homes and institutions remain unregistered. One reason why the Department has not taken such nasty action is attributable to lack of personnel to inspect and take action. However, the second reason which is more important, is that the Department attached more important to negotiations co-operation with all organizations involved in this voluntary and yet very important service to our needy children. This second reason accounts for the good results so far achieved in the voluntary services to both our needy young and old.

According to records, the undermentioned children's homes and Institutions have been registered under the Act. A total of 34 institutions

remain unregistered, although under Section 76 of the Act, these institutions ought to be compulsorily registered. However, as stated earlier, shortage of personnel is the reason why the registration exercise, is perforce slow.

Children's Homes.

1. Dagoretti Children's Centre
2. Edelvale Home
3. Dr. Barnardo's Home
4. Salvations Army
5. Salvation Army Joytown
6. St. Oda School for the Blind
7. Rangala Catholic Orphanage
8. Nyang'oma Catholic School for the Deaf
9. Mumias Catholic School for the Deaf
10. Egoji (St. Lucy's) School for the Blind
11. Salvation Army Training School for Girl's
12. Catholic Children's Home
13. Starehe Boy's Centre
14. John F. Kennedy Memorial School for Crippled Children
15. Jacaranda School for Mentally Handicapped Children
16. Salvation Army Kabete Children's Home
17. Mama Ngina Hostel
18. Salvation Army School for the Blind Kibos
19. Children's Orthopaedic Catholic Bohra Road.
20. Child Welfare Society Embu Home for children
21. Port Tudor place of Safety
22. P.C.E.A. Kambui School for Deaf
23. Meru Children's Home
24. Thika Children's Home
25. Tumutumu Deaf & Dumb Unit
26. Tuuru Home for Children
27. Kakamega Children's Home
28. Machakos Children's Home
29. Dayanand Children's Home Nairobi
30. Kandara Children's Home
31. Githiga Children's Home
32. Karatina Children's Home
33. Caltex Children's Home
34. Lady Northey C. Home
35. The Save the Children Fund
36. Madunguni Children's Home

Children's Homes Conti:

37. Charles Lwang'a House Port Tudor
38. Amani Cheshire Home
39. Ngala School for Deaf
40. Salvation Army School for Blind Likoni
41. Kapsabet School for the Deaf
42. Nakuru Boy's Centre
43. Salvation Army Sec. School for the Blind
45. C.C.M. School for the Deaf Murang'a
46. Kaaga School for Deaf
47. Garissa Boy's Town Private Bag
48. Mama Ngina Kenyatta Children's Home
49. Got Kokech Orphanage
50. Garissa Muslim Home
51. Kandunyi Children's Centre
52. Kigumo Children's Centre - Murang'a
53. Maseno School for the Deaf
54. Port Reitz School for Handicapped
55. Garbatulla Girl's Home
56. C.C.M. Children's Home
57. Merti Boy's Home
58. Girl's Town Wajir
59. Osaro Self-Help
60. Nyandarua School for the Deaf
61. Kwale School for Deaf
62. Kipchimchim Home for Cripples
63. S.O.S. Children's Village
64. Mugura Children's Home
65. Testimoney House
66. Al-Farah Children's Home
67. Ol-Kalou for Physically Disabled
68. Kerugoya School for the Deaf
69. Kibarani Lions School for the Deaf Children
70. Kizito Children's Home
71. Mandera Boys Town
72. C.M. Homecraft Training for girls.

Management:

A children's home is an institution and as you very well know such a care institution is not wholesome for the normal rearing of a child. However, since institutional care becomes necessary when family or foster care cannot be provided, great care has to be taken to make sure that life

in the institution is as near as family one as possible. To achieve this, provision is made under Section 76 of the Act for the formulation of regulations as to the management and administration of the approved societies and voluntary institutions in relation to the care of children in the homes and institutions. The full text is contained in the Legal Notice No. 268/1965.

To ensure good quality services to children placed in any type of care, adequate funds and trained personnel are a must. Unfortunately our Country, like many other developing countries, cannot afford these requirements adequately in all the institutions.

Some voluntary organizations are wealthier than others and can afford the best for the children placed in their care. In many cases, their field and residential staff attend refresher courses and training programmes abroad. There is, however, dire need for locally established training programmes in this country for both field and residential childcare workers. This need is felt even in statutory corrective institutions like approved schools.

#### CHILDREN'S DEPARTMENT.

The children's Department is charged with the day to day administration of the Children and Young Persons Act. The Department co-ordinates all the legal aspects of all bodies and institutions for children's services. It processes all appointments, registrations, gazettements, said above and operates statistical aspects and inspections/supervisory responsibilities in relation to the care, protection, control, discipline, education and training of the needy children.

#### Statutory Children's Institutions:-

There are two types of statutory institutions managed and run by the Department. These are Juvenile Remand Homes and Approved Schools.

Juvenile Remand Homes are Established under Section 36 of the Act. They offer safety and custody to Juvenile remands awaiting for disposal action by the courts. There are nine of these Institutions at present and they are:-

|          |          |         |
|----------|----------|---------|
| NAIROBI  | NAKURU   | MOMBASA |
| KIAMBU   | KAKAMEGA | NYERI   |
| MURANG'A | KISUMU   | ELDORET |

Approved Schools are established under Section 38 of the Act. There is a total of 9 at present and they offer residential corrective care, education and vocational trades training. These are:-

|           |           |                  |
|-----------|-----------|------------------|
| KABETE    | GETATHURU | KIRIGITI (GIRLS) |
| DAGORETTI | WAMUMU    | OTHAYA           |
| LIKONI    | KERICHO   | KAKAMEGA.        |

CONCLUSION.

Ideally, children should grow up in their family institutions. The department abhors the growing need for institutional care and appeals to individuals, parents and organizations to try and encourage parents to keep and rear their own children. And where, by reason of death parents are absent, close relatives or suitable guardians should absorb the orphans into their families. This being the International Year of the Child, all adults should pull together for the common good of the child. This will ensure a strong and stable future for the Nation in the Nation future.

SEMINAR PROCEEDINGS ON-LEGAL ASPECTS OF CHILDREN'S HOMES.

Rapporteur: SHEM ONG'ONDO

Following a lengthy and learned discussion of the paper the Seminar made the following Recommendations;

1. That as far as possible, children should be encourage to grow in their own homes. This, it was thought would only be possible if peoples standards of living were improved.
2. That descipline which is part and parcel of a good citizen should be instiled in the children whether at home or in the children homes.
3. That parents who make their children needy should be subjected to some form of punishment- subject, of course, to Recommendation 1, above.
4. That in light of the fact that children's officers have very little power to prosecute, and in light of the limitation by Section 23 of the Children and Young Persons Act, as to who may be prosecuted, this Section should be amended by deleting the words "...Custody, charge or care,." and, further, that the children's department be readily given legal advise if possible, a qualified lawyer be attached to this department.
5. That in order to realize Recommendation Four above, wider investigative powers carried out by a specialized person for this purpose, be given to the children's department.
6. That in order to ensure effective governmental control on the establishment of children homes, there should be prior consent before the establishment of these homes.
7. That offences against children be consolidated in one statute.
8. That the public be involved more in reporting of abuses against children and other cases.

LAW GOVERNING THE EMPLOYMENT OF CHILDREN IN KENYA.

By

P.K. Ng'ang'a  
A Graduate of Faculty of Law  
University of Nairobi (1979)

INTRODUCTION

This paper is an abstract and a summary of a dissertation compiled and submitted by the present writer for his LL.B degree (1979). The **dissertation**, "Infant contractual capacity and protection by the Law: A special study into contracts of employment," analyses the concept of contractual capacity, traces this concept into employment contracts and then looks at the employment legislation affecting children in Kenya.

The underlying theme of the dissertation is the special position accorded to children in every human society. The nature of children is such that they depend on the adult members of the society for both their material and non-material needs. Child welfare has been considered to be a most important consideration which **any** human society should have towards its very young. The concept of contractual capacity and the employment Legislation in Kenya has therefore been looked at as against this test.

Problem Areas

The writer has certain factual situation in mind:

- (i) Many children, mainly female, employed as domestic servants. This is particularly so in the urban areas but to a lesser extent in the rural areas.
- (ii) Many children, mainly male employed as "Matatu" conductors.
- (iii) Many children who work in coffee, pyrethrum and tea plantations.
- (iv) Many other children employed to do other miscellaneous activities e.g. shoeshine boys, waiters in hotels, in timber pit-saws, dance troupes etc.

The Present Law

This is contained in the Employment Act (Cap.226 Laws of Kenya) and the Subsidiary Legislation made thereunder. Legal Notice No.155 of 1977, has rules that are relevant to the situation under consideration. Situations falling within the ambit of the Industrial Training Act (Cap. 237 Laws of Kenya) are not within the ambit of this paper.

The Employment Act

The Act defines a juvenile as meaning a child or a young person. A child means an individual, male or female who has not attained the age of 16 years. A young persons is an individual, male **or** female who has attained the age of 16 years but has not attained the age of 18 years.

Section 24 of the Act defined "Industrial Undertaking" and makes provisions regulating child employment in such undertakings.

Section 25 expressly prohibits employment of children in Industrial undertakings but has a proviso with regard to children so employed under the Industrial Training Act. Under Section 26 a child can only be employed under a verbal contract of service. Under Section 27 no child can be employed to attend on any machinery or in any open cast workings or sub-surface working which are entered by means of a shaft or adit. Section 28 prohibits the employment of juveniles between the hours of 6.30 p.m. and 6.30 a.m. in any industrial undertaking. Under certain circumstances, a male young person may be employed between these hours. Under Section 28 (2), notwithstanding the above provisions, the minister may, after consultation with the board authorise an employer in writing to employ young persons up to the hour of midnight or from the hour of 5.00 a.m.

Under Section 29, Section 28 may be waived when public interest demands it. Section 31 requires an employer employing a juvenile to keep and maintain a register containing such matters as the age and date of birth of the juvenile, date of entry into and leaving such employment and such other matters as may be prescribed.

Section 34 gives the Labour Officers extensive powers. Such officer may, by notice in writing served upon the employer, not only prohibit a person from employing a juvenile but may also terminate or cancel any contract of service so entered with a juvenile. Section 35 If any person knowingly employs a juvenile in any industrial undertaking in contravention of the provisions of the law, he would be guilty of an offence and liable to a fine. Section 50 of the Act gives an authorised officer power to initiate proceedings and to take into custody and return to the parents or guardian any child employed contrary to part (iv) of the Act.

Employment (Children Rules 1977 (L.N. 155 of 1977))

The Minister for Labour, pursuant to the powers given to him under Section 56 (1) of the Employment Act made the Employment (Children) Rules 1977.

These rules apply to any type of employment except employment as an apprentice or an indentured learner. Under rule 3, no person shall employ any child without the prior written permission of an authorised officer. The permission cannot be granted where the child has to stay away from his parents or guardian unless such parent or guardian consents in writing. The authorised officer cannot grant the permission where the child is to be employed in any bar, hotel, restaurant or club unless the Labour Commissioner has consented in writing and the child is in possession of a copy of such consent. Every permit issued under this rule must be renewed annually and failure to comply with this rule is an offence. Rule 4 provides that every person authorised to employ more than 10 children on permanent basis shall designate a person to be responsible for the welfare of the children. Such a person must be approved in writing by the Labour Commissioner. Upon conviction for non-compliance with these rules, a person is liable to a fine not exceeding **Kshs. 4,000.** **The Common** Law rules governing contracts of service in which infants are parties will also apply.

Observations made on the Present Law.

It is submitted that the Employment Act is limited in scope in the sense that it mainly deals with the employment of children in Industrial undertakings. The Law contained therein has the effect of interfering with the freedom of infants who might wish to go into such employment. **In** other undertakings which are non-industrial, the employment rules will apply. It is submitted that the rules are only procedural. The Law should stipulate the specific rights and duties of an infant in a service contract.

It is also submitted that the formalities and procedures **that the** employer is required to follow are largely disregarded by the employers and unknown to the infant employees.

It is submitted that the only justification for the intervention by the "state" into the employment contracts entered into with infants is to protect infants from any exploitation by the adult members of the society who might wish to avail themselves of cheap child labour.

It is also submitted that the Law as we have it today has become ineffective and does not contain the situation. The Law must be made to cope with the situation in a better way.

Before any recommendations are made, the above submissions will be expounded a little. Although Section 24(2) of the Employment Act has a definition of "Industrial Undertaking" which is quite wide, the Act does not concern itself very much with non-industrial undertakings. Obviously, there are many sectors of our economy in which children could be employed such as in undertakings which are agricultural in nature.

Section 24 (2)(d) defines "Industrial Undertaking" to include inter alia, transport of passengers or goods by road, rail or inland waterway. This definition is important as it covers an area in which many children are being employed today, namely as "Matatu" conductors. Section 24 has two provisions which have the effect of narrowing down even further the operation of the Law in this field of Industrial Undertakings. Firstly, the minister responsible for labour matters,....."if he sees fit so to do, having regard to the nature of the work involved in any employment carried on in any industrial undertaking may by order declare that such employment shall be excluded for the purposes of the provisions of this part, and therefore such employment shall be deemed not to be employment in Industrial Undertakings for the purposes of this part. "Secondly", any undertaking of which a part only is an Industrial Undertaking shall not for that reason alone be deemed to be an Industrial Undertaking. These provisions were deliberately included to allow for any policies which the government might wish to implement.<sup>1</sup> This was expressly stated when the Bill was being debated in 1948. The proviso excluding partly Industrial Undertakings should be seen in light of two factors. The first is the government policy. It was the policy of the colonial government to make the economy of the Kenya colony self-supporting. This economy was primarily based on agriculture.<sup>2</sup> The second is the exclusion of agricultural undertaking from the provisions of the Law. Infants had to be available to work legally in factories that processed raw agricultural materials at the coffee and sisal estates.<sup>3</sup> These provisions must be seen in light of Section 25 particularly which prohibits employment of children in any industrial Section 27 and 28 also take the form of prohibiting the employment

1. Legislative Council Debates 1947/48 at p.434 per Mr. Vasey. (M.C.); 433 per Mr. Hyde Clarke (M.C.)
2. For our understanding of the col.policy.
  - N. Leys "Kenya" (1924)
  - W. Mcgreggar Ross, "Kenya from within"
  - Marjorie Ruth Dilley, "British Policy in Kenya Colony"
3. - Legislative Council Debates 1933 vol.1 - p.42.

of children in certain areas and in certain times. Sections 34 and 50 gives the Labour Officers wide powers to interfere with contracts of employment entered into with juveniles. The effect of these provisions is to interfere with the independence and capacity of infants as citizens.

The (children) Employment Rules are, unlike the Act, wide in scope.<sup>4</sup> However these rules are only procedural. A prospective employer is required to conform to the laid down procedure before he can employ a child such as the permission of an Authorised Officer. Even when read together with the common law rules, still the law should spell out the substantive rights and duties of an infant in any contract of service. In the research which the writer of this paper did, labour officials were interviewed. Personal interviews were conducted with the Deputy Labour Commissioner, and two provincial Labour Officials. The indications were that there is no way in which the labour personnel can control the situation. The interviews indicated that many children are employed in many places where in the absence of co-operation of the adult employers of children it would be impossible to enforce the law. It is also clear that even the children employees are not very cooperative. The number of children in employment is a large one. The conditions under which they work is exploitative. Children employed as 'Matatu' conductors for example have to do with 2/= per day, which some employers claim is compensated by lunch, provided by the employer. The same case applies with respect to 'Ayahs'. They also get about 2/= Per day which is said to be compensated by provided accomodation and meals. This is clear to any person who knows the Kenyan Society today. This has also been the subject in the local newspapers,<sup>5</sup> also over the radio of late, probably because in 1979 children welfare has been the concern of the Kenyan and the International Community. It is clear that the law is either disregarded deliberately or unknown to many people, especially the children. The Labour personnel also indicated the difficulty in its enforcement. There is therefore a need to increase the number of personnel dealing with child labour. As has been alluded to above the interference into the childs capacity to enter into industrial undertakings has not been solely for the benefit of the child. When Section 25

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4. Employment (Children) Rules 1977 - L.N. No.155 of 1977 . See Rule.2

5. Newspapers -"The standard" - April 13th 1978; April 14th 1978; March wnd 1979; July 11th 1979 (p.9).

"Daily Nation" Sept.15th 1978 (p.5) Radio - "The Way It is" Programme - 27/28/July 1979.

is read together with Section 24, it reveals a very half-hearted spirit regarding the protection of children from dangerous employment. This is when these sections are seen in light of their historical origins. However, in independent Kenya, the powers of the minister could be exercised for the benefit of infants in some cases. An argument can be advanced therefore that the minister may exercise his powers under the proviso and exclude "Matatu" conductors from the provisions of the part, therefore putting such employment in the category of non-industrial undertakings. It is however submitted that this would not solve the problem. In this case, the employment rules which are ineffective and inadequate would apply.

Section 28 is another illustration of the half-hearted approach towards safeguarding the welfare of children who go into employment. The provisions of the section are subject to considerations of public policy and convenience or expediency more so for male young persons. The history of these provisions was that children had to be made to work at night in the coffee factories during the rush season.<sup>6</sup> The law has the effect of reducing the capacity of children especially with respect to Industrial Undertakings. It is however apparent that when the law does allow the child to enter into some of these undertakings it has been for two reasons. This has been to legalise the employment of children in certain essential sectors of the economy. Secondly, a need to prohibit the employment of children in other sectors on humanitarian considerations.

#### RECOMMENDATIONS

The capacity to enter into employment contracts which is given to an infant under the Kenyan Law has been governed by considerations not solely in the interest of the infant. This is because the substance of our law regulating the employment of children is incompatible with a true spirit of protecting the infants. The Law as it is does in fact restrict the independence and capacity of infants as citizens. The Law has had to consider the two needs of safeguarding the interests of children and the interests of other individuals. The interests of others has had the upper hand. It is, therefore, recommended that no child or young person should, in any way be restricted in his or her capacity or independence as a citizen solely or largely for the benefit of any other person or persons. It is acknowledged that the present law adopts a good position with

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6. 1956 Bills - Memo of objects and Reasons' P. 16.

regard to the employment of children. This is because at a certain stage in their growth, the best place that children can spend their time is in school while in the absence of parents or other family members. It is submitted that this is an ideal position. The reality is that there are many children neither in school nor with their family members at home. This class of children have to be employed so as to earn a living. It is these children who should be allowed to work. This is in the absence of a better alternative which has not been available so far. The question then does arise. Is the present legal position assisting them in any way? It is submitted that the law should assist these children even more. The child should be able to enter a binding contract with his employer. Children and young person should be protected by legal incapacity to act independently. Children should be free from having attributed to them any legal responsibilities likely to be unduly burdensome to a person of that age.

The powers given to the Labour Officer under Section 34 interfere with the child's independence. However the Labour Officer should be made a party to the contract the infant enters into. This should be solely on the grounds of public policy.

As shown above, the Employment Act is narrow in scope and a large area does exist where the law is silent and the rules which govern such areas are mainly procedural. Regarding the rights acquired and obligations under the contract, there should be basic terms in the contract employment. There have to be presumed in all cases of child employment. These terms should be substantially for the benefit of the infant and should include:-

- That the infant has completed a minimum standard of education which should be compulsory.
- A minimum wage payable to any child. The wage payable to any child would however vary depending on the nature of the work, the type of job and the circumstances of each case.
- The contract will contain a term that the infant can leave the employment any time he wishes. Any disputes that could arise on such a child leaving the work would be settled on equitable principles.

It is also recommended that the child should also be availed of legal counsel at the expense of the state as a matter of right. This will mean that the Labour Officer or other authorised officer together with a State Counsel can take up an issue to court asserting the child's rights.

SEMINAR PROCEEDINGS ON - EMPLOYMENT OF CHILDREN

Rapporteur - MR. A.G. RINGERA

The seminar was aware of a conflict between the principle of State intervention in contracts of employment entered into with children in the interests of the child and the common realization that children are part of the free citizenry of Kenya who were indeed capable of much work. It was accepted that the overriding principle should be State non-interference in children's contractual capacity unless it was obvious that their physical and/or moral health would be in jeopardy. That apart, it was felt to be in the interest of children to reform the Employment Act and Regulations pertaining to the subject matter with a view to making it mandatory for all contracts of employment to be in writing, open to the superintendence of a labour official and clearly spelling out the level of education a child should have attained to be employable, his minimum wage and the terms on which he can terminate the contract.

The seminar also felt that there should be made available free legal assistance to all children on matters arising in the course of or out of the employment relationship. It was also suggested that children should have as of right certain hours or days off duty to indulge in formal education, self-education and recreation.

At a broader level the seminar felt that it was necessary on the part of the authorities to consider the causes of children wanting to be employed. If the fault lies with inadequate provision of necessities of life in the child's home, that should be tackled by the state through making facilities to ensure that every family have a shelter and something to eat. No concrete suggestions were made in that respect.

JUVENILE DELIQUENCY AND THE LAW

By

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1.1. INTRODUCTION

This year, 1979 is the International Year of the Child and already alot has been said about this topic during the first half of this year. So far what has been said about the International Year of the Child points to the fact that parents and the community as a whole have a great responsibility of ensuring that the children in their midst live in a healthy environment for their proper development, in all respects. We are all aware of the fact that a child who grows up in an unhealthy environment will usually grow up without any sense of direction or responsibility.

1.2. CAUSES OF JUVENILE DELIQUENCY

At the mention of the words "juvenile delinquency" most people will at once cast their minds at the streets of Nairobi and other towns, and will see the dirty looking boys who scavenge the street, and eat from dustbins. To a large extent this is a correct picture of what the juvenile delinquent is, but one has to remember that there are many juvenile delinquents who do not frequent the streets. These are the delinquents back in the villages to whom the hand of the law does not reach. An example that fits such a situation exists in Bungoma District, especially close to the border where the Chepkule era has left its indelible mark. During that period, many children, particularly boys left school in the name of smuggling. Now that the period is over, these children who have been reduced to nothing, do not wish to return to school, and most of the parents have got no idea whatsoever of what to do with the children. To come to the point, the following are some of the causes of juvenile delinquency:-

a) Poor Home Life

Though it is not uncommon to find anti-social children among some of the children from well-to-do homes it is generally accepted that most juvenile delinquents come from poor homes. In most of these homes

education whether of a formal or an informal nature is completely lacking, and there is also a complete lack of both moral and spiritual guidance from the parent(s).

From my experience in the Juvenile Court, this factor of poor home conditions contributes quite a great deal to criminal or difficult behaviour in children. Most of the cases in the Juvenile Court which are usually probed into by probation officers, reveal that juvenile offenders come from broken homes where either parent, usually the mother is left solely responsible for the everyday upkeep and upbringing of the children. In many of the cases, the mother has no formal employment and has to resort to other means, including prostitution, to earn whatever cents they can earn for the family's bread, the mother thus ends up having no time to get involved with the children, the children therefore have to find their own way of solving their problems, which include finding meals for the day. This kind of problem, coupled with the ever increasing strains of urbanization makes the problem of juvenile delinquency a pressing one, calling each one to play our part.

b) Child Born Out of Wedlock

Most of such children are born either of school girls or unmarried mothers whose chances of marriage are minimal. In the rural areas, such children are left in the care of their aged or ageing grandparents who in the long run are not able to properly care for the children. In the few cases where the children are 'lucky' to be recognized by their putative fathers, they are taken to live with their stepmothers. Such cases rarely end on a happy note for the children where the incidence of child beating is very high. In this area, the abolition of the Affiliation Act has helped to make the situation very bad. It is heartening, therefore, to hear that the Hon. Attorney General, Charles Njonjo, is seriously considering the re-introduction of the Act.

c) Over Indulgence in Children From well-to-do Homes It is a fact that in homes where children are made to take material things as a substitute for love, quite a few of such children end up being delinquents. I dealt with quite a few cases of this nature, and most parents seem to be at a loss as to what could be the cause of such a situation.

1.3. LAWS RELATING TO CHILDREN

a) The Children and Young Parents Act (Cap. 141, Laws of Kenya)

Enacted in 1963 and designed specifically to make provision for the protection and discipline of children, juveniles and young persons.

Section 3 of the Act provides for the establishment of Juvenile Courts to deal with juvenile offenders and delinquent parents. Parents who neglect their children can be summoned to appear before the Court.

The Act provides that children may be brought before the Court if it is established or suspected that they are:-

- a) neglected
- b) not under proper control by their parents or guardians
- c) living in an environment which is detrimental to their physical or moral well-being
- d) over 18 years old and therefore criminally responsible for any acts or omissions

It is worthy of note that the rest of the children who appear before the Court for the first time will normally appear again for a second, third and even fourth time. This shows, as I have stated earlier, that somewhere along the line of development parents fail to do their job. Once the case is before the Court, it is the Court's duty to find the most appropriate punishment for the offender, the guiding principle in this respect is that it is the welfare of the child which should be given paramount consideration, so that the Court is empowered to take steps to remove a child from undesirable surroundings and for securing that proper provisions made for its maintenance, education and training.

Depending on the nature of the case, and after considering all the circumstances surrounding a case, a Juvenile Court may order that:

- i) the child be handed back to the parents or guardians and may require the parents or guardians to enter into a recognizance that the child will be well looked after.
- ii) the child be committed into the care of a fit person
- iii) the child be committed to an approved school where the child is over ten years old
- iv) the child be committed to a ~~Forstal~~ Institution or Youth Corrective Training Centre.

I wish to mention in passing that most of the facilities recommended by the Act are in short supply and sometimes a court's good intentions to do the best for the child never work. I also wish to mention that though it is easy to have the law on paper, it is another thing to enforce it. Most parents are very uncooperative when they discover that their children have been involved with the law. Quite a few of them are happy to have their children taken away from their homes, and even encourage their children to do wrong, so that somebody, they will find their way to an Approved School.

a) The Employment of Women, Young Persons and Children Act Cap 277  
Designed to regulate the employment of women, children and young persons. Section 17 of that Act is important in that it prohibits the employment of the under thirteen year olds in circumstances which are calculated or are likely to cause or do cause such a child to stay away from home. I attach a lot of importance to this section because we are all aware of what happens in reality and we as participants of this workshop share the blame with everybody else. It is an open secret that in our midst there are seven year old girls employed as ayahs. The question of child labour is a touchy one. One of the papers will however deal directly with this.

c) The Adoption Act. Cap 143.

This has been dealt with adequately by Mr. Slade and I have no wish to say any more on it.

#### 1.4 SOME COMMON CASES THAT COME BEFORE THE COURT

- a) Thefts, (b) Assaults - child Vs and parent/guardian Vs child
- c) Drug trafficking especially in bhang (d) Vagrancy.

### 1.5 OBSERVATIONS & CONCLUSION

Though the law regarding the protection and discipline of children exists, it is only in rare cases that a case may reach the appropriate authorities. The parent/guardian may be ignorant of the law and the child who may be a victim is ignorant of its rights. There are only limited facilities and a desperate lack of personnel so that the Probation Officers, Childrens Officers and the Child Welfare Society of Kenya re not able to cope with the demand for their services. In addition to this is the problem of uncooperative parents or guardians.

In the case of ayahs who may be victims of ill treatment their positions call for sympathy. Ayahs are forced to earn a living due to the harsh economic conditions in their own homes, they not only need the job but they are very ignorant of their rights.

Some people have suggested that in order for the law to be more effectively felt, there must be an increase of the sentence provided by the law. My own feeling is that increasing the fines or custodial sentence as far as parents are concerned may not be very helpful, I feel that this would only increase the burden of the state, more so in the face of the scarce resources available to put these children on a proper footing. Harsher custodial sentences would separate the parents from the children and this has not only got harmful psychological effects on the child, but also increases the burden of the state for looking often a greater number of inmates.

What I think is required is an improvement in the whole of the socio-economic set-up of this country. Parents need more education on ways and means of earning a living that would ensure good health for their children. More important there is great need for a total revitalization of both personal or public morality which have collapsed in the face of the present present economic order.

SEMINAR PROCEEDINGS ON JUVENILE DELINQUENCY AND THE LAW

Rapporteur: S.B.O. GUTTO.

The discussions that followed generally agreed with the author's observations and stressed that delinquency is not so much caused by hereditary problems as they are by social conditions. The following suggestions-cum-recommendations were made:

- a) That more probation services should be provided,
- b) That increasing of approved schools for delinquents is not necessarily good for the society as they may well become a permanent normative feature of society,
- c) Since there seems to be only one known study done in evaluating the treatment meted to children in borstal institutions, it is necessary that proper studies be done on this subject since it was the impression of the seminar that many children from borstals move on to crimes and then jails,
- d) Usually there is a tendency among some societies to create more institutions for the care of delinquents but this should be discouraged in Kenya in favour of more welfare workers and probation officers,
- e) There is need for probation officers and welfare workers to co-ordinate their work,
- f) There should be a system of material assistance to the poor families since alot of children suffer without necessarily being technically delinquents - e.g. parking boys and girls.

MEDICAL AND LEGAL ASPECTS OF OFFENCES AGAINST CHILDREN

By

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and

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ABSTRACT

In this paper an attempt has been made to highlight some of the glaring offences against children as well as practices which unless curbed, would inevitably have injurious effects on children. The objective is to provoke discussion on this subject which is the only way by which better ideas and more workable methods of bringing them into fruition will be arrived at.

The paper is in two main parts. The first part is a presentation of some of the offences and their health implications. The second part deals with the legal aspects of offences against children.

MEDICAL AND LEGAL ASPECTS OF OFFENCES AGAINST CHILDREN

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PART I; INTRODUCTION

Health Implications of some offences against Children

Definition: Applies to first part only.

Offence: Is used in this part to imply a practice that is injurious to health.

Child: This term is used here to include the period from conception to the legal status of adulthood. For the purpose of this presentation, the period of Childhood is subdivided into four parts thus:

1. The Child in utero
2. The Young Child This includes infancy to Pre-school.
3. The School Age Child This period includes the period from about six years to the peripubertal period.
4. The Adolescent Youngster

The commonest offences of each age group will be presented and **their** health implications discussed.

1. THE UNBORN CHILD

Events that take place from conception to birth are of profound consequence to the development of the unborn child in utero, and subsequently on the child after birth and on the adult. Practices that are likely to be injurious to the unborn child include the following:-

(a) Indiscriminate Ingestion of drugs by expectant mothers

That drugs can be tetragenic was poignantly if tragically brought to the surface with the cases of thalodamide and the limbless children born to mothers who used this drug at a certain stage in their pregnancy.\* The practice of ingestion of tetragenic drugs in this country may be due to:-

(i) Small print presentation of the warning not to prescribe a drug during pregnancy which is easily missed by an undesigning prescriber. The problem becomes bigger when newer drugs fill the market and memory of what was learnt as harmful in pregnancy may no longer be applicable. To ingest a drug during pregnancy which should not be ingested by an expectant mother is an offence against the child.

There are, of course, the rare situation where the only hope of saving a mother's life may be by use of a drug that could harm the unborn child. But this is a case in which not only the mother but also the unborn child may lose their lives. This situation need not be used to encourage indiscriminate prescription of drugs. Public awareness on this matter is of the greatest importance.

(ii) Self-prescription by patient or family may result in ingestion of harmful drugs. The patient or family may be so familiar with what usually helps the patient that the same thing is bought regardless of existence of a pregnancy. This is sometimes done by a patient in protest against "poor care" by a doctor who has not prescribed drugs. It implies a breakdown in communication or a foolhardy state of mind for which the unborn child may pay a very dear price.

(iii) Traditional medicinal herbs: Whether some of these herbs could harm the unborn child is not known since many of these herbs still have to be studied scientifically. One sees herbs used extensively by rural populations and, it is said, herbs are equally used by city dwellers- although not as much in the open. The whole question of appropriate dosage for traditional remedies is yet to be resolved. The fact that their effects on an unborn child are unknown makes the need for investigating them even more urgent.

(b) Habits

Cigarette smoking is one of the best documented variables as being harmful to the health of the individual with extensive effects on the

respiratory, cardio-vascular and other systems. It has also been shown to be one of the important variables that negatively affect the growth of the child in utero in the "small-for dates" children who are small due to some stunting effect on their growth resulting in below average sizes at birth. The stunting probably goes beyond the physical to the mental spheres.

Excessive alcohol by an expectant mother has also been found to be harmful to the growing foetus.

The adult individual may consciously decide to ignore the health risks and continue to indulge in these habits. But if that adult is an mother, then her rights are impinging on the rights of the unborn-child. In terms of possible injury that could be effected in the child these habits are offences.

Habits, such as excessive alcoholic intake are said to be indulged in as response to emotional strain. In communal living within traditional villages the need of the expectant mother for her husband's emotional support was probably less crucial than in the hostile urban setting. The indulgence of an expectant mother should therefore be seen to reflect the type of relationships existing in homes and need to be of concern to both the expectant mother and her spouse.

(c) Good Nutritional Status

While good nutrition is important throughout pregnancy particularly the protein component, it is very important in the last three months which is the period of the fastest brain growth. In many traditional culture, many protein foods are taboos during pregnancy and even where there are no taboos the very familiar stories of "Nyama ya Kuchoma at the bar" often implies that the expectant mother and her children do not benefit from these meat-roasting sprees. A spouse could therefore injure the unborn child by failing to provide or assist in providing sufficient proteins during pregnancy.

(d) The health of the mother

A growing foetus is said to be "a very successful parasite" in that it will continue to prosper even in rather debilitated individuals. There is however a limit. A mother who has got syphilis and other venereal diseases, a mother who has severe medical condition which is unattended to may deliver a baby who has been offended against by herself,

her family or her society at large. A practice that seems quite common in some parts which has harmful effects on the child is wife-beating. Where wife-beating is rampant consideration is not often made of the presence of a pregnancy. This may result in bleeding and even loss of the foetus. Few more offensive practices exist that is more serious than this one both to the mother and the unborn child.

## 2. THE YOUNG CHILD

### (a) Nutritional status

(i) Inadequate/unbalanced diets In infancy and young childhood good balanced feeding is probably the most crucial factor with respect to the growth and development of the infant and the young child. Failure to provide a good nutritional base is therefore one of the major offences against children. A Nutrition Survey done in 1977 by the Central Bureau of Statistics (then in the Ministry of Finance and Planning) brings out the rather grim fact that there was only "about 2% in a community (in Kenya) without any Protein Energy Malnutrition". This rather grim figure is even more grim with realization that poor nutritional status in childhood has been found to be associated with low resistance to infection and high death rates from diseases not connected with high death rates in the well nourished child. There has also been association with poor mental development, poor school performance and so on.

(ii) Introduction of Potentially dangerous Feeding Practices Bottle feeding without the facilities of refrigeration and a very high standard of hygiene is no longer a matter of dispute with respect to its health hazards. These dangers of bottle-feeding without the proper understanding and facilities for appropriate care have been the subject of many books and films pointing out that this is a leading cause of death, usually through infective diarrhoea and vomiting - the number one killer in most developing countries. And yet one continues to see the glorification of and the pushing of this mode of feeding even in the very poor urban settings and rural areas. Glorifying practices that lead to high morbidity and mortality is surely an offence against the health and life of the victim.

### (b) The Care of the Child during the day

It is well known that in traditional settings every young children help look after their younger siblings. This, however, is within a network of communal living and responsibility such that

somewhere in the background or close by there is an adult, perhaps a grandmother who oversees everything. Within the continuing breakdown of the communal life, mutual supportiveness that existed is dwindling fast. In the old days mothers worked mostly in farmlands close to the home and the times of going and returning home were regulated by family needs. A lactating woman was not expected to dig for as long as the non-lactating one and so on. But with entry of mothers into the formal employment sector, the time of leaving and returning home is controlled by external forces. A mother can only stay home on a "hunch" that something is not quite right with her baby at the risk of losing her job. There was a time when getting a responsible ayah was easier than it is nowadays. To get a responsible ayah one needs to be in a position to pay rather well. And there are not many of them around. And yet in most families the mother needs to work to help supplement the family income. Moreover there are certain public sectors notably teaching and nursing, which would more or less come to a halt if married women were withdrawn from work voluntarily or by force. This would also tend to perpetuate the discriminating practices against educating girls if they were not seen to contribute to the national effort by supporting these service areas. It would appear therefore, that the answer would not be simply to say "A woman's place is in the house with her children".

The fact of the matter is that in this period of transition between different roles and occupation by women, the care of young children is in danger of being left in limbo. And yet child care and rearing are so important not only for proper physical development but also for proper emotional and mental development and adjustment. It seems to me that it is an offence against the proper development of the child when the care of that child is left uncatered for adequately. This lack of provision of care usually goes with unsupervised playing areas or lack of any facility or grounds for playing, an important factor in a child's development.

(c) Protection against preventable diseases

This paper has already touched on the devastating effects both in morbidity and mortality, of diarrhoea in developing countries. Most diarrhoea can be prevented.

There is a group of diseases for which prevention is possible by immunization. This includes diseases such as measles, whooping cough, tetanus, and polio. Measles and whooping cough are responsible for a very large percentage of death among infants and young children. They continue

to be killers and polio continue to main long after vaccines are made available for their prevention. Infants and children cannot take themselves to health facilities in order to benefit from this protection. Is it not an offence to the health of children when we do not get them to benefit from this existing knowledge?

### 3. THE SCHOOL-AGE CHILD

It is generally stated that in developing countries, children under 5 (who form about 20% of the total population) contribute more than 50% to the mortality. The picture is made even more grim by the realization that of all children born in developing countries a high percentage die before attaining school age.

So when discussing the school-age child we are discussing the "tough ones" that have made it through the critical period and who, with a little help, would probably make it all the way. But even for those children the road is far from rosy when it is realized that -

- Only a small proportion of them enter school long enough to be functionally literate,
- That even of those who do stay in school long enough lack of basic supportive facilities hinder them from optimum utilization of these facilities. Many school children go to school without any breakfast.
- And many of those parents who do give breakfast have substitutes too - which has no food value--unlike porridge, especially millet porridge, which is more nutritious. Many children are too far from school to go home for lunch. And most of those who do go home or make an effort at getting lunch, one finds, end up having "water for lunch". The lack of a school lunch policy makes the situation more critical.

One could further say that lack of school or community libraries close to children does not help them make maximum use of their school days if they are at school. But perhaps that seems like a far fetched issue. One could, however, say if the children who are at school were supported by a good nutritional policy, good environmental sanitation and good health that they would probably perform better even in the limited offerings that some rural schools provide.

4. THE ADOLESCENT YOUNGSTER

At the best of times and with all kinds of support, the adolescent period is known to be one of the most tumultuous. In a country like ours the adolescent's problems are compounded by the fact that the majority of this population are "no where" in that; with the existing bottle-neck to high school entry, many of the youngsters who were in Primary Schools find themselves, to use the expression of one of them, "thrown out and floating to nowhere". They find themselves suddenly unplaced in life.

But the "Silent (and often violent) majority" never did go to school for any length of time. They may not feel thrown out and floating to nowhere but rather, "forever" kept out and down. Exclusion from school, even if due to circumstances rather than intention, has many effects on youngsters. Only two will be touched upon here:

(a) Lack of Education on the body and its development

In the traditional communal life that is fast vanishing initiation into adulthood through gradual teaching by grandparents and other elders was dramatically brought to a climax by the specific initiation rites such as **circumscision**. This teaching by grandparents is almost non-existent in most communities in Kenya with the development towards unclear families. Even where rites such as circumscision are **still** done, a common practice is that these are done much earlier (usually before the baby leaves the hospital after delivery) and does not go hand in hand with the teaching. Asked about this most parents say, "their children learn these things at school".

Even if school teaching touches on matters relating to body development, sex and family life, a large section that does not go to school is left out of any such teaching. And for those who do go to school, there are questions as to how adequately sex education is carried out.

Lack of planned information on sex, sexual relationships and their consequences leaves many young people at the mercy of their impulses, often with costly consequences, particularly to the female youngsters and the children they bring into the world. Is it not an offence against the young when society leaves them in limbo on such crucial matter?.

(b) Employment

The right to employment is one of the basic human rights in the UN Declaration of Human Rights. Without an education many youngsters are handicapped even before they start. Even with those who do go to school the step wise reduction of those who continue with education beyond seven years leaves many youngsters without any planned occupation or employment.

Lack of planned occupation often leads youngsters to such habits as excessive alcoholic intake, drugs and violence. Is it not an offence against these youngsters when there are no planned occupations for them as they enter adulthood?

5. WHO IS RESPONSIBLE FOR THE OFFENCES AGAINST CHILDREN?

Who is responsible for offences against an unborn child?

The usual response one gets is that it is, of course the mother. But is it?

And who is responsible for the poor nutrition, lack of immunization, absence of safe play grounds? Who is responsible for the offence of the daily starvation of children who are in the process of trying to learn? And who is responsible for the lack of adequate preparation of youngsters with the minimum essential knowledge about themselves?

There are areas in which the responsibility falls squarely on each of the parents. There are areas in which responsibility falls on the entire family.

In yet other areas responsibility falls squarely on the larger society, the community and beyond that, the entire nation.

The areas of responsibilities need to be delineated and the requirements of each specified. Mechanisms for assisting in seeing that these responsibilities are being carried out need to be established.. And perhaps penalties for failing to carry out certain basic responsibilities need to be worked out. In some countries it is unlawful to keep a child out of school. In others it is unlawful to have a child remain unimmunized against certain diseases by a certain age.

The legal profession is historically to be the profession that clarifies, and delineates issues. And perhaps it is the law society that will help this country set the limit as to what can be considered "voluntary" provision of basic rights of the child and what is to be considered "not so voluntary". Offences against the health of the child jeopardize the very life, the continuance and the quality not only of the child but the adult that the child becomes.

#### 6. COMMUNITY PUBLIC EDUCATION

While the legal details are being discussed and streamlined, it is important that the general public be informed on these and other topics of direct importance to them. For in the final analysis the decision of whether or not to act rests with the individuals. Acting as an individual in a traditional setting can be very difficult. This brings us to the importance of involving communities as a whole and improving situations with people's participation. The "learned professors" need to step out of their academic/high class settings and get down to the people. This is a responsibility that professions like law and medicine cannot afford to side step.

#### PART 2: THE LEGAL ASPECT

The protection of children and other young persons from neglect, ill-treatment or abuse is a subject which is as important and complex as it is of great concern for the law. And this, it is felt, is as it ought to be particularly because when we speak of children and other young persons we are in fact, speaking about over half of the Kenyan population. Furthermore, and perhaps more important, we are speaking about the section of population which, owing to its youth with the concomitant physical and intellectual insufficiencies, is susceptible to a wide range abuse. Due to their gullibility, children are open to guile and deceit by unscrupulous adults. Because of their physical and mental weakness they can easily be subjected to bodily abuse. Yet, the task of trying to make legal provisions wide enough to cover the ever-increasing number of ways in which abuse to and of children can be achieved does not cease to be enormous and complex.

At all events, there exists a body of law directed at protecting children and/or combatting the incidence of abuses. What seems necessary is to see that the provisions of these laws are carried out and that where they fall short of what is needed, amendments or new provisions be enacted to enhance the protection of young persons.

A duty to support and maintain minor children is universally recognized as resting upon parents of such children. Usually such duty rests on the father primarily, but partially or entirely **upon** the mother, under some circumstances or pursuant to some statutes. The parental duty is said to be principle of natural law, and is everywhere acknowledged as at least a moral obligation of parents towards their children for having brought them into being. Although arising out of the fact of their relationship, that parental duty may be rested also upon the interest of the state as parents patriae of the children and of the community at large in preventing the children from becoming a public burden. It is, therefore, essential to the welfare of the state that children and other young persons be fed, lodged and educated, and also that the state shall not be unnecessarily burdened with their care, and is therefore a duty not **only** to the parents themselves but also to the public as well. The duty is at once a legal one and natural obligation, the consistent enforcement of which is equally assential to the well-being of the state, the morals of the community and the development of the individual. And, because of this very fact, this duty extends beyond just the parents and guardians and attached also to those who have assumed a relation in loco parentis .

#### Protection and Discipline of Children

The Principal enactment aimed at the protection and discipline of children and young persons is the Children and Young Persons Act (CAP 141) of the Laws of Kenya (Hereinafter called 'the Children's Act'). This Act amongst other things, provides for the setting up of juvenile courts for the purpose of hearing all charges against persons under eighteen years of age, except in cases where they are charged jointly with any person or persons over the age of 18 years, and for the purpose of exercising any other jurisdiction conferred on them by or under the Act or any other written law. It also provides for establishment of approved schools and for the constituting of approved societies working for the care, protection or control of children, juveniles and young persons. It further provides for the appointment of appointed local authorities to make welfare schemes for persons under 18 years of age, and for the care of children and young persons currently under charge and for their supervision by inspectors appointed for the purpose. The following discussions will, however, centre mainly on Part III of the Act, which deals with the protection or discipline of children and juveniles, and on Section 23 in particular.

Section 23 of the Children's Act provides for the penalty for cruelty to and neglecting children or juveniles. The section provides inter alia as follows:-

Section 23. (1) If any person who has the custody, charge or care of any child or juvenile -

- (a) Wilfully assaults, ill-treats, neglects, abandons, or exposes him or causes or permits to be assaulted, ill-treated, neglected, abandoned or exposed in any manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, hearing, limb or organ of body, and any mental derangement) or
- (b) by any act or omission, knowingly or wilfully causes that child or juvenile to become, or conduces to his becoming in need of protection or discipline, he shall be guilty of an offence and liable to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding six months or to both such fine and imprisonment.

Provided that the court, at any time in the course of proceedings for an offence under this sub-section, may direct that the person charged shall be charged with and tried for an offence under the Penal Code, if the court is of the opinion that the acts or omissions of the persons charged are of a serious aggravated nature.

#### The Problems of Definitions

In order for Section 23 to become operative two elements must be shown. The first is that there is a person who has custody, charge or care of another. Secondly, that the other person is a child or juvenile.

Section 21 of the Act sets out the circumstances under which any person is said to have charge or care of a child or juvenile. Any person who is the parent or guardian of a child or juvenile or who is legally liable to maintain him is deemed to have care of that child or juvenile. So is any person to whose charge a child or juvenile is committed by any person who has the custody of him. Similarly, where any person has actual possession or control of a child or juvenile, or where any person employs a child or juvenile who is not resident with his

parent or guardian, such a person will be deemed to have care of that child or juvenile.

It is clear that this provision not only covers parents and guardians but also persons who stand in loco parentis. A person is usually said to stand in loco parentis when he or she puts himself in the situation of a lawful parent by assuming the obligation incidental to the parental relation without going through the formalities necessary for a legal adoption. It is submitted that can include total strangers to the child or juvenile, provided such a person has actual or constructive possession or control of a child or juvenile in such circumstances as would morally oblige him to take responsibility for such child or juvenile.

It is not clear why the protection under Part III of the Act is extended only to the persons under 16 years of age. It is suggested, however, that perhaps the guiding principle here was that young persons under 16 years of age, in contradistinction with those above that age but less than 18 years of age, are more likely to exhibit the disabilities of infancy and consequently more often than not to need greater protection from acts of their own improvidence as well as from acts of others. It is essential to note that the state of being a 'child' or 'juvenile' is a status which is created by the law without necessarily having regard to whatever medical evidence there may be as to 'mental' age in any given case. The disabilities of infancy are in fact personal privileges conferred on infants by law, and as such constitute limitations on the legal capacity of infants, not to defeat their rights but to protect them against their own acts and those of others. It could be argued that there may be cases in which a child or juvenile is definitely 'grown up' and others when a young person over 16 years of age needs more protection than a juvenile, by virtue of being less 'grown up'.

It is noteworthy also that although Section 2 of the Children's Act clearly defines the upper age limit as to can be considered a child, it seems open to argument at precisely what point in conception a foetus becomes a child recognized by law. This is a matter on which our law remains painfully silent. Yet it is a matter whose importance can never be over-emphasized, especially when we talk about 'offences' against children.

Although the term 'offence' has no technical meaning in law, its definition distinguishes it from a mere civil wrong. In Section 2 of the Interpretation and General Provisions Act (CAP 2) it is defined as "any crime, felony, misdemeanor or contravention or other breach of, or failure to comply with, any written law, for which a penalty is provided". More specifically, as defined in the Penal Code (CAP 63), an offence is "an act, attempt or omission punishable by law". Thus, the term 'offence' connotes any wrong which attracts punishment. It must be distinguished, however, from a tort which only gives rise to a right of action, being a wrongful act or injury consisting in the infringement of a right created otherwise than by contract. The standard of proof in the event of a prosecution for an offence is very high, the requirement being that all particulars of the charge, the essential ones at any rate, must be proved beyond any reasonable doubt. It follows, therefore, that anyone embarking on a prosecution under Section 23 of the Children's Act must prove the existence of the child beyond reasonable doubt and in the construction of a will a posthumous child en ventre sa mere at the time of the testor's death may ordinarily be included in the term 'children' etc., even though, it is submitted, at the time of the testor's death the mother may not be aware of the pregnancy. In the American case of State v Atwood, 54 Or. 526, 102 P295 it was held that, for the purposes of inheritance, the phrase 'person living at the death' of one may be construed for many purposes as including a child en ventre sa mere. Similarly, an American court in Hornbuckle v Plantation Pipe Line Co., 93 S.E. (2nd) 727 (Ga. 1956) held that a plaintiff who sustained injuries while still in his mother's womb which caused him to be born with deformed right foot, ankle and leg could recover damages against the Defendant. The Plaintiff had received the pre-natal injuries when the Defendant drove a motor vehicle so negligently that it collided into the vehicle in which the Plaintiff's mother, who was then taken pregnant, was travelling occasioning the lady the injury that resulted in the deformity of the Plaintiff.

It is, however, doubtful that the foregoing sense of the term 'child' could be adopted in the event of a prosecution under Section 23 of the Children's Act, or even provision that the section is dealing with children who have been born alive. For it is difficult to conceive even with a stretch of the imagination, how anyone could have custody, charge or care of any person who is at the time in the mother's womb. There is a further difficulty which is that of proof. If the charge is one of, say assaulting a child when the 'person' assaulted is a person

en ventre sa mere the difficulty of proving legal personality of such assaulted person is clear. How does anyone proved beyond reasonable doubt that a two-day old zygote is a person? And it is precisely this very problem that has necessitates the distinction between the offences of abortion and child destruction.

Abortion means a miscarriage, or premature expulsion of the contents of the womb before the term of gestation is completed. In law, this means the confinement of a pregnant woman at anything short of the full term, that is to say, her miscarriage. Child destruction, on the other hand, (which in the marginal note of Section 228 of the Penal Code (CAP.63) is referred to as 'killing unborn child' is an offence which **makes** guilty of felony any person who, when a woman is about to be delivered of a child, prevents the child from being born alive by any act or omission of such a nature that, if the child had been born alive and had then died, he would be deemed to have unlawfully killed the child. Before any person can be convicted under that **pro**vision it must be proved that the child was capable of being born alive. If the 'child' were constituted in a week old pregnancy, it could easily be argued that whatever else it may have been it could not have been a child; and the sense of that argument can well be appreciated. In England this contingency has been taken care of by Section 1 (2) of the Infant Life (Preservation) Act, 1929 which provides that evidence that a woman had at any material time been pregnant for a period of twenty-eight weeks or more is prima facie proof that she was at the time pregnant of a child capable of being born alive. It is submitted that the proposition would be of a highly persuasive authority in our courts here in the matter. Support, to an extent, of this view was voiced by Judge Blackstone in the case of Commonwealth v Parker (Mass) 9 Met 263 when he said that "Life begins in contemplation of the law as soon as infant is able to stir in the mother's womb". If we understand his reasoning correctly then it means that, for the purposes of penal provisions at any rate, life begins, not when conception (i.e. the infusion into the egg by the spermatozoa) occurs, but much later; when the 'baby' actually starts 'kicking'.

#### Specific Offences

Having digressed in order to emphasize the necessity and importance of definitions in law, let us now revert back to the subject of offences against children.

It follows from the definitions given above that certain acts, attempts or omissions which may be socially or morally abhorrent may not amount to offences punishable under our law. An area which is inevitably of great concern for gynaecologists and other medico-legal enthusiasts is one related to habits by pregnant women which habits may be harmful to foetal development. Some of these habits are the indiscriminate ingestion of drugs, cigarette - smoking, the imbibing of alcoholic beverages, failure to maintain good nutritional status, to name just a few. These habits are not in themselves prescribed by law and are not consequent offences. Generally speaking, therefore, anyone indulging in them is not thereby rendered liable to prosecution albeit that the health of the child in utero may thereby be jeopardised, unless of course the act, attempt or omission falls clearly **within** one or more the specified offences such as abortion or an attempt thereto. For it is a principle of natural justice that laws be specific and not so general as to enable any act, attempt or omission to be included therein.

Various legal instruments have been enacted to ensure protection of children against abuse and exploitation.

#### Employment

Although one of the papers herein specifically deals with child employment, it is appropriate to say a few words on the subject from a different view point. The regulation of the employment of children and young persons is provided for under Part IV of the Employment Act (CAP 226) which is headed "Employment of Women and Juveniles." This Act repealed the Employment of Women, Young Persons and Children Act (CAP 227) whose provisions have by and large been incorporated in the later statute.

Under the provisions of this Part **no** child or juvenile can lawfully be employed whether gainfully or otherwise, in any industrial undertaking, except where such employment is under a deed of apprenticeship or indentured learnership lawfully entered into under the provisions of the Industrial Training Act. To do so is an offence punishable by fine of up to Kshs 1,000/- on the first conviction and up to Kshs 2,000/- in the case of a second or subsequent offence. 'Child' is defined as any individual, male or female, under 16 years of age. "Industrial undertaking" means (1) mines, quarries, and other works for the extraction of any substance from or from under the surface of the earth (2) any factory within the meaning of the Factories Act; (3) the constructions, reconstructions, maintenance, repair, alteration or demolition of building, railway,

tramway, harbour, dock, pier, canal, inland waterway, road, tunnel, bridge, viaduct etc; (4) transport of passengers or goods by road, rail or inland waterway, including the handling of goods at docks, quays, wharves and warehouses, but excluding transport by hand. The Minister is empowered to declare any employment excluded from the provisions for the Part relating to industrial undertakings if he sees it fit so to do, having regard to the nature of the work involved in any employment carried on in any industrial undertaking.

As a passing comment, it is sad to note that the penalty provided is, by most standards, extremely lenient. One would perhaps have liked to see a stiffer penalty provided for, especially as there is doubtlessly an increase in the blatant flouting of this provision by persons, more often than not, who have the financial capability to absorb this 'soft' punishment quite comfortably. Provision for mandatory imprisonment in case of a third or subsequent offence, it is submitted would have been a much more appropriate and deterrent penalty.

Part V of the Employment Act then goes on to make further provisions relating to the employment of children and young persons. Subject to the provisions of the Industrial Act relating to contracts of apprenticeship or indentured learnership, it is an offence for any person to employ a child, or to cause any child to be employed, or being the parent or guardian or other person having for the time being the charge of or control over a child, to allow such child to be employed, otherwise than under a verbal contract of service. This provision is presumably aimed at ensuring that a child is not tied down by a written contract which may well not be in his interests. Subject also to cases of serious emergency, when public interests demands it, in which cases the Minister empowered, by publishing a notice in the Gazette, to require otherwise, no juvenile shall be employed between the hours 6:30p.m. and 6.30 a.m. in any industrial undertaking. The only exception to the rule insofar as concerns juvenile is that in cases of emergencies which could not have been controlled or foreseen which interfere with the normal working of the industrial undertaking and which are not of a periodical nature.

However, the Minister may, after consultation with a Labour Advisory Board - constituted pursuant to the provisions of the Act - authorize an employer in writing to employ young persons up to the hour of midnight or from the hour of 5:00 a.m. subject to such conditions as the Minister may determine.

Every employer who employs any juvenile must keep and maintain a register containing particulars of every juvenile employed: (1) the age or date of birth; (2) date of entry into and of leaving such employment and (3) such other particulars as may be prescribed.

An authorized officer may require any juvenile in employment to be medically examined at any time during the period of his employment.

The Employment Act also gives wide powers to the Labour Officer to cancel and prohibit contracts of service (other than a deed of apprenticeship or indentured learnership lawfully entered into under the provisions of the Industrial Training Act) which have been entered into by juvenile and employer. The grounds for such cancellation or prohibition are that, in the opinion of such officer the employer is an undesirable person, or the nature of the employment is dangerous or immoral, or is likely to be injurious to the health of such juvenile, or for any other cause which may be prescribed. An employer aggrieved by the decision of the officer may appeal in writing to a subordinate court of the first class.

Part V of the Employment Act seems to omit a provision which we believe was of utmost importance in the now repealed Women, Young Persons and Children Act. That Act provided inter alia that it was unlawful for any person to employ or cause to be employed, any child below the age of 13 years in circumstances which are calculated or are likely to cause, or do cause child to reside away from his parents. If the child was over the age of 13 years he could be employed only in accordance with the terms of a permit in that behalf granted by the Labour Officer and with the consent of an authorized officer in the prescribed form. In the case of a female an additional provision was that the parent of such a child must have given approval to an authorized officer to such employment. In relation to a female child who was married and was living with her husband, the expression 'parent' was construed as meaning husband. Where the aforesaid consent had been given it could still be rescinded by the express desire of the parent for the return of the child.

In our submission the additional protection that those provisions given to children has been taken away by their omission in the new Employment Act. It would appear that, as long as any child is not employed

in any industrial undertaking - except where permitted by law - such child can be employed away from his or her parents. This happens commonly especially with respect to 'ayahs' in the urban centres.

One need not look for research in Nairobi to find that the provisions of this Act are grossly violated by a large section of the Kenyan population. We think it fair to say that this is in no way a feature that is peculiar to Nairobi only. It is common to see very small children, employed as conductors in 'matatus', hanging precariously at the back of overloaded vehicles. In recent years many press reports and feature articles have bespoken the plight of infant 'ayahs' who are imported into urban centres from rural areas to work for their relatives or even for total strangers. Often they are unpaid, their employers occasionally remitting a certain sum to their parents at home. More often than not they do not take part in any negotiation regarding their future employment, and the fact that they ultimately do come to the city is much more due to the glamour that the city holds them as it would for any rural person than any genuine desire to come and work. Their displeasure in this respect is amply demonstrated by the fact that few of them remain in such employment for very long, preferring to disappear somewhere in the city with some man, who is painfully almost in each case married and with a family. Not a step of the procedure laid down in the Act is ever followed. When for instance, do we ever hear of a cancellation or prohibition of a contract by a Labour Officer under the Act?

We do not think most people employ children or juveniles in deliberate disregard of the law. In our view it is often more out of ignorance than by design. But there is little doubt that there are some who do so in deliberate violation of the law. The fact that so many press reports on the matter have not been able to stir up the society into doing something about this is indicative of (1) public apathy, or (2) condonation by the authorities, or both. The phenomenon seems widely accepted for obvious identifiable economic interests. The authors of this paper are not aware of any one prosecution under Section 23 of the Children's Act, or even the Employment Act. This is despite the fact that authorised officers have powers either alone or in the presence of any other person, wherever they have reasonable cause to believe that a violation of any provision of the Act is being perpetrated, to enter into any place at any reasonable time and examine such place or any person therein.

One other cause of the apathy may be the apparent helplessness of child welfare societies which are often relegated to a position of 'extras'. The societies do not have a big enough membership and good contacts to enable them to influence the proper authorities, leave alone the legislature. Then, of course, there is always this unavoidable problem of insufficient manpower, coupled with the general poverty of the people. The enforcement of the provisions of any law ultimately presupposes co-operation by the public in general. This is usually not forthcoming, not only due to ignorance, but mainly - in our submission because the parents of the children are usually impoverished rural people who want a little money from the city to supplement their already meagre earnings, if any. Because they are usually not able to afford school fees for their children, they would rather the same children started earning for them at an early age. As for the employers themselves, their reluctance to co-operate may be out of fear of a possible prosecution.

It is submitted however that the Act does not go far enough. The following could be considered:-

(a) Street Trading: Unscrupulous persons, in order to avoid the payment of tax, could easily recruit children to carry out street trading on their behalf at a small fee. It is probably a stretch of the imagination to say that the child maize roasters on the streets of our main towns do belong to any such organisation. But it is not naive to think that in the realm of organised crime this cannot be conceived. Our legislators should therefore provide for the prohibition of street trading for children except where they have been employed by their own parents - with defineable limitations.

(b) Entertainment and Performances: Provisions should also be made for the regulations of the employment or participation of children in any entertainment or performance in connection with which any charge, whether for admission or not, is made to any of the audience; so that any person who causes or procures a child or being a parent or guardian allows him, to take part in an entertainment in contravention of the provision would be guilty of an offence. There then could be a proviso that this could properly be done only on a licence issued for this purpose. And such licence may not be issued if the net proceeds of the entertainment are devoted to purposes other than the private profit of the promoters. Further that it shall be the duty of such promoters to show that the premises within which the performance is taking place are not licensed for the sale of any intoxicating liquor, or for gambling.

Education.

Under the Education Act, 1944 of Britain and under similar statutes in other common law jurisdictions there is provision for compulsory education for children, which is in accord with the proposition by the United Nation that it is an inherent right of every person to obtain an education. Our Education Act (CAP 211) has no such provision, but this is understandable. Kenya lacks the finances and the means to sustain a system in which compulsory education is provided, for if the obtention is compulsory, the provision of it by the state must likewise be compulsory. What is more, there is far too high a demand for too few schools and that is a problem which the government is commendably trying to solve. Consequently, to date in our country it is not an offence for anyone to omit taking a child to school.

It is submitted here that owing to the non-compulsory nature of education some parents, perhaps deliberately, but more often due to reckless over-indulgence in worldly pleasure which burn away their finances, fails to provide an education for their children although under normal circumstances they would be in a position so to do. Such cases often arouse sympathy from the public and possibly admonition of the parent concerned from relatives or cronies, but not much more. This contributes to the premature termination of the education of many children in this country.

Under section 23 of the Children's Act (quoted above) a parent may be prosecuted for wilful neglect of his child but only where such neglect is of a manner likely to cause such a child unnecessary suffering or injury to health (including injury to loss of sight, hearing or organ of the body, and any mental derangement), or for wilful act or omission causing a child or juvenile to become or conducting his becoming in need of protection. In other words if the result of the neglect is simply that a child is deprived of a chance to go to school, this section does not apply.

The point seems to be emphasized by the fact that, as regards education, a child is said to be in need of protection under Section 22 (f) only if he is prevented from receiving compulsory education. There is still doubt that Section 22 (f) is misplaced as it marked reference to compulsory education in a country which the same is compulsory. It is submitted that an amendment to this particular provision deleting the

word 'compulsory' would be desirable. Likewise Section 23 ought to be amended to provide that wilful omission by any person to provide a child in his custody, charge or care with the means to seek education where such means are available would be an offence punishable under the section. Safeguards could always be put to ensure that the provision is not abused to the detriment of the parent. A proviso could be made to the effect that if such parent has been unable otherwise to provide such education the burden shall be upon him to show that.

Cruelty and Exposure to Danger

Section 23 of the Children's Act (quoted above) provides a penalty for cruelty and neglecting children and juveniles. Cruelty here has the meaning of endangering the life of the child or exposing him to possible bodily injury or jeopardising his health. Subsection (2) of the same section provides that for the purposes of the section, a person having custody, charge or care of a child or juvenile shall be deemed to have neglected him in a manner likely to cause injury to his health if he has failed to provide adequate food, clothing, medical and, or lodging for him.

In many senses this provision is a dead letter. It is hardly enforced and that may be an indication either of condonation by or a complacent attitude of the authorities in this regard. Surely, the emaciated, rag-dressed child ayahs in town, the child matatu conductors and many starving children whose parents are alive and "living it up" must be, at the very least, prima facie evidence that all is not well to warrant investigations which may lead to a prosecution. In our submission the penalty provided is far too lenient having regard to the gravity of the offence. A stiffer deterrent penalty would be more desirable.

The section also makes it an offence for any person by an act or omission, knowingly or wilfully to cause a child under his care to fall into bad associations or be exposed to moral danger, Presumably, then, no offence would have been committed where the same result has been achieved owing to negligence, albeit unwitting, on the part of the parent. If that is so then the section does not provide sufficient cover to children who are then exposed to great moral danger such as being able to attend any public bar where intoxicating liquor is sold, of buying or receiving any drug which may be dangerous or habit forming, of going out

to beg or receive alms or inducing the giving thereof of going into brothels and associating with any person thereat. It would have been better in our submission for individual offences to be provided for in separate sections so as to cover all these areas.

The selling to a person who is apparently under the age of sixteen years any tobacco or cigarettes ought to be made an offence, since smoking has medically been shown to be harmful. The sight of children smoking away with impunity, having bought the cigarettes from a shop or kiosk is common in Nairobi. A lower age limit of children to whom any intoxicating liquor could lawfully be given could be provided for. Liquor given to very small children could endanger their health. Gambling could also be prescribed for children under 16 years of age. Such a provision could be made so as to put the burden of disallowing entry of any infant into gambling premises or participating in the gambling on the licensed premises. Although Section 28 of the Betting, Lotteries and Gaming Act (Cap.131) caters for this aspect it merely creates offences of betting with a young man, employing any young person on any licensed betting premises, receiving or negotiating any bet through a young person or of sending to any young person any circular, notice advertisement, letter or other document relating to any betting. The section does not prohibit entry into licensed betting premises by young children. And the proliferation of betting machines in and around urban centres access to which is free and easy for children as well the existence of a national lottery is testimony that there is not much seriousness in trying to protect the young from this sort of scourge. At best it shows a half-hearted attempt at protection.

It could be argued that other statutes cater for these other areas and there need not be duplication. For instance, it may be asserted, protection against the corrosion of children's morals or against children, juveniles or young persons falling into a habit of drinking is accomplished by Section 30 of the Liquor Licensing Act (CAP 121) which makes it an offence for any licensee under the Act to employ a person under the apparent age of 18 to sell, control or supervise the sale of liquor or to have the custody or control of liquor licensed premises. It is also an offence under the same section for any person knowingly to sell or deliver liquor, or permit it to be sold or delivered, to a person under the apparent age of 18. It is submitted that this provision is observed more in breach than in compliance therewith. One could easily observe at both the 1978 and 1979 Nairobi International Shows that many children

who were of the apparent age of less than 18 years were freely purchasing intoxicating liquor from the counters of various bars on the showground, the bottles would then be opened for them and they would proceed to consume the contents. There is little doubt that many bars in Nairobi, not to mention those in rural areas, do not discriminate as required by this section, and sell liquor quite freely and openly to all and sundry.

The reaction, or rather non-reaction, of the authorities to the influx into the city of children who are either beggars themselves or pilot beggars in the streets is also evidence of the general apathy existing regarding this abuse. Most of these children do have parents. In fact, normally the parents will be found to be people who are constantly in a drunken stupor, or are carrying on active prostitution, and hence the lack of time to care for their children.

However, by far the most dramatized abuse to children is one related to sexual offences. Pages of our newspapers everyday carry revolting stories of rape, defilment, procurement, abduction, indecent assaults, of deaths resulting from abortions, most of which events involve young persons. Some of these vicious attacks on young persons leave indelible scars on them especially due to the fact that there is usually a social stigma attached to the offence not only to the offender but also to the one against whom the offence has been perpetrated. It is appreciated that the courts are doing their best in meting out punishment to offenders in this respect. But it is the feeling of the writers that generally the sentences are far too lenient. A person who is found guilty of housebreaking and stealing therefrom is more likely to receive a stiffer sentence than one who has defiled a twelve year old child, if newspaper reports are anything to go by.

It is submitted here that in any case involving a sexual assault on any child the investigators should not only investigate the report relating to the attack. They should also carry out enquiries to establish whether or not sufficient protection had been given to the child by the person for the time being having custody, charge or care of such a child immediately prior to the attack. And, if it is revealed that no adequate care had been exercised by such person, a prosecution under Section 23 of the Children's Act should follow.

FINAL THOUGHT

As our society becomes more sophisticated and demands upon people multiply in a highly competitive world, time to be with our children and give them the care they require lessens with each day. There is a temptation to be out of the home at all times, busy doing this and that. To supplement family income both parents are often forced to take up employment. The break up of traditional society with its socialization processes and increase in the emphasis on nuclear families coupled with urbanization and cosmopolitanism means that the highly cherished values that characterized our society are rapidly disintegrating and dissipating into oblivion. The hunger for housing in urban centres to accommodate a steady migration from rural areas and the inability to keep pace with the migration forces families to move into shanties some of which are built by well-to-do persons craving for greater profit; and those who do not end up in the shanties have to find some shelter in the already crowded estates. Playgrounds, social halls, and other recreational amenities are pathetically few and not able to meet the great demand.

Often times the rural people live in a forgotten world. The people there have to do the best they can scratching a livelihood on parched pieces of land and trying to raise an income from people who do not have any money to buy whatever is harvested and offered for sale. It is easily identifiable that most of the money circulates in urban centres. Yet this is the hostile context within which the laws enacted to combat offences against children must function.

For the law to function effectively in a society the general populace must first be educated as to what, in general terms, the law is. The general level of literacy must necessarily be ungraded for this purpose. There must also be equitable distribution not only of our wealth but means of production, having regard always to the economics of the exercise. There must also be a labour force of dedicated and diligent law enforcement officers, well remunerated to avoid their being corrupted on a large scale.

In a word, the general standard of living must be raised albeit within the capabilities of our economy. This means there must be a national ethos, a general morality: the country as a whole must have a conscience. Profit must not be the sole motivating factor. Rather, a

concerted concern to care for each other ought to reign. Children have rights among which is a right for them to expect protection from harm from themselves and adults. Adults of this nation must prove themselves worthy of the trust placed on them by the young folk.

We believe that there is a lot of room for improvement, and the law ought to be expounded to ensure greater, and more effective protection of children. This is not to say that we do not have protection of children in the circumstances. We think that there is relatively reasonable protection. The problem seems to be a general apathy or retisence towards the Diligent enforcement of the law which exist for such protection. Perhaps a machinery needs to be set up whereby if any persons has a belief, on reasonable and sufficient grounds, that a child is being mistreated or is exposed to danger or cruelty such a person may file a resport with the police who then should initiate investigations into the matter with a view to prosecuting the offender, if any. Reasonable protection against any proceedings in damages should be placed to ensure that the person who so files a report is not precluded from making a genuine report. Or, perhaps, better ways of doing this could be done. Whatever the case, what seems important now is to see the existing legal provisions for the protection of children enforced diligently.

SEMINAR PROCEEDINGS ON OFFENCES AGAINST CHILDREN.

Rapporteur - MR. A. G. RINGERA

The Seminar discussion that followed agreed first that; for effective protection of children, it was imperative to spell out clearly what the term "child" means. It was noted that the present law indicates when one ceases to be a child by expiry of time but not when one should be deemed to have been constituted a child for the purposes of the laws protecting children. The seminar felt that there should be a legal provision indicating when a child comes into legal existence and inclined to the view that the moment of conception may be the operative time.

Second, the present law was not enforced. That was particularly so with regard to (a) Section 23 of the Children and Young Persons Act (cap.141),--relating to punishment of those guilty of cruelty and/or neglect of children, and (b) the provisions on Employment of Women, and Juveniles (Part IV of the Employment Act, 1976), - relating to employments, prohibited to children and the formalities required before engaging children in salaried employment. It was recommended that the above provisions of law should be enforced by the public officials concerned.

Third, even if the present law was vigorously enforced there would be undesirable gaps due to its inadequacy. To fill such gaps the seminar felt that certain additions and modifications to the present laws were necessary. Specifically, the law should (a) prohibit street trading by children, (b) regulate the participation of children in entertainments and performances likely to corrupt their morals, (c) penalize the wilful omission or neglect to educate children, (d) prohibit sale of cigarettes and alcohol to children under pain of severe penalties, (e) Prohibit the entry of children into licensed betting premises and (f) treat indecent violations of children's physical integrity more severely.

Fourth, the present laws unfortunately adopt a constrictorist attitude to the term offence. Excluded from its purview are several practices and omissions injurious to the mental and physical health of children. Examples include habits like uninformed ingestion of drugs, smoking, and alcoholic indulgence by pregnant women, malnutrition, lack of sound moral education in the light of biological urges etc. It was felt that in understanding the term child in the broad sense indicated above, it should be possible for the legislature to delineate what rights children should have under the law. Conversely, the obligations of those responsible for such malpractices and/or mal-omissions should be spelt out. Addressing itself to the issue of drugs specifically the seminar felt that

there was need for a watch-dog body to oversee the use of our society for drug testing, dosage determination, and distribution of all manner of drugs.

Last, but not least, the seminar articulated its desire for the state to take appropriate economic and social action to alleviate some of the problems which continuously shadow offences against children. Specifically the provision of compulsory and free education, a broader campaign in adult education, and the general amelioration of poverty were considered to be imperative measures if the child is to be liberated from all Malpractices/Malmomissions and whether or not the child is susceptible to such conduct and to make the conduct an offence. Offence in this regard ought to be viewed both from the narrow lawyerly approach as well as from the wider layman's "wrongs" approach.