MARRIAGE LAWS OF MALAWI -

THE EVOLUTION OF AFRICAN MARRIAGE LAWS UNDER COLONIAL RULE

BY

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DEDICATION

This dissertation is dedicated to:
my grandfather, the late Edward
Zachariah Mhango, and my grandmother,
Edith Tembo.

ABSTRACT

This thesis examines the evolution of the law regulating African marriages and divorce in Malawi. It offers a review of the principal rules of customary law governing marriage and describes the introduction of relevant legislative provisions by the colonial administration, including the provisions for the registration of customary marriages enacted by African authorities. Special attention is given to the position of African Christians and to the policies and attitudes of Christian missions as determinants of colonial legislative policy.

The analyses focus on the interaction of African custom, Christianity and secular statutory regulation of marriage and divorce. They highlight the impact on, and implications for, African society of the endeavours of the missions to Christianise African marriage and family life and of the reluctant efforts of the colonial administration to extend the application of the marriage laws imported from the English legal system to the indigenous population. This also involves a review of African responses to relevant aspects of the colonial experience.

Largely through the study of case material, the wider consequences on African traditional marriage law and practice of African participation in the social, political and economic possibilities of Western European culture are also detailed. Much of the effort here is devoted to the examination of the contribution of the courts to the development of customary law and its adaptation to the changing environment and modern conceptions of social justice.

PREFACE

The advent of European colonial rule in Africa contributed to radical changes in the lives of the indigenous people. What have these changes meant in terms of African marriage laws and practices? The material presented in this study addresses this question with specific reference to the evolution of the laws governing African marriages in Malawi.

The existing laws of marriage in Malawi have not undergone any radical changes since the attainment of independence in 1964. In the whole field of family law, the only major legislative changes have been those affecting the law of succession.[1] Basically three different types of marriage law operate side by side within one and the same legal system. Thus, there are three ways in which marriage may validly be contracted in Malawi, namely, under customary law, under the Marriage Act,[2] and in accordance with the provisions of the Asiatics (Marriage, Divorce and Succession) Act.[3] This last Act applies only to those who are described as "non-Christian Asiatics",[4] whether domiciled in Malawi or not. Although the term "Asiatic" is nowhere defined, it is clear that the provisions of the Act do not apply to Africans. This study is concerned with the development of only those marriage laws which are applicable to members of the indigenous African population. The "Asiatics Marriage Act" therefore falls outside the ambit of the study. Any references to the Act are intended only for purposes of completeness.

There are basically two bodies of law under which African marriages may be contracted, namely, customary law and the law under the Marriage Act. There are also District Council By-Laws[5] which provide for the registration of customary marriages. Customary marriages may also be registered in accordance with the provisions of the African Marriage (Christian Rites) Registration Act.[6]

The study is divided into four parts. Part I, which is preceded by a general introductory survey of Malawi, consists of three chapters that offer a review of the principal rules of customary law governing marriage. By far, the majority of African marriages in Malawi are contracted under customary law. The material examined in Part I is intended to contribute to a greater understanding of the relationship between the development of customary marriage law and the impact of European colonialism on African society, in particular in terms of the transformation of African familial institutions. It is hoped that the relevant analyses will show the significant extent to which the development of customary marriage law is rooted in the impact of colonial, capitalist economic systems on traditional African communities and in the intervention of colonial judicial and administrative institutions in African family matters.

Unlike the second and third parts of the study, in which the basic material used is of a purely historical nature, the discussions in Part I rely principally on case material. Although the records consulted are mainly those

of the colonial period, post-colonial legal materials, especially the decisions of the National Traditional Appeal Court, have also been utilised extensively. It will be seen that generally, it is not essential to draw a very rigid distinction between the colonial and post-colonial periods. This is so because, firstly, the end of colonial rule did not result in the elimination of the institutional framework within which the customary law had been evolving during the colonial period. Secondly, while the attainment of independence ushered in a period of new and different political experiences for the African people, generally, it has led to the intensification and consolidation, rather than to a reversal or diminution, of the forces of social change initiated by European penetration. The same processes of social change continue to impinge upon the development of customary law.

Part II contains two chapters which describe the history of the principal legislation on marriage. This is mainly the Marriage Ordinance, 1902, and the Native Marriage (Christian Rites) Registration Ordinance, 1923. The material presented highlights the issues and problems arising from the introduction of the "English system" of marriage law in [Malawi]. The arguments, concerns and differing points of view of the principal protagonists in the history of colonial marriage legislation are surveyed. The basic issue in the whole of this history was the question regarding the application of the new system of marriage law to members of the indigenous African population. It will

be seen, however, that the focus of the controversies which ensued was not the whole problem of African marriages, but merely the problem of African Christian marriages. This underlines the limited scope of colonial legislative activities, the way in which the legislative agenda tended to be influenced merely by the interests of the missions.

At the same time, however, there is an extent to which the position of African Christians can be said to have been an inherently problematical one. In a society where the social division between the so-called "civilised" (mostly European) and "uncivilised" (mostly African) people tended to be a major element of life, the status of African Christians was somewhat ambivalent. It will be argued in this study that the debates leading to, and resulting from, the enactment of the Native Marriage (Christian Rites) Registration Ordinance, 1923 - a unique piece of legislation in British colonial Africa - were in effect essentially about the social status of African Christians.

However, with the differences in doctrinal approach, mainly between the episcopal and the non-episcopal missions; with the rise of African nationalism, which manifested itself in political as well as religious forms; with the advent of "indirect rule", under which there was an apparent shift in colonial administrative policy in favour of African traditional authority and social institutions - the question of African Christian marriage became more tangled. In Part III of the study, an attempt is made to decipher the various strands of opinion, to delineate a whole range of attitudes

and viewpoints, on the question of the interactions of Christianity, African custom and secular statutory regulation of marriage. There are three chapters in Part III. The first chapter traces the history of Native Authority legislation dealing with the registration of customary marriages, the second looks at the question of monogamy and the third reviews the problem of divorce. It is in relation to these three subjects that most of the marriage-law policy issues are examined in detail.

Part IV concludes the study by identifying the main elements and themes in the evolution of African marriage law. Current problems of marriage law and the question of reform receive consideration at the end of this part of the thesis, which consists of one chapter.

The research for this study was conducted between 1982 and 1983. It mainly involved the examination of archival sources at the Public Record Office in London and at the National Archives of Malawi in Zomba. Thus, the bulk of the material presented in this thesis is derived from the primary sources contained in government and missionary files. Most of the files consulted date before the end of World War II. At the National Archives in Zomba, it was also possible to consult more recent files, especially those containing court records. (All the relevant archival sources are described in full in the Bibliography.) The libraries at the School of Oriental and African Studies, the Institute of Advanced Legal Studies, and the Foreign

and Commonwealth Office, in London, and the library at Chancellor College in Zomba, also yielded much useful material. Although much of the time of the "field work" in Malawi in 1983 was devoted to the research at the National Archives, it was also possible to visit a number of institutions, including courts and government departments, and to hold informal "interviews" with judicial, government and religious officials.

So far very little has been written on the laws of marriage in Malawi. Indeed, the whole legal history of Malawi remains largely uncharted. Thus, Dr B.P. Wanda's unpublished Ph.D. Thesis, Colonialism, Nationalism and Tradition : The Evolution and Development of the Legal System of Malawi (1979)[7] may be regarded as a pioneering work in the field. Dr Wanda's thesis includes a large section (Vol.6) which deals with the evolution of the law of marriage. Needless to say, the work does not address most of the central issues involved in the development of the law, but is concerned merely with aspects of the broader theme of the evolution of the legal system in general. The recently published study by Martin Chanock, Law, Custom and Social Order : The Colonial Experience of Malawi and Zambia (1985) is really the only known systematic account of the development of customary law in Malawi during the colonial period. Chanock's work also deals with the law of Zambia. It is unfortunate that the book became available only after much of this thesis had already been written. Thus the only substantial reference to some of the

central themes of Chanock's study appear in the concluding chapter of the thesis. Dr H.F. Morris' article, "The Development of Statutory Marriage Law in 20th Century British Colonial Africa", (1979),[8] also contains a useful section on the development of the statutory marriage law of Malawi. Mention should also be made of J.O. Ibik's Restatement of African Law (The Law of Marriage and Divorce) Vol.3 (1970). Although the Restatement has not had the same success as similar Restatements in some of the African countries, for example, E. Cotran's Restatement of the customary law of marriage in Kenya,[9] it is still the only work in which an attempt has been made to describe all the rules of customary marriage law in Malawi. The Restatement purports to describe the law as it is - it does not make any attempt to explain the context in which particular rules have developed. It is indeed a major weakness of the Restatement that it fails to convey the fact that customary law is a living process. In fact, it is strange that, throughout his account of customary law, Ibik makes no reference to the decisions of the courts. For a law that has been developed almost entirely by the courts, this is a serious omission.

Most of the secondary sources used in this study are either anthropological accounts or studies on the general history of Malawi. There are also a number of useful works on African law and marriage in general. The Survey of African Marriage and Family Life (1953), edited by Arthur Phillips, deserves specific mention.

NOTES

PREFACE

1. See The Wills and Inheritance Act (cap. 10:02), enacted in 1967.

2. Cap. 25:1. The Act was first enacted as the British Central Africa Marriage Ordinance, no. 3 of 1902. It was re-named the Marriage Act in 1964. See Chap. 5.

3. Cap. 25:03. The Act was first enacted as the Nyasaland Asiatics (Marriage, Divorce and Succession) Ordinance, no. 13 of 1929. It was re-named in 1964.

4. Section 2(1).

5. These were first introduced as Native Authority Rules in the 1930's and 1940's.

6. Cap. 25:02. The Act was first enacted as the Nyasaland Native Marriage (Christian Rites) Registration Ordinance, no. 7 of 1923. This Ordinance had replaced the Nyasaland Christian Native Marriage Ordinance, no. 15 of 1912 (repealed by no. 4 of 1923).

7. London : 1979, (see esp. Vol.6).

8. Vol.23 J.A.L.(1979), p. 37. See also Simon Roberts, The Growth of an Integrated Legal System in Malawi : A Study in Racial Distinctions in the Law, Ph.D. Thesis, University of London, 1967.

9. Restatement of African Law : Kenya I : The Law of Marriage and Divorce (London : Sweet and Maxwell, 1968).

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I will forever be indebted to the Government of Malawi for the generous scholarship which enabled me to study in London. I am also grateful to the University of Malawi's Centre for Social Research for funding my field research in Malawi during 1983.

I have a special debt to acknowledge to my wife, Barbara Catherine. I wonder how, or even whether, I could have completed the thesis without Barbara's tireless exertion, remarkable energy and keen interest in my endeavours. She accompanied me during the period of field research in Malawi and has helped me at every stage of the preparation of this thesis. It was also her typing and editorial skills which

transformed my draft into a presentable document. Words cannot adequately express my sense of gratitude to her.

I am also very grateful to the following bodies for allowing me to consult their documents at the National Archives, Zomba : the Government of Malawi; the Diocese of Southern Malawi; and the Blantyre, Livingstonia and Nkhoma Synods of the Church of Central Africa, Presbyterian. I am also indebted to the Rev. Don Fauchelle of the Zomba Theological College for his valuable advice. The members of staff at the Malawi National Archives in Zomba, and at the Library of the School of Oriental and African Studies, the Library of the Institute for Advanced Legal Studies and the Public Record Office, in London, were most helpful and co-operative. I am very grateful to them.

Various colleagues have helped me in different ways. Dr B.P. Wanda and Dr M. Machika of the Law Department at Chancellor College, Zomba, generously put at my disposal their valuable collections of unpublished court records. Dr C. Ng'ong'ola advised me on many procedural aspects of my research. Mr F. Phiri of the University of Zambia interrupted work on his Ph.D thesis to help me with the maps. Ms Marion Chibambo and Mr H. Kazinga Msiska kindly provided my wife and me with accommodation during the research in Malawi. I extend to them my heartfelt gratitude.

During the course of my stay in London, I have been residing at Nansen Village, which is run by the Barnet Overseas Students Housing Association - I wish to thank Mr K.W. Weinberg, the Chairman, and Mrs Valerie Mindlin, the Warden, for their kindness and assistance.

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ABBREVIATIONS

BCA	British Central Africa
CA	Central Africa (a UMCA monthly publication)
CCAP	Church of Central Africa, Presbyterian
CO	Colonial Office
C.P.	Central Province
DC	District Commissioner
FO	Foreign Office
J.A.L.	Journal of African Law
MNA	Malawi National Archives
NA	Native Authority
N.P.	Northern Province
NTAC	National Traditional Appeal Court
PC	Provincial Commissioner
S.P.	Southern Province
UMCA	Universities Mission to Central Africa

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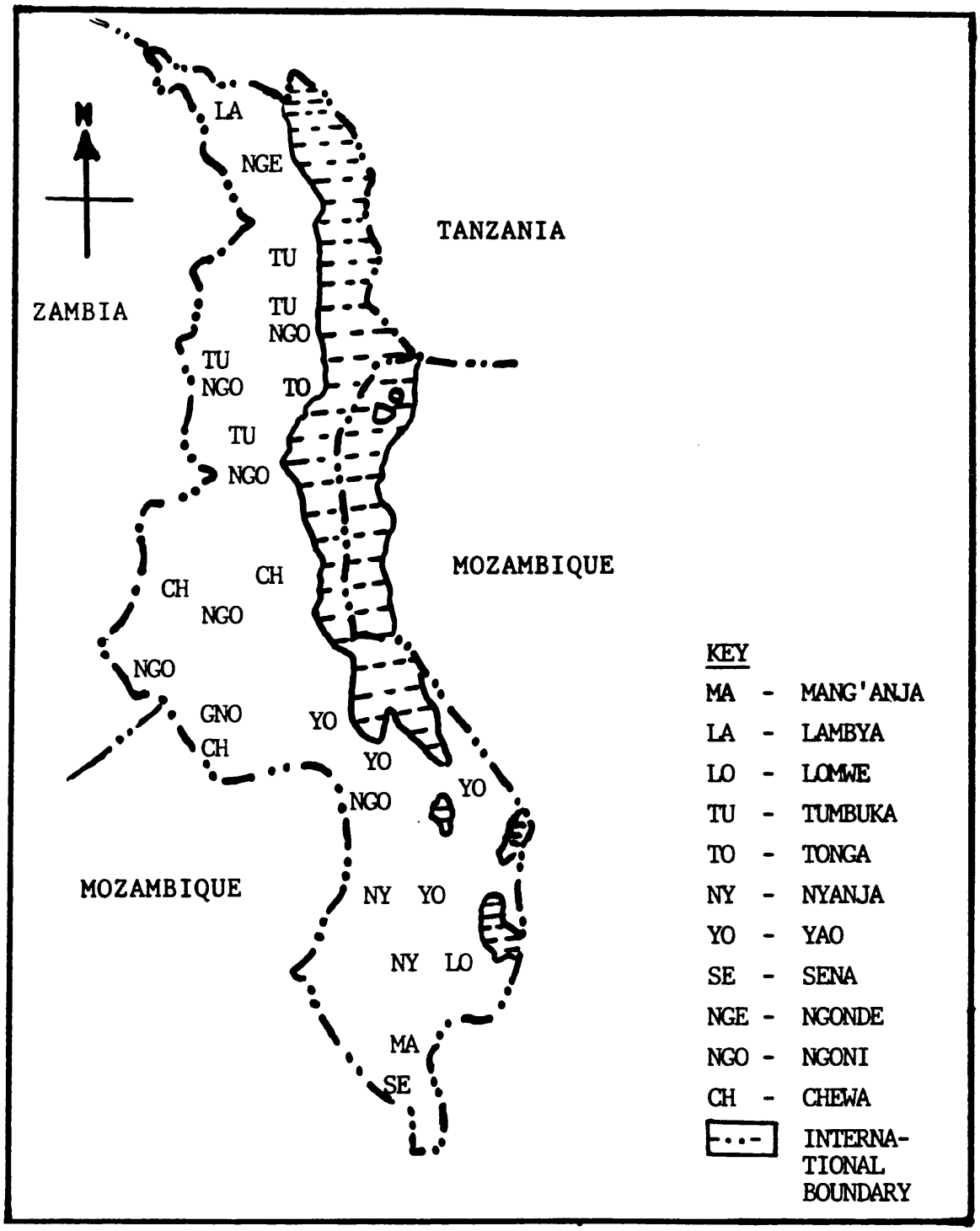
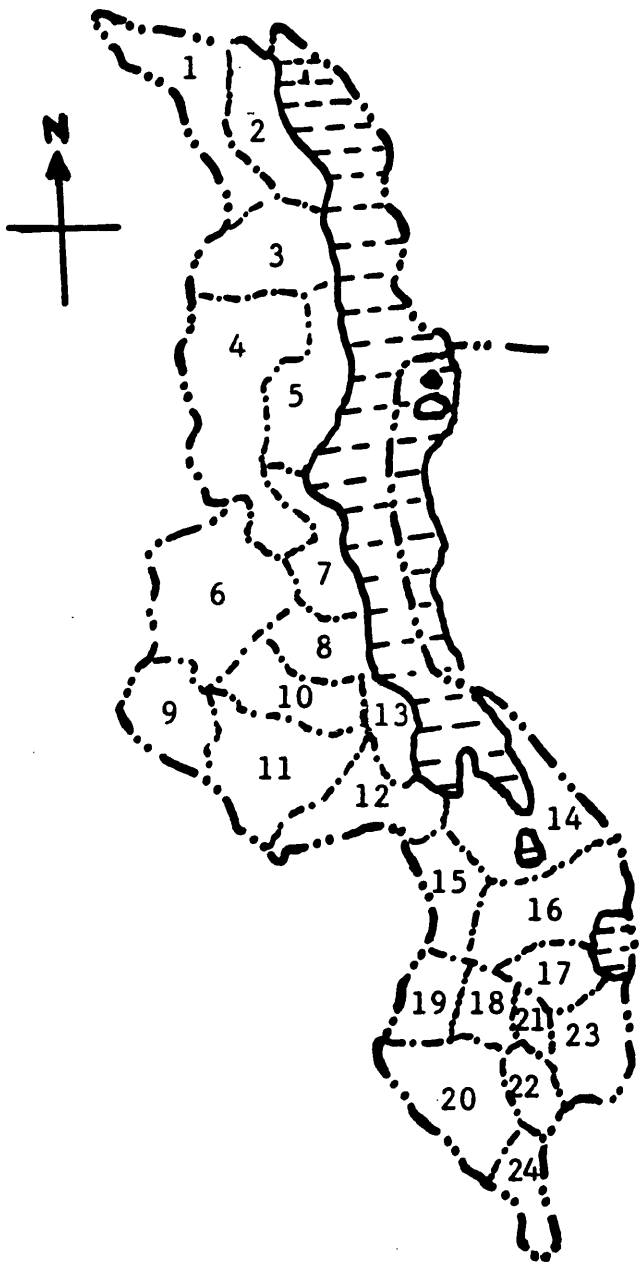
Map 1

Malawi : Distribution of Principal Traditional Groups



Map 2

Malawi : Present District Boundaries



Key

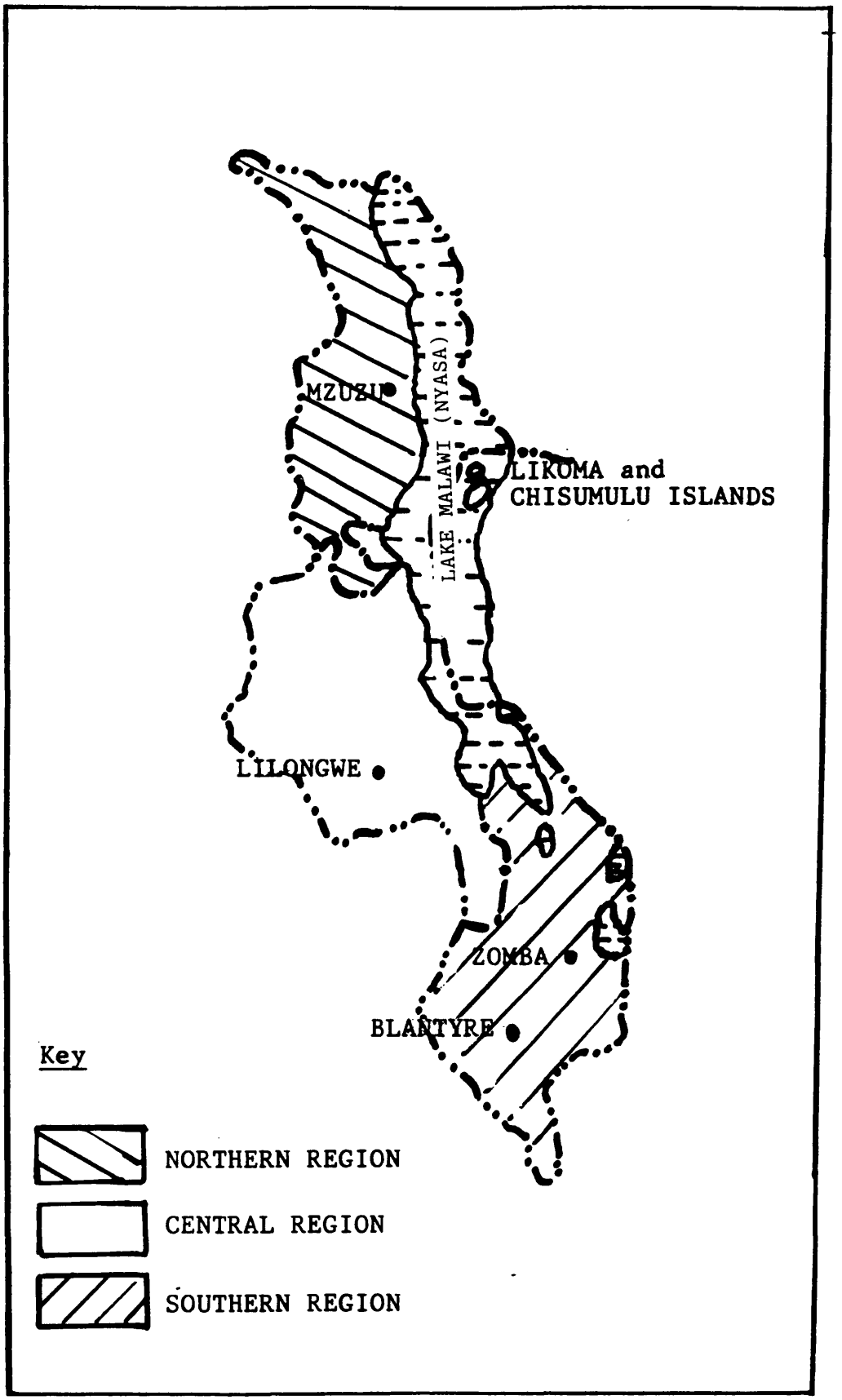
International Boundary

District Boundary

1 - CHITIPA (FORT HILL)
2 - KARONGA
3 - RUMPHI
4 - MZIMBA
5 - NKHATA BAY (CHINTHECHE)
6 - KASUNGU
7 - NKHOTA-KOTA
8 - NTCHISI
9 - MCHINJI
10 - DOWA
11 - LILONGWE
12 - DEDZA
13 - SALIMA
14 - MANGOCHE (FORT JOHNSTON)
15 - NCHEU
16 - MACHINGA (KASUPE)
17 - ZOMBA
18 - BLANTYRE
19 - MWANZA
20 - CHIKWAWA
21 - CHIRADZULU
22 - THYOLO
23 - MULANJE
24 - NSANJE (PORT HERALD)

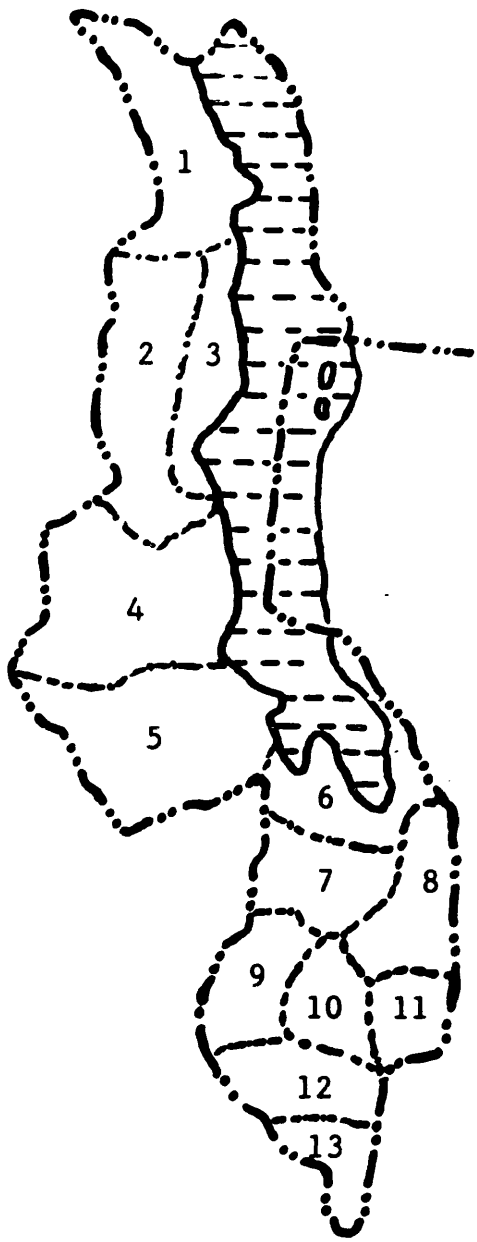
Map 3

Malawi : Regional Boundaries



Map 4

MALAWI : DISTRICT BOUNDARIES IN 1910



Key

International Boundary

District Boundary

1 - NORTH NYASA District
2 - MOMBERA " (MZIMBA)
3 - WEST NYASA "
4 - MARIMBA "
5 - CENTRAL NGONILAND "
6 - SOUTH NYASA "
7 - UPPER SHIRE "
8 - ZOMBA "
9 - WEST SHIRE "
10 - BLANTYRE "
11 - MLANJE "
12 - RUO "
13 - LOWER SHIRE "

CHAPTER ONE

MALAWI : AN INTRODUCTORY SURVEY

It is useful to offer a brief historical survey of Malawi, its people and institutions in general. The survey is not intended as a primer of the history of Malawi. It merely presents basic background information relevant to the issues raised and examined in the study. The general history of the country has fortunately been a subject of many published works readily available to the interested reader.[1]

Malawi was formerly a British Protectorate (British Central Africa 1891-1907; Nyasaland 1907-1964). Landlocked, Malawi is located in southeastern Africa. Its boundaries, like those of many other African countries, are a product of the "scramble for Africa" conducted by the powers of Europe in the last part of the nineteenth century. The country's longest border is with Mozambique, once known as Portuguese East Africa, on the east and south. On the north, Malawi is bounded by mainland Tanzania, formerly known as Tanganyika. Tanganyika had been under German colonial rule from 1890 until the end of World War I when Britain took over the administration of the country, first under the League of Nations Mandate and then under the United Nations Trusteeship. On the northwest, Malawi is bounded by Zambia. Northern Rhodesia, as Zambia was previously called, fell under British rule as an extension of the politico-commercial hegemony of the British South Africa Company - a chartered company formed by the English statesman, entrepreneur, and colonialist, Cecil John Rhodes (1853-1902).

Between 1953 and 1963, Nyasaland (as Malawi was then called) and Northern Rhodesia were two of three partners - the other being Southern Rhodesia, now the Republic of Zimbabwe - in the Central Africa Federation of Rhodesia and Nyasaland. Nyasaland achieved independence as Malawi in July, 1964. The country became a republic in July, 1966. Malawi is currently a member of the Commonwealth, the United Nations, the Organisation of African Unity, and the Southern African Development Co-ordination Conference (SADCC).

1. The African People of Malawi

Malawi is a densely populated country. With a total area of only 118,484 square kilometers, a fifth of which is covered by inland water, its population is well in excess of 6 million people. The ethnic complexion of Malawi may be drawn from the census results of 1977 which showed a total population of 5,547,460. Of this figure, 5,532,298 were Africans; 6,377 Europeans; 5,682 Asians; and 3,103 other groups.[2] These figures underline what has always been true about the ethnic composition of the country since the advent of colonial rule, namely that non-Africans have formed only a small fraction of the population. Europeans and Asians have over the years alternated as the largest minority group.

The earliest inhabitants of the region comprising present-day Malawi were a negroid, and perhaps even a pygmoid, people who lived by hunting and food-gathering. These people were either absorbed, displaced or eliminated by the Bantu people who have been in occupation of the area since about the twelfth century A.D.[3]

For the sake of convenience, the Bantu people who now live in Malawi may be divided between those who were already settled in the country by the beginning of the nineteenth century and those who moved in later. (Map No. 1 indicates the general distribution of the various communities in Malawi.)

At the beginning of the nineteenth century, the larger part of the Malawi region was occupied by groups of people who shared a common language, culture and clan organisation. These people were agriculturalists and lived in scattered village settlements. They followed a matrilineal system of social structure and spoke what is now commonly known as chiChewa. The term Chewa, however, more specifically describes only one, albeit numerically superior, group of the relevant people. The other groups were known as the Nyanja, Mang'anja, Chipeta, Nsenga, Chikunda, Mbo, Ntumba and Zimba. Broadly, those people who occupied the central part (Central Region) of Malawi came to be identified as the Chewa and those in the southern part (Southern Region) as the Nyanja and Mang'anja.

All the above groups had started as one body of people known as the Maravi or Marave. During the sixteenth century, the Maravi people had constituted a centralised, clan-based, state or empire under a ruler named Karonga or Kalonga (a name retained as the title of his successors). The empire extended well beyond the present borders of Malawi and covered portions of present-day eastern Zambia and western Mozambique. By the beginning of the seventeenth century,

however, the empire had started to disintegrate, creating numerous loosely organised chiefdoms. The present name of the country, Malawi, was chosen to commemorate the old Maravi empire.

The Tumbuka and Tonga[4] were the immediate northern neighbours of the Maravi people on the west side of Lake Malawi. Each of these two groups was an amalgamation of different smaller groups of peoples with clans which had quite different historical origins, traditions and types of organisations. Both groups included patrilineal peoples with their origins somewhere around present western Tanzania and matrilineal peoples with Chewa or Maravi origins. However, the people in each of these groups developed a strong sense of shared identity. The Tonga, and even more so the Tumbuka, evolved languages which were clearly distinct from chiChewa or chiNyanja. Like their southern Chewa neighbours, the Tumbuka and Tonga people lacked large-scale centralised authorities. Towards the end of the eighteenth century, a group of Bantu traders widely known as Balowoka had entrenched themselves among the Tumbuka and, largely through shrewd diplomacy as opposed to military conquest, managed to establish a loose confederation - the so-called Chikulamayembe dynasty or empire. However, this dynasty had been designed mainly to facilitate trade in ivory rather than to bring about any far-reaching changes in Tumbuka political organisation.[5]

To the north of the Tumbuka and Tonga were the settlements of the Ngonde-Nyakyusa and Lambya peoples. These groups were cattle owners and cultivators. They were clearly

distinguished from their Tumbuka, Tonga and Maravi southern neighbours. They were patrilocal and traced descent through the male line. The Ngonde had a highly centralised government under the powerful Kyungu dynasty. The Lambya on the other hand were organised into small chiefdoms. The Ngonde and Lambya groups had originated from the same area around western Tanzania. There is doubt whether the Ngonde people were ever extensively involved in the ivory trade which had absorbed the Chikulamayembe dynasty.[6] However, they are reputed to have achieved a level of material well-being and social development well above that of most groups in this part of Africa.[7]

Thus by the beginning of the nineteenth century, the area of the present Northern Region of Malawi had been settled by the Lambya, Ngonde-Nyakyusa, Tonga and Tumbuka groups; the Central Region by the Chewa; and the Southern Region by the Nyanja and Mang'anja peoples. According to existing historical accounts, until the early decades of the nineteenth century, relative peace and stability had reigned among the predominantly agricultural people settled in the region of Malawi. However, this state of affairs was shortly followed by a period of disruption and much upheaval which resulted from the intrusion of new groups of Bantu people and from the intensification of the trade in slaves.[8]

Mainly, four further groups of Bantu people arrived in the Malawi region during the nineteenth century - the Ngoni, the Yao, the Lomwe and the Sena. It was the arrival of the Ngoni and the Yao that was to spark-off the social and

political havoc which was to characterise the remainder of the nineteenth century and even the start of the twentieth.

The Ngoni people, just preceding the Yao, began to set up permanent settlements in Malawi from the mid-nineteenth century. The Ngoni of Malawi represent splinter groups of one of various groups of Nguni people who fled from the area of northern Natal (South Africa) around 1820 in the wake of the rising power of the Zulu kingdom of Tchaka. The particular group of Nguni people who finally settled in Malawi were led out of Natal by Zwangendaba Jere. They travelled north-eastwards. From the start, their odyssey was characterised by the "continual absorption of conquered people ... counterbalanced by a recurring fractionalization".[9] Even before crossing the Zambezi in 1835 and 1836, two groups had emerged - the original group led by Zwangendaba and a breakaway group led by Ngwane Maseko.

After the death of Zwangendaba around 1845, his group split into five factions which scattered in four directions. Two of the factions travelled to locations in what are at present Tanzania and Mozambique, one entered the Malawi area, and the remaining two headed for the Luangwa valley in present Zambia.

The faction which had entered the Malawi region was further split into two main groups. One group finally settled among the Tumbuka people in what is now Mzimba District (the Northern or M'Mbelwa Ngoni); the other, after even further fission, settled among the Chewa people in present Dowa

and Ntchisi Districts (presently known as the Central Ngoni). Of the two groups which had gone to the area of Zambia, one (led by Mpherembe) later came and joined the M'Mbelwa Ngoni. The group that remained in Zambia was led by Mpezeni (the Mpezeni Ngoni). Two offshoots of the Mpezeni Ngoni later settled among the Chewa of Malawi in present Mchinji District (also presently known as the Central Ngoni).

The Ngoni of Maseko (after sojourns in various places including locations in present Malawi, Tanzania and Mozambique) finally settled among the Chewa people in present Dedza and Ncheu Districts (the Central Ngoni).

The first wave of permanent Ngoni settlers had entered the Malawi region about 1857, the last wave entered right at the close of the nineteenth century. In the course of the long journey from Natal, the Ngoni ranks swelled with peoples of different groups and cultures. The original Nguni group included people of Ntungwa, Swazi and Sutu clans; by the time the Ngoni crossed the Zambezi, Karanga clans had been assimilated as well. By the time they finally settled in Malawi, the Tumbuka, the Senga, the Chewa and various other groups had been absorbed into Ngoni political structures.

The Ngoni were a pastoral people whose way of life was dominated by war. The organisation of Ngoni society and its moral code were geared towards martial ends. They had highly centralised monarchical governments with a system of age regiments, into which all males of fighting age were incorporated. Their livelihood depended on frequent raids on others for

supplies of grain and cattle. The Ngoni had little notion of trade. The maintenance of large armies also depended on these raids. Captives were not sold into slavery, but incorporated into Ngoni society and military machinery. Many successful Ngoni military leaders were of non-Ngoni origin, people who had once suffered defeat at the hands of the Ngoni.[10] The Ngoni entry heralded havoc in the Malawi region. The Tumbuka were subjugated; the Tonga remained under perpetual siege until the advent of European colonial rule; so too did many of the Chewa groups in Central Malawi. Only the Ngonde and Lambya groups further north and some Nyanja and Mang'anja groups further south really avoided the devastation of Ngoni terrorism.

Wherever the Ngoni settled, their culture did not dominate to the same degree as their political and military presence. The Ngoni who had come to settle in the Malawi region were a patrilineal people and many of their ranks spoke a Zulu-related language. Before long, however, local tongues replaced Zulu; and in most places, Ngoni social customs were overwhelmed by those of the host people. The Northern Ngoni were a partial exception; although Tumbuka replaced Zulu as the common language, the salient features of Ngoni social custom were maintained, and to some extent even adopted by the host people.

Groups of Yao people entered the Malawi area for permanent settlement between the sixth and seventh decades of the nineteenth century. Previously, the Yao had occupied a large area on the southeast of present-day Malawi, in what is today

Mozambique. By the beginning of the nineteenth century, there were about ten different groups of Yao people in the Mozambique area; of these, only four have settled in Malawi. Some groups remained in Mozambique while others settled in what is today Tanzania. The Yao are a kindred group to the Makua and Makonde people. Primarily, the Yao were an agriculturalist people. Some of their groups were renowned artisans. It was their trading activities, however, which earned the Yao fame, fortune, influence and eventually, notoriety.

Before they actually settled in the area, the Yao had long been trading with the people of the Malawi region. The Yao brought into the interior guns, gun-powder, cloth, beads and various ornaments which they exchanged for ivory, tobacco, copper, iron and even domestic slaves. At the coast, their main clients were the Arabs; at times they also traded with Indian, French and Portuguese merchants; although with the Portuguese, the Yao usually worked in competition.

Yao settlements in Malawi were established in the 1860's and 70's mainly in the southern part of the country, with concentrations in present Mangoche, Machinga, Zomba and Blantyre Districts. From their new settlements, the Yao maintained their trading activities. By then, tragically, the small-scale, and perhaps relatively benign, trade in domestic slaves had degenerated into a wicked mass-traffic in human lives. The coastal demand for slaves had increased and leading Yao traders began to concentrate on slave raiding. Peaceful trade relations were disrupted and the whole of the

Southern Region was engulfed in internecine conflict as thousands of men, women and children were dragged into slavery or, more usually, ignominious death on their way to the coast. The devastation was not confined to the Maravi people; weak Yao groups as well fell victim to the greed of their fellow Yao. Equipped with firearms, and backed by sophisticated and ruthless clients, principal Yao slavers like Mponda, Makanjira, Makandanji, Zarafi and Kawinga became very powerful. The old competition with Portuguese traders took on a new and sinister aspect in the southern part of the Malawi area.[11]

Like the Chewa, the Yao were matrilineal and matrilocal. Their political organisation was more decentralised than even that of the Chewa or Nyanja. They lived in small, loosely amalgamated groups of kin. These groups were fissiparous and rarely grew into large political units. ChiYao, the language of the Yao people, did not suffer the same fate as Ngoni. Even today, chiYao is widely spoken by Yao people. A further important point about the Yao is that many of them adopted Islam as their religion. This, however, is not attributed simply to the early Yao contacts with the coastal people. Large-scale conversions to Islam were a relatively late phenomena which was apparently indirectly facilitated by the establishment of the colonial order.[12] Prior to the 1890's neither the Arabs nor the few Yaos converted to Islam would seem to have had the "time or need to pursue an active Islamic conversion programme".[13] Only after the defeat of the slave traders, when relative peace and freedom of movement had been established by the British administration, did effective Muslim proselytism really begin.[14]

The Lomwe were the last group of Bantu people to enter and settle in the Malawi region. They are the only group whose main body settled in the country after the establishment of colonial rule. Small groups of Lomwe people had been in the area at an earlier period, but these had tended to be mixed with such other groups as the Yao and the Nyanja or Mang'anja and had thus never established a distinct presence. Such absorption must have been all too easy as the Lomwe shared the basic cultural patterns of the Yao and Nyanja people occupying the area. Indeed, the Lomwe and the Yao were kindred groups who had originated from the same region in what is today Mozambique. The arrival of the main body of Lomwe people for permanent settlement in Malawi is put at about 1899.[15] Lomwe groups continued coming in for the next two decades.

The Lomwe fled their original homeland in Mozambique because of the atrocities of the Portuguese feudal administration in the prazos and also because of famine. In British Central Africa, they became the chief source of cheap labour in the growing European-settler industry. Then commonly and misleadingly known as Anguru, the Lomwe became victims of much negative stereotyping from their European and African hosts. They also bore the brunt of the exploitation of African labour on European estates under the infamous Thangata system - a thinly-disguised form of forced labour.[16] Their inner resilience and progressive instincts, however, soon earned the Lomwe greater recognition and respect. Their main settlements were over what is today Mulanje District, among the Nyanja and Mang'anja people.

Little has been written about the Sena people who also migrated from Mozambique in the 1880's. They settled over the southern tip of the Malawi region, among the Mang'anja groups. Sena culture bears close similarities to the cultures of the people of northern Malawi. Unlike other major groups of the south, the Sena are a patrilineal people who trace descent through the male line. The Sena constitute the greater part of the population in present Chikwawa and Nsanje Districts.[17]

2. The Swahili-Arab Penetration

The people living in the Malawi region had been in contact with the outside world long before the arrival of British pioneers. Early British arrivals were not, as they often assumed, "entering a largely closed society with little concept of the outside world".[18] Of the various influences already operative in the area, the Swahili-Arab penetration calls for specific mention.

Arab and Persian settlements on the east coast of Africa just north of the Ruvuma river date as far back as around 975 A.D., that is, long before any manifestation of Portuguese interest in the area.[19] At first Malindi, then Mombasa, then Kilwa-Kisiwani, and finally Zanzibar, successively became headquarters of Arab traders. Here, as Pachai put it

> ...the Persians and Arabs traded and intermingled with Africans, marrying African women and influencing African culture in the development of a new language, kiSwahili, as well as in dress and religion. When the Portuguese came to Sena and Tete in 1531, they found eastern trading communities and settlements already existing in these places. A number of kiSwahili words were already part of the local African language.[20]

The main items of trade sought by the Arabs were ivory and slaves. There was also a demand for timber, tortoiseshell, leopard skins and gold.

Eventually, splinter groups of "Arabs" - mostly people of mixed Arab-African blood and Swahili or Arabised Africans - established settlements further in the interior. In the Malawi area, there were mainly two such settlements, one at Nkhota Kota and another at Karonga, on the western shores of Lake Malawi. A party of Zanzibaris led by Jumbe Salim bin Abdallah established a permanent settlement at Nkhota Kota in 1840. Through diplomatic tact, military alliances with local chiefs, trade and slave raiding, a succession of Jumbes consolidated their position at Nkhota Kota. They became influential in local politics. Their wealth - much of it reckoned in slaves and ivory, the possession of firearms, and the fact that they also acted as representatives (walis) of the Sultan of Zanzibar, earned the Jumbes power and prestige. They became a major obstacle in the way of the British colonial enterprise in the area. The last (fourth) of the Jumbes was charged with murder by the British and deported to Zanzibar in 1894; and in 1895, a British agent took over the government of Nkhota Kota.[21] Mlozi, the leader of Swahili Arabs who had settled among the Ngonde in Karonga, had an even less fortunate end. From about 1887, Mlozi and his allies had brought the Karonga area into turmoil with their slave raids. Mlozi's attempts to consolidate his influence in the area had been met with fierce resistance, first by the local Ngonde, then the African Lakes Corporation - a British company which

had established a branch in Karonga in 1884, and eventually the British administration. In 1895, Sikh and African troops led by a British captain moved against Mlozi. After his capture he was tried by Ngonde chiefs and hanged.[22]

The Arabs who had settled in the Malawi area were not missionaries; they had come to trade and not to convert, or to establish new values among, the local populations. In general, the local people continued to be governed by their traditional rulers and to adhere to traditional customs. The Arabs made no attempt to substitute Islamic law for local African laws. The Malawi Islamic tradition is traceable not only to the few Arabs who had settled in the country, but to the overall Arab presence along the east coast of Africa. At the same time, the spread of Islam in the area owes less to Arab proselytism than to the enthusiasm of a few local African teachers. In the words of Robert Greenstein:

> The spread of Islam in Nyasaland cannot ... be fully attributed to outsiders from the East African coast. Most Muslim communities generally agree that the two men responsible for the success of Islam were Shaykh Abdalla bin Haji Mkwanda of Kachulu (Bibi Kulunda's area) and his pupil, Shaykh Sabiti bin Muhammad Ngainje of Mpoche village, Mtengula, Portuguese East Africa. Both men trained numerous waalimu, and the latter supervised religious instruction and the erection of mosques in the areas of Chowe, Jalasi, Kawinga, Zomba, Chiradzulu, and Mlanje. The proselytism focused on the Yao and lakeside Cewa and was so successful that by 1921 some 73,015 claimed to be Muslims.[23]

Indeed, it is interesting to note that the spread of Islam in Malawi mainly took place after Christian missions had become well established in the country. There might well have been a connection between the spread of Islam and African reaction to Christian, European, presence.

Arab activities had no doubt contributed to the opening-up of Malawi and surrounding areas to the wider world. The coastal culture which the people of the interior had come in contact with could be traced further afield to Arabia, Persia, and even India. In reality, it was not only the Eastern world which had been opened to the peoples of Malawi by contacts with the Arabs. At Zanzibar, there had been extensive contacts between the Arabs and the Western world. By mid-nineteenth century, Zanzibar could boast American, British and French consulates. Through their involvement with the Arabs, the inhabitants of the Malawi area were also beginning to acquire some ideas about people of the Western world, who would come to dominate their lives.[24]

3. European Missionary Enterprise

Hardly had such groups of people as the Ngoni, Yao and Arabs settled down in Malawi than another force, the missionary enterprise, appeared on the scene. As an instrument of change, the arrival of the missions was to exceed any other previous event in its impact on the people of Malawi. Whether consciously or unconsciously, there can be no doubt that the missions paved the way for British colonial rule with all its consequences and implications. In short, without the missions there could be no Malawi as we know it today.

Christian missionary settlement in the Malawi region was inspired by the legendary Scottish explorer, Dr. David Livingstone (1813-73). Although preceded by the Portuguese, Livingstone was the first European to visit what is now Malawi with the firm intention of bringing the area to the attention of

the Western powers and who actually succeeded in doing so. Between 1859 and the time of his death in 1873, he visited the area twice and pursued a tireless campaign, urging the people of his country to open up this part of Africa for Christianity and lawful commerce.[25]

The first response to Livingstone's plea came within his lifetime with the launching of the Universities Mission to Central Africa (UMCA), mainly by the Universities of Cambridge and Oxford. In 1861, the UMCA set up a station at Magomero, between Zomba and Blantyre. This place proved inhospitable and the station was moved to Zanzibar. The mission returned permanently to the area of present-day Malawi in 1885, when it set up a station at the island of Likoma on Lake Nyasa (Malawi). From here the mission expanded.

Meanwhile, other missions had arrived in the area. After the death of Dr. Livingstone, the Free Church of Scotland and the Established Church of Scotland set up missions to honour Livingstone's pleas and commemorate his achievements. The mission of the Free Church of Scotland was Christened the Livingstonia Mission, after Livingstone, and began its operations in the country in 1875.[26] The Overtoun Institution, which was founded in 1894 at Khondowe, northern Malawi, is mainly responsible for the immense fame of the Livingstonia Mission. This institution became a nucleus of higher learning for Africans in Malawi and neighbouring regions. The Established Church of Scotland named its mission in Malawi after Livingstone's place of birth in Scotland, Blantyre. The Blantyre Mission was opened in 1875 in the present Blantyre

District. In 1909, the Blantyre Mission established the Henry Henderson Institute, the equivalent of the Overtoun Institution.

Non-Anglican and non-Scottish missions also established themselves in the country. The Dutch Reformed Church Mission arrived in 1859 and established stations in central Malawi. The Dutch Reformed Church had an organisational structure based on elders, similar to that of the Scottish missions. In 1924, the Presbyteries of the Livingstonia and Blantyre Missions were merged to form the Church of Central Africa, Presbyterian (CCAP). Two years later, the Dutch Reformed Church (the Nkhoma Presbytery) was also admitted to the CCAP.

The year 1892 saw the arrival of Joseph Booth, the most controversial of European missionaries. Booth engineered the establishment of the Zambezi Industrial Mission, the Nyasa Industrial Mission, and the Seventh Day Adventist Mission. It was by Joseph Booth that John Chilembwe - the leader of a 1915 African uprising against European rule and founder of the Provident Industrial Mission - was initially inspired to work, and even die, for the advancement of the African people.

The Montfort Marist Fathers and the White Fathers established Catholic missions in the country in 1901 and 1902 respectively. Although the Catholics were late in coming, they soon outstripped the earlier arrivals in the size of membership, although not in overall influence.[27] The arrival of the South African General Mission, whose operations were concentrated mainly in Northwestern Rhodesia, completed the

roster of missionary bodies which had been established in the country before World War I.

Spreading the Christian gospel was one of the basic aims of the missions. In their churches and tours of African villages, the missionaries were urging Africans to abandon traditional religious practices "and to accept the truths of the gospel as a complete code of conduct".[28] The missions, of course, did not speak with one voice, for each denomination strove to stamp its own version of Christianity upon the local scene.

The advancement of literacy among Africans was another basic aim of the missions. As mission stations and churches proliferated, so too did mission schools. The missionary contribution to African education during the colonial era cannot be overestimated. From small open space gatherings to such complex institutions as the Overtoun, mission schools drew thousands of Africans into the orbit of Western culture.

It may be noted in passing that although the colonial administration was an early beneficiary of missionary endeavours in the field of education - in the sense that many mission-educated Africans were utilised by the administration (mostly as messengers, clerks, artisans and interpreters), the colonial government was slow in assuming an active role in the promotion of African education. It was only in 1926 that a government-organised education system was introduced. Even thereafter, the Government shouldered only about 10% of the total cost of education.[29]

Mission education programmes varied markedly in content and emphasis, reflecting major cleavages in the thinking of the missions as to the desired impact of Western influence on the African populations. For example, there were some missions which advocated the type of education which merely made Africans better Christians and better subjects without radically altering their social, political and economic environment. Catholic and Anglican bodies, in particular, were closely identified with this type of approach,[30] which earned the missions much praise from government officials in the wake of the Chilembwe rising in 1915.[31] On the other hand, there were those, most notably the Scottish, missions whose aims were to bring about an economic and social revolution among Africans. In the rather apt and paraphrased imagery of one of the founding fathers of the Livingstonia Mission, the desire of the latter missions was "to create a purified Chicago in Central Africa".[32] The very composition of the first party of the Livingstonia Mission testified to the "industrial" intent of the mission. Only one member, Dr. Robert Laws, was an ordained minister. The rest were five artisans : a sailor, an engineer, a gardener, a blacksmith and a carpenter. The party was initially headed by a warrant officer of the Royal Navy.[33] Even Dr. Laws (who soon assumed the leadership of the mission and who was to stay in the country for fifty-two years) was not just a clergyman, but was also a qualified medical doctor whose other interests included meteorology and linguistics.

The ways in which the missions fostered the process of Westernisation in the country were by no means confined to

direct teaching and preaching. As stated by Rotberg:

> ...the missionary contribution was also evident in innumerable other ways. His tours of the villages and an entrepreneurial role that has generally been underestimated played a large part in opening up the country to Western influence. The missionary was a trader; he stimulated African desires for Western products and supplied those wants by a complicated transport, sales, and service network. The missionary was compelled to protect his trade routes and to preserve order on the stations. He therefore became a lawgiver, a policeman, a prosecuting attorney, and a judge....The missionary, whether trained or untrained, was also called upon to heal the sick and comfort the dying. In general, missionary assistance gradually drew Africans into the Western orbit.[34]

Missionary presence in the Malawi area was a major contributing factor to the eventual introduction of British colonial rule in the country. At the time of the arrival of the missions, the Malawi area was in a state of constant turmoil. The clash of various African groups continued; Arab and African slave traders were intensifying their activities; and the Portuguese were beginning to exert their influence in the area. The missions got involved in local squabbles and were under constant threat from slave traders. Their plight, but also the negative publicity of some of their attempts to exercise civil powers within the vicinity of their stations,[35] focussed the attention of the British people on the possibility of establishing a British Protectorate in the area.

4. Outline of Constitutional Developments

A British Protectorate was declared over what was then known simply as the Nyasaland Districts in May, 1891. A local administration was set up in accordance with the provisions of the African Order-in-Council, 1889. The head of the

administration was entitled Her Majesty's Commissioner and Consul-General[36] and was endowed with powers to introduce ordinances, proclamations, rules and regulations subject to approval by the Foreign Office. In April, 1904, control over the administration of the territory was transferred from the Foreign to the Colonial Office. In theory, however, the country was never annexed as a colony, but remained a Protectorate. In 1902, the British Central Africa Order-in-Council introduced the modern constitution of the Protectorate.[37]

New constitutional provisions were introduced under the Nyasaland Order-in-Council in July, 1907.[38] By virtue of this Order-in-Council, the designation of the country was changed from British Central Africa Protectorate to Nyasaland Protectorate; the title of Commissioner and Consul-General was replaced by Governor and Commander-in-Chief;[39] Executive and Legislative Councils were for the first time created. The Legislative Council was made up of the Governor, the Government Secretary, the Government Treasurer, the Attorney-General and other official and unofficial members appointed by the Governor. The Executive Council was composed of the Governor and the ex-officio members of the Legislative Council, namely the Government Secretary, the Treasurer and the Attorney-General. Up to 1949 both the Legislative and Executive Councils consisted of Europeans only. African interests were supposed to be represented by a missionary appointee to the Legislative Council.[40] No provision was made for the interests of Asians, who were settling in the country,

mostly as retail traders.[41] The Legislative and Executive Councils were created to advise the Governor. The creation of these bodies did not therefore put any new limits on the powers of the Governor. In the words of Pachai: "In effect what was introduced in 1907 was the principle of consultation without introducing the elements of constraints on the Governor's position".[42]

The introduction of the system of indirect rule in 1933 marked the start of official attempts to involve Africans in the administrative and policy-making processes. Under the Native Authority Ordinance, 1933,[43] African chiefs and Principal Headmen gazetted as Native Authorities were empowered to make rules and orders on various matters within their respective areas of jurisdiction.[44] In 1944 and 1945, three Provincial Councils were established. These were advisory and non-statutory bodies consisting of Native Authorities selected from District Councils of chiefs or Principal Headmen plus a minority of some other Africans. From among the membership of the Provincial Councils, a Protectorate Council was established in 1946.

In 1949 a limited, but important, step was taken when the Protectorate Council was invited to submit five names to the Governor out of whom the Governor could nominate two members to serve on the Legislative Council. Thus, for the first time, two Africans became members of the Legislative Council[45] (In 1953 the number of African members was increased to three). In the same year, 1949, the Indian Chamber of Commerce was also invited to submit up to three names from

which the Governor nominated a single person to represent Asian interests.

The Provincial, Protectorate and Legislative Councils constituted official channels through which African views could be put forward by the Africans themselves. On important matters of policy, however, the African voice still did not carry much weight with the colonial administration. It was the commercial sector of the European settler community which exerted an influence vastly disproportionate to its actual numbers. It was the voice of this sector which, at least in the short run, carried the day over the issue of Nyasaland joining Northern Rhodesia and Southern Rhodesia in a Federation of three countries.

The Federation (Constitution) Order-in-Council was enacted in August, 1953.[46] The Federation of Rhodesia and Nyasaland came about against the will of the majority of Africans in Nyasaland. African opposition to the Federation soon transformed into opposition to colonial rule in general and into calls for a more representative government. It was not so much the chiefs or headmen (whom the colonial administration insisted on treating as the true representatives of African people), but voluntary African movements or associations which became increasingly important in the voicing of African protest. "Native Associations", mainly comprising members of the indigenous intelligentsia, began to appear in Nyasaland as early as 1912 when the North Nyasa Native Association was formed by Africans around the Livingstonia Mission.[47] Several Native Associations had been created by the 1930's.

In 1944, the various Native Associations joined to form the Nyasaland African Congress, the precursor of the present ruling party, the Malawi Congress Party.

In 1955, provision was made for elections to be held for the non-official representatives on the Legislative Council.[48] Six non-Africans would be elected on one electoral roll and five African representatives would be chosen by the Provincial Councils, on a different roll. In the first elections, which were held in 1956, each of the five African representatives elected to the Legislative Council spoke as a representative of the Nyasaland African Congress.[49] Thus, perceptibly, the role of leading the African population was being shifted from the traditional chiefs to the indigenous intelligentsia. In 1959 African representation on the Legislative Council was increased to seven members. The result of the creation of one roll for all non-Africans was, ironically, the elimination of Asian representation on the Legislative Council.[50]

Following major political disturbances in 1959, a new constitution was agreed upon during the Nyasaland Constitutional Conference which was held at Lancaster House in London from July to August, 1960.[51] The new Constitution provided for a Legislative Council of twenty-eight elected members and five officials and an Executive Council of ten members, five officials and five non-officials. There were two voting rolls for the Legislative Council, the upper roll with eight members and the lower roll with twenty. Qualifications based on education, income and property practically

ensured that the upper roll would be dominated by Europeans. Elections under the 1960 Constitution were held in August, 1961.[52]

After the electoral victory of the present ruling Malawi Congress Party in the 1961 elections, the stage was set for the further constitutional talks that were held at Marlborough House, London, in November, 1962.[53] Here a constitution for internal self-government was agreed upon. Internal self-government was achieved in 1963. The Executive Council was replaced by a Cabinet headed by the country's first Prime Minister. The Legislative Council was re-named the Legislative Assembly. For most purposes, the Cabinet would not be advisory to the Governor. In September, 1963, new provision was made for a Legislative Assembly of fifty-three members, fifty chosen from a general roll and three from a special roll reserved for Europeans. European representation was terminated in 1973; Asian representation had ceased in 1961. In December, 1963, only ten years after its creation, the Federation of Rhodesia and Nyasaland was dissolved.

Malawi became an independent sovereign state on 6 July, 1964. Exactly two years later, the country achieved its present republic status. The Republic of Malawi (Constitution) Act, 1966, provides for an elected President as Head of State. Executive power is vested in the President. Cabinet Ministers, chosen by the President, are responsible to him. Legislative power is vested in a unicameral National Assembly of elected members. However, the President may appoint an unlimited number of nominated members. The Constitution provides for

the Malawi Congress Party as the only legal national party. The Party meets annually in a National Convention which can deal with a variety of matters of national interest, including moral and social issues. Questions relating to family law have also been addressed by the Party. Some of the declarations on marriage law and practices are considered in the fourth chapter of this study.

5. Some Elements of the Administration

Administering what, in relation to the meagre resources available, was a vast territory, with poor communications, was a major problem for the British colonial authorities. Perhaps it says something about the industry and resourcefulness of the people involved that before long the life of almost every individual African became affected by the presence of the boma.

The district administrator, invariably a British officer, was without doubt the hub of the colonial administration. The broad policy decisions were, of course, ultimately taken between the Governor (Commissioner) and the Colonial (Foreign) Office. Still, the district was the main unit of administration, and it was on the shoulders of the district administrators that the many burdens and responsibilities of administration rested. In the words of one historian:

> ...these men were required to be resourceful and enterprising in dealing with a host of problems ranging from bridge building to shooting marauding animals, but their primary duty was to represent the government, maintain law and order and collect taxes....Although it has in recent years become fashionable to denigrate the colonial service official, the individual achievements of these

> men did much to ensure the relatively efficient functioning of administration at district level where the main contact between government and the people lay.[54]

The district administrators had been known by various names, including "Collectors", "Residents", "District Officers" and "District Commissioners".[55] There were also "Assistant Collectors" or "Assistant Residents" etc., who shared the duties of district administration. The number of districts increased with each new demarcation. The first Commissioner, Johnston, started with four districts in 1892; the number had increased to twelve in 1894; and by 1922, there were twenty districts. There are now twenty-four or more districts (see Maps 2 and 4).

When Provincial Commissioners were appointed for the first time in 1921, the hierarchical structure from the Governor through the Provincial Commissioners to the District Commissioner took shape. The office of the Chief Secretary (Secretary to the Administration) also calls for specific mention. The Chief Secretary was the channel of communication between the Governor on the one hand and the ever-increasing number of Heads of Departments, the Provincial Commissioners and various other bodies operating in the country, for example, the missions, on the other. He was Head of the Civil Service. Most matters of policy were controlled and defined by the Secretariat. For example, the Chief Secretary played a major role in defining policies regarding marriage legislation.

At first, the British authorities had no clear policy as to whether or not, or to what extent, African traditional rulers should be involved in the administration. There were

clearly too few European officials to establish effective control, especially in the rural areas. There was thus an obvious need to utilise the African rulers or leaders in the administration. Instead, however, Johnston began his administration by a series of military campaigns of "pacification" against the more powerful chiefs or leaders. Whether the Commissioner had much choice in the matter is debatable.[56] Clearly, the chiefs he had moved against were themselves intent upon resisting the British intrusion. With an army based on a few hundred soldiers from India, Johnston managed to subjugate the African chiefs. In the process, the fabric of traditional authority was either undermined or altogether shattered. The "pacification" which had been won by military might led to the disintegration of traditional government and, eventually, to an administrative nightmare.[57]

Even as early as 1903, the officials had already begun to address themselves to the possibility of involving the Africans in the administration of the country.[58] Of course, it is useful to bear in mind that the purely indigenous forms of government and dispensation of justice did not altogether cease with the advent of the British administration. These, however, increasingly became weak. Within the framework of the direct administration by the British authorities, some use was made of the services of traditional leaders. As Pachai notes, however, these services:

> ...were obtained on an ad hoc basis. Traditional chiefs had no place in the statutory provisions of the administrative system. They were officially regarded as ineffectual, incapable and unnecessary.[59]

This view, that the traditional chiefs or leaders were ineffectual, continued to influence the policies of the British Government even after significant steps had been taken formally to involve African chiefs or leaders in the administration of the country. The system of direct British administration came to an end in 1933 when the Native Authority Ordinance and the Native Courts Ordinance[60] came into operation. Under these statutes, the system of "indirect rule", based on the Cameronian model of Tanganyika, was inaugurated. Under this system, African "chiefs"[61] as "Native Authorities" assumed some judicial, executive and legislative powers.[62] In these functions, these "Native Authorities" were closely "supervised", "guided" or "controlled" by the District Commissioners. The Native Authorities acted too much as agents of the British officials to retain any real capacity to facilitate the evolution of any truly representative local government.[63] It was, indeed, this issue that Lord Hailey addressed when he visited Nyasaland in 1935 and 1947.[64] Following the directions of the Colonial Office[65] in 1947, the Nyasaland Government moved steadily towards the idea of representative local councils.

Statutory local councils were introduced in 1953 under the Nyasaland Local Government (District Councils) Ordinance.[66] The Ordinance envisaged the creation of multiracial councils in all districts. For some time, the Native Authorities had been working with non-statutory councils, although they had nevertheless remained the main units of local government. However, from 1953, although they would remain part of the

system of local government, their real authority, even if not their nominal powers, would be diminished, as they were to be required to operate within the larger multiracial councils. More importantly, however, the 1953 Ordinance was to be introduced only gradually and not at once throughout the territory. Thus, by 1960, when the Ordinance underwent radical amendments, only a fraction of the Native Authorities had been affected.[67]

The system effected by the 1953 Ordinance had come under heavy attacks, particularly from radical African nationalists who saw it largely as an attempt to obscure the issues raised in connection with the imposition of the Central African Federation. Elections to the councils had largely been boycotted. In 1960, the 1953 Ordinance[68] and the Native Authority Ordinance (the latter had not been wholly repealed) were amended.[69] The Native Authorities and the District Councils now became separate units, the former remaining largely as agents of the central government. By further amendments in 1961[70] statutory District Councils would be constituted in all the rural districts; the majority of the members of the councils would be popularly elected; a smaller number of chiefs in each district would remain as ex officio members;[71] and the District Commissioners would relinquish their positions as Chairmen of the District Councils.[72] Although these developments partly reflected the recommendations of the Colonial Office of 1947, they really constituted the beginning of the post-colonial, African, administration. In the new context, the powers of the chiefs were further attenuated and their role became less clearly defined.

6. The Judiciary

Only a very brief word on the courts is really necessary in this Introduction.[73]

The history of the court system in Malawi may be divided into five phases. The first phase spanned the years between 1891, when the country was formally declared a British Protectorate, and 1902. In accordance with the 1881 Royal Instructions, the area was constituted into a local jurisdiction in 1891. The jurisdiction was exercised by the British Consular Court and the Supreme Court of the Cape Colony was constituted as the Court of Appeal for British Central Africa. Soon afterwards, in 1892, on the recommendation of the Commissioner and Consul-General, the Secretary of State for Foreign Affairs issued judicial warrants to a number of collectors to act as magistrates. Under the Africa Orders-in-Council of 1889 and 1893, the collectors could administer justice to Europeans and other foreigners. Although the collectors could administer justice even in the case of Africans, justice for the latter continued to be dispensed by the indigenous authorities, outside the framework of the colonial administration.

The second phase began in 1902 and lasted until 1933. Under the British Central Africa Order-in-Council, 1902, the High Court of the British Central Africa was constituted. This court had "full jurisdiction, civil and criminal, over all persons and over all matters in the Protectorate".[74] The British Central Africa Order-in-Council, 1902, also laid down the constitutional basis of the laws that would be applied

in the Protectorate. Under Section 15(2) of the Order-in-Council, it was provided that in the exercise of its civil and criminal jurisdiction, the High Court should:

> ...so far as circumstances admit, be exercised in conformity with the substance of the common law, doctrines of equity, and statutes of general application in force in England on the Eleventh day of August, 1902, and with the powers vested in and according to the procedure and practice observed by and before courts of justices of the peace in England and according to their respective jurisdictions and authorities at that date....

Under Section 20 of the Order-in-Council, it was provided that:

> In all cases, civil and criminal, to which natives are parties, every court (a) shall be guided by native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any Order-in-Council or Ordinance, or any Regulation or Rule made under any Order-in-Council or Ordinance; and (b) shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

The Subordinate Courts Ordinance, 1906, established courts subordinate to the High Court. These courts were divided mainly between District Courts, which had jurisdiction over non-Africans, and District Native Courts, which had jurisdiction over Africans. These courts were manned by administrative officers. Appeals from them lay to the High Court. In 1929[75] the District Courts and District Native Courts were reconstituted into first-, second-, and third-class Subordinate Courts. From 1948, the Government began to pursue a policy of relieving administrative officers of their judicial duties and entrusting these to professionally-qualified Resident Magistrates. There are currently four types of Subordinate Courts : the courts of the Resident

Magistrates and the courts of the Magistrates of the first-, second-, and third-Grade. Appeals from these courts lie to the High Court.

Thus, some features of the second phase in the evolution of the judiciary can be traced to the present day. However, the third phase began in 1933 and lasted until 1962. This is the phase of indirect rule, during which the Native Authorities were empowered to dispense justice among Africans. Appeals from the Native Authority courts went to the District Commissioners and then from there, to the Provincial Commissioners and finally to the High Court. In the case of sub-Native Authorities, appeals first went to the Native Authorities. The Native Authority courts applied customary law, although they also presided over certain minor criminal offences created by statute. The Native Authorities lost their judicial powers in 1962.

The introduction of Local Courts, under the Local Courts Ordinance, 1962,[76] ushered in the fourth phase. This Ordinance removed the judicial powers of the Native Authorities. The appellate functions of the District and Provincial Commissioners were also abrogated. Some of these officials, however, became Assistant Local Courts Commissioners who supervised local court work and trained staff. The former judicial functions of the Native Authority courts were assumed by the Local Courts. Thus, the Local Courts essentially applied customary law. In each district there was a Local Appeal Court to which appeals from the various Local Courts within the district lay. Appeals from the Local Appeal Courts lay

to the High Court. Appeals from the High Court were heard by the Supreme Court of Appeal. The latter was the highest court of the land. The Republican Constitution in 1966 abolished the appellate jurisdiction of the Privy Council.

The Magistrates' Courts continued as before. Thus, the court system in Malawi followed the common pattern in Commonwealth Africa. The customary-law courts and the English-styled courts were not completely separated. Such separation existed only at the lower levels. At the higher level, the High Court and the Supreme Court of Appeal handled appeals from both the Magistrates', and the customary-law courts.

The general movement in Commonwealth Africa has been towards the integration of the courts. In the fifth and current phase in the evolution of the Malawi judicial system, which began in 1969, the movement has been towards the opposite direction. Fundamental reforms introduced between 1969 and 1970 brought about a more complete separation between the "customary-law", and the "English-styled" courts. Under the Traditional Courts Act (cap. 3:03), the Local Courts were renamed Traditional Courts. More importantly, however, three Regional Traditional Courts, one in each region, were constituted. These courts were empowered to try the most important criminal offences (including murder and treason) and to order any sentence provided under the Penal Code, including capital punishment. The Regional Traditional Courts have no civil jurisdiction; neither do they have any appellate jurisdiction. They only hear criminal cases on first instance. By a further amendment to the Traditional Courts

Act in 1970, the National Traditional Appeal Court was constituted. This court is empowered to hear civil and criminal appeals from both the [District] Traditional Appeal Courts (formerly Local Appeal Courts) and the Regional Traditional Courts. Appeals from the Magistrates' Courts continue to be heard by the High Court and appeals from this court lie to the Supreme Court of Appeal.

The 1969-70 reforms were not introduced specifically to bring about a more complete separation between the "English-styled" courts and the "customary-law" courts. The immediate objective of the reforms was to give greater power to the Traditional Courts. At least with respect to criminal cases, the thinking was that these courts would be less incumbered by alien legal technicalities and therefore that they would administer justice in a way that was more satisfactory to the majority of the people. In general, the creation of these more powerful Traditional Courts was also intended to enhance the traditional character of customary law. The abolition of the appellate jurisdiction of the High Court in customary-law civil cases underlined the belief that an English-styled court, normally manned by British officials, was less likely to be sympathetic to traditional African values and customs.[77]

7. Economic Life Under Colonial Rule

Obviously, British colonialism meant the introduction of a cash economy and wage labour. At least in the early years, however, what Dr. David Livingstone had seen as complementary ventures, namely, Christianity and commerce, turned out to be

tragically contradictory. The ravages of the transactions in slaves which had partly led to the British intervention would be compounded by new, though comparable, forms of exploitation.

To this day, Malawi has remained a country of few natural resources. Agriculture, mainly at subsistence level, is the main occupation of the people. From the beginning, cash-cropping in large plantations was the main economic venture of European entrepreneurs. This led to an acute demand for land and human resources. Both of these were secured by means that were far from equitable or, indeed, much removed from slavery. The problems of land and labour were compounded by Government tax policies.

The Shire Highlands in the Southern Region was the most intensively exploited area. Here, many settlers "bought" large tracts of fertile land, reducing the Africans previously occupying these lands into a status of indentured serfs:

> By the 1920's, Africans who resided upon white-owned plantations in the Highlands had the option of either working there, paying a cash rental, or subjecting themselves to eviction and the long, rather difficult process of finding new plots on which to plant subsistence crops. If they remained tenants, whites told them what and when they should and could cultivate and, at arbitrarily contrived prices, purchased the resultant crops in lieu of rent. White managers refused to allow their tenants to grow maize and other foodstuffs for personal profit. They prevented Africans from cutting down trees in order to build huts in the customary manner. In an area where the accepted pattern of residence was matrilocal, whites denied young men the opportunity to live with their prospective in-laws. Although whites viewed these and a number of other constraints as logical and even necessary exercises in defense of private property, Africans considered them harsh and irrational abuses. An African who regarded whites and the coming of white rule with

> suspicion could have his worst fears confirmed by becoming a tenant upon a white-owned plantation.[78]

Africans who resided outside European plantations were not exempted from exploitation. They were drawn into European plantations by the need to fulfill their tax obligations to the Government. The colonial administration had insufficient financial means even for the minimum tasks of consolidating European rule and maintaining order. The colonial administration introduced a poll tax as early as 1892. This was payable by every male adult.[79] In many cases, the poll tax was later converted into a hut tax. Tax was sometimes deliberately used by the Government in order to "encourage" Africans to work for the planters. Wages were generally set at a monthly level corresponding to an individual's tax obligations. Thus, people worked simply to pay tax, which kept on increasing as Government commitments widened. The methods of enforcing tax collection were themselves highly oppressive,[80] often contravening the clear instructions of Whitehall.

Thus, within the territory, wage labour meant practically nothing in terms of the material wellbeing of the African people. In most cases, it meant suffering and rank exploitation. The result was that many Africans sought to better themselves materially by seeking employment in foreign lands, especially the countries of southern Africa. By 1903, writes Pachai:

> ...substantial information was already to be had in the country about the prospects outside....With the growth of the cash economy, more western goods were

> in demand. The practice of Indian shopkeepers of allowing credit facilities increased the volume of purchasers as well as debt into which the unsophisticated purchaser was drifting. A period of work outside seemed the best method of liquidating debts, purchasing luxury or status goods, earning cash for the payment of lobola or bride money and also satisfying one's curiosity about the world outside while at the same time raising one's standards, a point which missionary preaching and teaching never ceased to stress.[81]

From 1903, when about 1000 labourers travelled abroad, except for occasional interruptions, each succeeding year saw greater numbers of [Malawians] leaving the country for work in other African countries. Again, to quote Pachai:

> In 1935 a commission was set up in [Malawi] to report on migrant labour, on the effect of this on village life and on the probable future effects on the Protectorate as a whole. The commission found a gloomy picture : 25-35 per cent never returned home; many married foreign wives or entered into irregular unions. It also found that at one time about 120,000 Africans worked outside the country - or one in every four male adults.[82]

Even within the territory, the number of Africans involved in wage labour was gradually increasing. Trading and cash-cropping by the Africans themselves also increased.

The ascendancy of the money economy also meant the beginning of the process of urbanization. Many people flocked to the towns in search of a living. The process of urbanization led to the forced integration of different communities of people. Marriages across traditional groups became common. In the new context, the social concepts and beliefs of individual communities became less meaningful. The new economic systems also led to the ascendancy of the nuclear family, the weakening of traditional authority and the emergence of new patterns in social relationships. Prostitution,

single-parentage and loose informal unions between men and women became more prevalent. Even the rural areas were not shielded from these developments. Everywhere, the new economic systems put a great strain on traditional social structures and mechanisms of social control. Thus, while the people remained basically poor, the new economic forces brought about fundamental changes in African social life.

NOTES

Chapter One

1. B. Pachai, Malawi : The History of the Nation (London : Longman Group Ltd., 1973), The Early History of Malawi (London : Longman Group, 1972); John Pike, Malawi : A Political and Economic History (London : Pall Mall Press Ltd., 1968); Robert I. Rotberg, The Rise of Nationalism in Central Africa : The Making of Malawi and Zambia (Cambridge-Massachusetts : Harvard University Press, 1967); Samuel Josia Ntara, The History of The Chewa (Wiesbaden : Franz Steiner Verlag GMBH, 1973) - edited by Beatrix Huntze, translated from chiChewa by Kamphandira Jere, with comments by Harry W. Langworthy; Rodrick J. Macdonald (ed.), From Nyasaland to Malawi (Nairobi : East African Publishing Home, 1975); Carolyn McMaster, Malawi : Foreign Policy and Development (London : Juhan Friedmann Publishers Ltd., 1974); Lucy Mair, The Nyasaland Elections of 1961 (London : The Athlone Press-University of London, 1962); Colin Baker, The Evolution of Local Government in Malawi (Ibadan : The Caxton Press, 1975); George Simeon Mwase, Strike A Blow and Die (London : Heinemann Education Books Ltd., 1975) - edited by Robert Rotberg; John McCracken, Politics and Christianity in Malawi 1875-1940 : The Impact of the Livingstonia Mission in the Northern Province (Cambridge : Cambridge University Press, 1977); T. David Williams, Malawi : The Politics of Despair (London : Cornell University Press, 1978); R.B. Boeder, Silent Majority - A History of the Lomwe in Malawi (Pretoria : African Institute of South Africa, 1984); K. Nyamayaro Mfuka, Missions and Politics in Malawi (Kingston-Ontario : Brian Martin Ltd., 1977); Ian Linden, Catholic Peasants, And Chewa Resistance in Nyasaland 1889-1934 (London : Heinemann Ltd., 1974); George Shepperson (ed.) and Thomas Price, Independent Africa : John Chilembwe and the Origins, Setting and Significance of the Nyasaland Native Rising of 1915 (Edinburg : The University Press, 1958); Martin Chanock, Law, Custom And Social Order : The Colonial Experience in Malawi and Zambia (Cambridge : Cambridge University Press, 1985).

2. Source : Dept. of Information, Blantyre; and Ministry of Finance, National Statistics Office, Zomba.

3. For details, see Pike, op. cit., pp. 27-61; Williams, op. cit., pp. 21-38; Pachai (1973), pp. 1-15; McCracken, op. cit., pp. 2-16.

4. These are quite different people from the Tonga of Zambia.

5. See McCracken, op. cit., pp. 3-7; Williams, op. cit., p. 27; Pachai (1973), pp. 9-12; and Pike, op. cit., pp. 48-50.

6. See McCracken, op. cit. and Pike, op. cit.

7. Pike, op. cit.

8. See generally citations in note 1.

9. See Williams, op. cit., p. 34.

10. See McCracken, pp. 8-9, for specific examples.

11. See Pike, op. cit., pp. 58-61 and Williams, op. cit., pp. 28-32.

12. See Robert Greenstein, "The Nyasaland Government's Policy Towards African Muslims 1900-1925", in From Nyasaland to Malawi, p. 144.

13. Pachai, (1973), p. 56.

14. Greenstein, op. cit., p. 145.

15. Thomas Galligan, "The Nguru Penetration Into Nyasaland, 1892-1914", in From Nyasaland to Malawi, p. 108. See also R.B. Boeder, op. cit., p. 14.

16. For a closer examination of the problem of Thangata, see K. Mkandawire, Thangata : Forced Labour or Reciprocal Assistance (Zomba : Research and Publication Committee of the University of Malawi, 1979).

17. See G.M. Hochstenbach, Towards a True Christianization of Marriage And Family Life in the Lower Shire Valley of Malawi (Essay submitted for the Diploma of Pastoral Studies, Pastoral Institute of Eastern Africa, Saba, 1968).

18. See McCracken, op. cit., p. 12.

19. See Pachai, pp. 41. Portuguese intrusion in the region began from the third decade of the 16th Century.

20. Op. cit., (1973), p. 41.

21. Ibid.

22. The Ngonde and the British had acted as allies. British rule had not yet been extended to the Karonga area.

23. Op. cit., pp. 145-6. Statistics collected in 1928 show that there were 105,000 Muslims in the country, 95% of whom were Yao. See Pachai, (1973), p. 179.

24. See McCracken, op. cit., p. 13. Also see Martin Chanock, "Development and Change in the History of Malawi", in Pachai, (1972), p. 437.

25. For a brief survey of Livingstone's endeavours, see McCracken, op. cit., p. 437.

26. See citations in note 1 generally.

27. By 1910, for example, the White Fathers baptism figures of 13,061, compared with Livingstonia's 10,355 and Blantyre Mission's 3,410 baptisms. See Mfuka, op. cit., p. 37.

28. Rotberg, op. cit., p. 9.

29. Pachai, (1973), p. 72.

30. See McCracken, op. cit., p. 177.

31. See Statement of A.G.B. Glossop of the UMCA during the inquiry into the Chilembwe rising, see Shepperson and Price, Independent Africa, p. 339. See also Mfuka generally.

32. James Stewart of Lovedale College, quoted by McCracken, op. cit., p. 28.

33. McCracken, op. cit., pp. 33-4.

34. Op. cit., pp. 10-11.

35. See e.g. the well-publicised case of officials of the Blantyre Mission, who flogged an African to death without having sufficiently established his guilt. Rotberg, op. cit., p. 7 and McCracken, op. cit., pp. 65-8.

36. Harry H. Johnston was the first Commissioner.

37. 11th August, 1902, no. 663, enacted under the Foreign Jurisdiction Act, 1890 (53 and 54 vict. c.37).

38. Nyasaland Order-in-Council, Royal Instructions of August, 1907.

39. Alfred Sharpe was the first Governor.

40. Dr. Alexander Hetherwick of the Blantyre Mission was the first such representative.

41. By 1949 there were about 4,800 Asians in the territory.

42. (1973), p. 238.

43. 13 of 1933.

44. See Chap. 7 for further details.

45. These were Alexander Muwamba and Ellerton Mposa.

46. Federation of Rhodesia and Nyasaland (Constitution) Order-in-Council, 1953 (no. 1199). See Rotberg, op. cit., pp. 99-134; Pachai, (1973), pp. 256-266; Williams, op. cit., pp. 128-160; and Pike, op. cit., pp. 103-142.

47. See McCracken, op. cit., pp. 257-273; Pachai, (1973), pp. 225-235; Rotberg, op. cit., pp. 116-124.

48. Legislative Council Ordinance, 25 of 1955.

49. For details, see Pachai, (1973), pp. 240-41.

50. There were over 8,490 Asians, compared to 6,730 Europeans, in the country. An overwhelmingly high percentage of the Asian population were disqualified from voting by the requirements of literacy, ability to speak English and property (£200 annual income or ownership of property worth £250). One had also to be a British subject or a resident in the Protectorate for two years or more.

51. For details, see Lucy Mair, The Nyasaland Elections of 1961.

52. Ibid.

53. See Pachai, (1973), p. 243.

54. Pike, op. cit., p. 95. See also Pachai, History of the Nation, pp. 181; Colin Baker, The Evolution of Local Government in Malawi (Ibadan : The Caxton Press, 1975). Much of the material used in this section is obtained from an "Outline of the History of the Administration of the Nyasaland Protectorate" which ~~introduces the Government archives of the MNA, Zomba.~~ appears at the beginning of the index to the Government archives, MNA, Zomba.

55. The term "District Commissioner" is the one which will mostly be used in the following study. Occasionally, however, the term "Resident" is also used.

56. Cf. Pachai, op. cit., p. 181, expressing the view that Johnston had other alternatives to military subjugation.

57. See Baker, op. cit., p.2.

58. Pachai, op. cit., p. 182; Baker, op. cit., p. 4.

59. Pachai, Ibid.

60. No. 13 and no. 14 of 1933, respectively.

61. Some of the Native Authorities were traditional chiefs, but others had been appointed entirely by the administration. Even the traditional chiefs themselves were in effect assuming an altogether new role. The area of their jurisdictions was defined by the administration.

62. See Chap. 7 for some relevant details.

63. See note 62 above.

64. See Lord Hailey, Native Administration and Political Development in British Tropical Africa (London : H.M.S.O.)

(published sometime between 1940-44), pp. 263-64. Hailey's visits were in connection with the now famous Africa Survey (London : Oxford University Press, 1938).

65. Arthur Creech Jones, Secretary of State for the Colonies to the Governors of the African Territories, 25th Feb., 1947 : See Baker, op. cit., pp. 42-3 for details.

66. 48 of 1953.

67. See Baker, op. cit., p. 47.

68. No. 8 of 1960.

69. No. 5 of 1960.

70. No. 30 of 1961.

71. In a few cases, paramount chiefs became "presidents" of the council - a ceremonial position.

72. The Commissioners were later reinstated as "advisers" to district councils.

73. This part also relies much on the "Outline", note 54.

74. Section 15(1).

75. The Courts Ordinance, no. 24 of 1929.

76. No. 8 of 1962.

77. See Williams, op. cit., p. 251. See also Hansard, Nov., 1969, for relevant debates.

78. Rotberg, Introduction to Mwase's Strike A Blow and Die, pp. XVI-XVII.

79. A 14 year old was deemed to be an adult.

80. See Rotberg, op. cit., pp. XVIII-XIX.

81. Op. cit., pp. 119-20.

82. Op. cit., p. 126.

P A R T I

CUSTOMARY LAWS OF MARRIAGE AND DIVORCE

CHAPTER TWO

CUSTOMARY LAWS OF MARRIAGE AND DIVORCE - A General Introduction and Legal Aspects Relating to the Formation of Marriage

1. Introduction

This is one of three chapters which offer a review of the principal rules of customary law governing marriage in Malawi.

The study carried out in the three chapters is not intended to provide detailed descriptions of rules or principles governing each and every aspect of marriage in the manner of the Restatement of African Law projects.[1] Only a limited number of issues are covered in these chapters.

The matters selected for discussion are those which more clearly bring out the distinctive features of customary marriage and, therefore, those which serve to illustrate actual or potential conflicts of customary law with both the imported Western principles of marriage and the changing social conditions within African society. The main task of the discussions is to highlight legal responses to the process of social change and to new patterns of social relationships. In particular, the discussions describe legal developments in response to: the breakdown of the traditional kinship-structure which has led to the emergence of the nuclear family; the increased emphasis on freedom of the individual as against the traditional authority of the senior members of the family; the increased economic independence of individuals; and in general, the adoption or imposition of Western culture and values.

The material presented in each of the three chapters roughly corresponds to a particular aspect of marriage law. The present chapter examines selected items relating to the formation of marriage. These include capacity to contract marriage, essential consents, and other items relating to marriage preliminaries. The next chapter examines some of the consequences of marriage under customary law. The last chapter of the series deals with the dissolution of marriage and consequent rights and obligations. Still, there is much overlap in the material presented in the three chapters. Indeed, the division of these chapters is primarily intended to facilitate presentation and not to demarcate any thematic boundaries.

While it is not very difficult to recognise the changes which have taken place in African patterns of social and familial relationships, the attempt to depict the impact of modern influences on the development of particular rules of customary law must reckon with a plethora of obstacles. Chief among these is the lack of any extensive knowledge of customary law and its operation in pre-colonial societies. Anthropological writings provide one source of information. However, the fact that these were prepared for different purposes, by people whose main interest was not to ascertain rules in a legalistic sense, is only the lesser of several shortcomings of existing anthropological sources. Another shortcoming of these sources is that they all date from the twentieth century. They therefore mainly describe societies which had already come under the new, Western, influences. Where they purport to depict customary law in its prestine state, their accounts ought not to be regarded as amounting to much more than mere

reconstructions of the past. Furthermore, existing anthropological writings on Malawi are not comprehensive. Only a limited number of traditional societies have been investigated. Thus, even in the discussions which follow, most examples of specific rules or developments will tend to be drawn only from the somewhat limited number of societies on which there is ample material.

Even the rules of contemporary customary law are not always readily ascertainable. The law has remained unwritten. Although court records do exist, these are of limited utility. Most of the records do not contain much beyond a short narrative of the facts of the case and a simple, sometimes even cryptic, order of the court. In fact, there are important aspects of customary marriage on which it has not been possible to find adequate case material. In some of such instances reliance has been placed wholly on the works of anthropologists and other non-legal sources. Even where there are court records, it is not always possible to ascertain the existence of a particular rule of law, particularly if there are contradictions in the relevant decisions. There is no unifying principle under customary law by which contradictions in the judgements of the courts may be resolved. Decisions of the relevant courts do not strictly constitute binding precedents. Their value is, so to say, evidential rather than authoritative.

2. Social Grouping

The operation of customary-law rules of marriage cannot fully be appreciated without some acquaintance with traditional social groupings. These are now briefly surveyed as follows.

a) The Village

The village is the basic unit of settlement among the African communities of Malawi. Even today, with growing numbers of people establishing more-or-less permanent residence in urban centres, practically every member of the indigenous African population is, at least nominally, attached to some village. The village - mudzi (in chiChewa), muzi (in chiTumbuka), musi (in chiYao) or akaya (in chiNgonde) are some of its African names - is both a territorial and a social entity. Each group of people setting up a village recognises one person as the "leader". The leader is commonly referred to descriptively as "the owner of the village" (e.g. asyene musi in chiYao or mwene muzi in chiTumbuka). The title "village headman" introduced by the colonial administration has in various corrupted forms (e.g. hedemani in chiTumbuka) become part of indigenous vocabularies. Villages are indigenous institutions. They constituted basic building blocks of chiefdoms. However, the colonial administration recognised and reorganised these villages for colonial administrative purposes, especially for the collection of taxes. Administrative villages did not always coincide with customary villages. The colonial administration insisted on larger villages. Normally a village headman could not obtain government recognition unless he had at least twenty tax-payers under his charge. Headmen strove for government recognition because this conferred on them greater prestige, greater authority and a financial reward based on the amount of tax collected.[2] The terms "village" and "village headman" are used in this discussion in their customary, rather than administrative, context.

Villages differ in size and physical appearance. The size of a village could be anything from one cluster to a dozen or more clusters of dwelling units.[3] Usually, villages are compactly built and easy to discern as discrete units. However, some villages do exhibit different characteristics. The Tonga villages, for example, as Van Velsen noted:

> ...do not have the obvious physical apearance of villages, viz a collocation of dwellings clearly marked off from other similar units of habitation. In fact along parts of the lakeshore the population lives in a string of seemingly uncoordinated clusters which are generally within hailing distance of one another. In the hills the situation is slightly different. As one gets farther inland, more than a mile or so from the lake, the population becomes less concentrated and the distance between one group of hamlets and another may be greater. But here, too, villages as political units are not easily discernible for a stranger.[4]

The unity of the village, however, is manifested not only through the physical boundaries, but also through the social relationships of the people occupying it. Thus, even where the physical boundaries of a village are unclear, its corporate identity is always readily discernible by its members.

b) Social Groups Within the Village

The majority of the people in one village are related to each other and to the village headman by blood and/or marriage. Complete strangers might settle in a village with the consent of the village headman or a higher chief.

Many Malawian terms denoting social groupings lack precision. Different communities would use the same term to denote different types of social units. Even within one community a particular term can be used indiscriminately to denote a variety of social groupings. The term mbumba is a good example. The

term may refer to a simple or nuclear family consisting of a married man and woman with their children.[5] Mbumba may also describe the larger group of relatives who trace descent through either the male or female line to a common ancestor or ancestress.[6] In some matrilineal communities the group consisting of uterine brothers and sisters may constitute a mbumba with the eldest brother or maternal uncle as its head.[7] Mbumba may also refer only to a man's sister or sister's daughters, that is, to that group of a man's female kin who are likely to perpetuate the matrilineage which he represents.[8]

The smallest social unit in the village is the nuclear family or elementary family consisting of a married man and woman with their children, if any. Two very common Malawian terms for this unit are nyumba (literally, house) and banja. A polygynous man, together with each of his wives and their respective children, will normally be regarded as constituting a separate unit. The husband is invariably regarded as the head of the nyumba or banja. Members of each nyumba occupy a separate building or set or cluster of buildings, they cultivate separate plots of land and maintain separate food stores. Big livestock, such as cattle, are usually kept in a common pen. It is rare, however, for African households in the villages to consist entirely of members of the nuclear family. Relatives other than primary kin often form part of the household.

Within the village, members of the nuclear family form part of larger social groups within which relationships are effectively recognised for a variety of social purposes. The

composition of these groups vary from community to community. Among the matrilineal Yao, for instance, all daughters of a single woman constitute a distinct group called the mbumba. This is the unit which Clyde Mitchell calls "the sorority-group".[9] He explains as follows:

> Consistent with the Yao idea that men should take care of the affairs of the lineage, sisters look to their eldest brother when they are in trouble. This group of sisters in the care of their brother is called mbumba. In the plural acambumba the word refers to women in general, but in the singular it refers to a particular group of women in the way I have explained. The word is always used in the sense of 'so-and-so's mbumba', as mbumba Ja Ce Mayele.[10] The central concept here is the brother-sister link and I have accordingly translated the word mbumba as sorority-group.[11]

The brother in charge of the mbumba is called the asyene mbumba (the owner of the mbumba). His sisters rely on him on a variety of matters including marriage arrangements, illness, quarrels with husbands, and supervision of children. While the eldest brother is still young the functions of the asyene mbumba are discharged by the maternal uncle, the mother's asyene mbumba. The supervisory role of the latter does not entirely cease with the coming of age of the nephew. The roles of the maternal uncle and the brother over the latter's mbumba can therefore constitute a source of conflict between the two. If the elder brother fails to perform his duties as asyene mbumba the sisters may turn to a younger brother or brothers.[12]

The mbumba among the Yao and corresponding social groups among other matrilineal communities form parts of even larger groupings, the matrilineages. The matrilineage, which is also called mbumba (or big mbumba) by some people[13]- the Yao call it

mlango - is also found within the village. It consists of all the blood relatives who trace their descent through the female line to a first or common ancestress. The depth of a matrilineage within a village varies. Mitchell notes that among the Yao the depth of a matrilineage within a village is seldom more than five or six generations from the founding ancestress to the new-born children. He further observes that:

> The name of the founding ancestress is remembered and the descent of each member of the matrilineage can easily be recounted. The ancestress is known as the likolo or lipata, words which also refer to the trunk of a tree ... the founding ancestress is seen as the stem or root from which all members of the lineage have sprung, and the various sections of the matrilineage are seen as branches (nyambi).14

The senior man by generation and age is the leader of the matrilineage. It is from the members of his/her matrilineage that a person expects most help and whom he/she, in turn, is expected to help. Ideally, members of the matrilineage will act together to pay fines imposed on one of their member. They will support a member in quarrels and disputes. They will collectively seek redress if one of them is injured. An individual is in turn expected to share his wealth with members of his matrilineage.

In patrilineal communities the largest group within the village is the patrilineage, consisting of all blood relatives who trace descent through the male line to a first or common ancestor. Among the Tumbuka, for example, this group is called fuko. The senior man by generation and age leads the fuko. The leader will normally preside over the settlement of internal

disputes. The social rights and obligations of the fuko vis-a-vis an individual member and vice versa are similar to those described above in relation to members of a matrilineage.[15] Members of one fuko will normally have a common name. A village is often known by the common name of the lineage of the village headman. The village will normally have been founded by the first ancestor of this group. Its members will span more generations than other lineages found within the village. Members of the village headman's lineage also tend to enjoy a special political status. The lineage will normally be linked to similar groups within the village through its female members. Thus, members of the "smaller" or "younger" lineages are often referred to by members of the dominant lineage as baphwa, that is, maternal nephews.

c) The Emphasis on Kinship Ties

Kinship ties among Africans used to be carefully cherished and emphasised. One's prestige and material security mainly depended on the size of the group of people falling within the range of relationships which could be utilised for social and economic purposes. Duties founded on consanguinity were extended to a wider circle of kin. This was partly emphasised by the classificatory terminology characteristic of African kinship systems. An officer of the Nyasaland administration once observed that:

> The commonest cause of difficulty to the European is the use by English-speaking Africans of terms, which we are accustomed to apply to one individual only, to a large number of people whom the African regards as all standing in the same relationship to him. If an employee asks

> permission to attend his mother's funeral for the third time in a year he is not necessarily a liar, because he will call "mother" not only the woman who bore him but also everyone whom she calls "sister" and he will speak in the same way of a multiplicity of "fathers" and "children". The only way of settling a definite relationship in European terms is by asking whether a person referred to as "father" or "mother" is the actual biological parent of the speaker, and likewise when "children" have been spoken of.[16]

As Radcliffe-Brown pointed out, the significance of such terminology is not only that it brings within one's mental grasp a much greater number of kindred than is possible by the use of descriptive terminology (e.g. father's brother or mother's sister), but it also underlines the method of ordering relationships in the relevant societies. He wrote:

> The general rule is that the inclusion of two relatives in the same terminological category implies that there is some significant similarity in the customary behaviour due to both of them, or in the social relation in which one stands to each of them, while inversely the placing of two relatives in different categories implies some significant difference in customary behaviour or social relations.[17]

Persons addressed as "father", "mother", "sister", "brother", "son" or "daughter" could be called upon to serve surrogate or interchangeable roles with members of the nuclear family. Interactions with these people would normally be characterised by the same etiquette as that followed in relation to corresponding members of the nuclear family. Incest taboos, for example, would apply between a man and all women who are classified as his "sister" or "mothers" or "daughters". Indeed, this might partly explain the low incidence of pre-marital sexual intercourse and pregnancies which is said to have existed, for example, in the patrilineal Ngoni villages.[18] None or few

of the unmarried people within the village could indulge in sexual flirtation that was not in violation of the incest taboo.

d) Marriage, Family and Social Structure

Many of the family-law disputes that have come before the courts underline the problem of reconciling one basic aspect of African customary marriage with contemporary social life and ideas. At least in its traditional context, marriage under African customary law is to be seen primarily as a pact or an alliance between two bodies of relatives and only in a secondary aspect as a union between one man and woman:[19]

> In order to understand the African customs relating to marriage we have to bear in mind that a marriage is essentially a rearrangement of social structure. What is meant by social structure is any arrangement of persons in institutionalised relationships. By a marriage certain existing relationships, particularly, in most societies, those of the bride to her family, are changed. New social relations are created, not only between the husband and the wife, and between the husband and the wife's relatives on the one side and between the wife and the husband's relatives on the other, but also, in a great many societies, between the relatives of the husband and those of the wife, who, on both sides, are interested in the marriage and, in the children that are expected to result from it.[20]

The interest of the respective kin in the marriage is not only social in character as marriage creates rights and obligations capable of legal enforcement by or against them. As will be shown below, the very legal validity of marriage depends on the involvement of the kin.

The problem today is that the social context reflected in the collective aspect of customary marriage has changed fundamentally, particularly in urban centres, but even in rural

areas. The relevant aspect of customary marriage reflects the character of traditional African society which was one of loosely constituted nuclear families within dense networks of lineage and kin relationships. The nuclear family in traditional African society bore some resemblance to the English family of the late medieval and early sixteenth-century. The most striking characteristic of the latter, Lawrence Stone has noted:

> ...was the degree to which it was open to external influences, a porosity that is in contrast to the more sealed off and private nuclear family type that was to develop in the seventeenth and eighteenth centuries. Not only its individual members, but the nuclear family itself was strongly other-directed.[21]

The functional boundaries separating the nuclear family from wider kinship networks were weak and blurred. For many social purposes, the nuclear family was less autonomous and less isolated. More often individual members looked outside the nuclear family for social, material and emotional support. The importance of the nuclear family lay almost exclusively in its role as a unit of reproduction, hence the obsessive emphasis of African marriage systems on procreation. Marriage was first and foremost a mechanism for the determination of "ownership" of children. It is in relation to children that the concept of the customary marriage as a pact between two families finds its ultimate expression.

For the individual many aspects of life were experienced at a collective level within kinship structures. Individualistic tendencies were generally deplored and were readily associated with punishable behaviour such as witchcraft. The

interests and desires of the individual were subordinated to those of the extended family. The collective needs of the kin received greater emphasis than those of the "immediate" parties in the formation and termination of marriage alliances. Formal, as opposed to intimate or romantic, relations between husband and wife were quite consistent with "happy" or "successful" marriages. The collective will of the kin as expressed through the elders was authoritative and at times even authoritarian. Many of the "battles" of early missionaries against what they saw as "forces of heathenism" were in reality struggles with kinship ties and authority.[22] Many of the rules or principles which are unique to customary law underline this collective aspect of African customary marriage.

The whole process of colonialism involved the establishment of institutions and the introduction or intensification of forces which were to weaken the hold of the kin over the individual, reduce the individual's dependence on kinship ties, and enhance the character of the nuclear family as a discrete, autonomous, social unit. As the social, political and economic environment became more complex, the individual became involved in new, and often more rewarding, relationships. The individual's loyalty to the kin was even more decisively undermined by the superimposition of the more authoritative state structures over the traditional familial structures.

3. Capacity to Contract Customary Marriage

The question as to which people are capable of contracting marriage under customary law is an involved one. In the following discussion, however, only three topical aspects of the

subject are examined, namely age, marital status and the prohibited degrees.

a) Age

There is no definite answer to the question as to at what age persons become legally capable of entering into marriage under customary law. Ibik has noted in relation to all the major African groups in Malawi that, under customary law, there is no fixed age as such for either males or females at which they become legally capable of contracting marriage.[23]

Normally, however, a male person will be allowed to marry any time after puberty, so long as he has shown that he is capable of discharging the necessary marital duties.[24] Likewise, a female person will be allowed to marry after her first menstrual period. In the olden days, boys and girls would normally acquire the various skills necessary for married life by the time they reached puberty.

Pubertal ceremonies, particularly in the case of girls, often involved preparation for marriage. In certain special cases these ceremonies also constituted part of marriage ceremonies. Lucy Mair observed, for example, that among the Chewa people:

> ...it was customary in the past for girls to be betrothed before puberty. From the time of betrothal limited sex relations were permitted between the couple, but the girl must not be deflowered until the initiation ceremony which was held as soon as possible after her first menstruation. This ceremony was linked so closely with the marriage as to be almost part of it; the husband provided part of the cost in the form of presents to the women instructors, and married life began immediately afterwards.[25]

The discouragement of early marriages would seem to have been a feature unique to Ngoni society before British conquest. The need for martial excellence controlled almost every aspect of Ngoni culture, including their moral code which sometimes verged on the ascetic. Margaret Read made the following observation:

> Being a nation under arms the state demanded first of all a supply of young men whose outlook was fixed on war, and who were relatively independent of family ties. They considered the years from 20 to 30 as the best years of a man's fighting life, and during these years the state desired to claim him to the exclusion of all other claims.[26]

The Ngoni associated even legitimate sex between a married couple with misfortune in battle, with weakness before the enemy, and even with laziness![27]

The discouragement of early marriage among the Ngoni was also extended to women. The ages of 25 to 30 years were considered ideal for marriage on the part of women.[28] It was believed that women came to their "full strength" at these ages. Strong children, it was maintained, could be born only of mothers who had come to "full strength".

It may be noted as an incidental point that the Ngoni seem to provide an example of the rather unique situation of a statal or political authority directly intervening in matters of marriage arrangements. A characteristic feature of traditional African life was that marriage was no concern of the state or political organs. Marriage was mainly a matter between the kin of the man and the kin of the woman. Ngoni men in contrast had to obtain permission from the king or chief in order to marry.

Permission was normally given on a regimental basis and, in turn, regiments were organised on the basis of age.

In general, it was up to the parents or guardians to decide whether or not a boy or a girl was old enough for marriage.

There is ample evidence showing that in many traditional communities children used to be betrothed even before puberty.[29] Girls in particular would be betrothed while still very young and often to men who were far much older than themselves. It is far from clear whether in all these cases marriage would be deferred until the parties reached puberty. The character of African marriage formalities is such that it is not always easy to tell when a mere betrothal turns into an actual formal marriage. Marriage alliances were often forged in stages rather than by a single act or transaction. Thus in the example of the Chewa cited above, the relationship between the betrothed couple already begins to look like that of husband and wife before and during the pubertal ceremonies. Where a child is betrothed to a man who is already married, particularly in patrilineal societies, it was also possible for the man to pay the whole or part of the lobola due and take the girl with him. Cohabitation would nevertheless be postponed until the girl reached her puberty. It is difficult to say whether, before the girl reaches puberty, such an arrangement could be regarded as constituting a marriage or a mere betrothal. The Tumbuka term for the practice, kujalira, literally means "to book", as one books a hotel room or a seat with an airline. This tends to convey the idea that the arrangement is not regarded as a fully constituted marriage.

There can be little doubt that since the establishment of colonial rule, since the courts began to intervene in African family disputes, the norm against marriages involving young children has gained ascendancy.

The turning point came with the advent of Christian missions. Mission teaching condemned child-betrothals and child-marriages. Guided by the Christian-European concept that marriage was a contract between man and woman, the missionaries insisted that the free consent of the parties was essential to a "valid" marriage. Child-marriages tended to undermine the consensual nature of marriage as conceived by the missions. It is also useful to note that at the time of the arrival of the missions, various aspects of African customary law were undergoing a process of severe degeneration as a result of the intensification of slave trade and raiding. Principles of traditional law were being corrupted to accommodate the ever-increasing demand for slaves. Marriage was widely used to disguise transactions in slaves. Early colonial court records are replete with cases of this nature.[30] The condemnation of child marriages was in some respects an extension of the campaign against slave institutions.

Colonial magistrates played an even more decisive role in discouraging child-betrothals or child-marriages. They did so mainly by disallowing any claims based on such marriages or betrothals. In one case which came before the Blantyre District (Native) Court in 1909, the plaintiff sued the defendant for the return of the latter's daughter aged 6 years. According to

the plaintiff, the girl in question was his wife. There would clearly seem to have been some arrangement to that effect between the defendant and the plaintiff. The presiding, European, magistrate was disgusted. He dismissed the claim, observing that it was "repulsive that any native should marry a child of such tender years".[31]

In 1911, the same court heard another case in which the plaintiff claimed for the return of a wife whom he had married two years previous to the presentation of the suit. According to the presiding magistrate, the wife in question was only about 8 and 9 years old at the time of the hearing. He observed:

> Besides conformity with native custom in the matter of ankhoswe etc., free consent of both principals is necessary to a valid marriage: in this case the girl is not old enough to give such consent as she cannot understand the contract.[32]

The marriage was therefore, in the words of the judgement, "annulled". In another similar case the same court declared that the marriage was void, although the supposed husband was awarded 2/6 compensation for the hut he had built in the girl's village.[33] In yet another case with similar facts, the court declared that there could be no marriage. Yet, confusingly, it went on to record a judgement of "divorce".[34]

One observation which can be made from these judgements is how the magistrates so readily incorporated English legal concepts into customary law. Even assuming that pre-colonial customary law did not allow marriages involving children of tender

years to take place, it is altogether unlikely that traditional authorities would have applied the concepts of a void or voidable marriage contract in the manner of the European magistrates. There is no evidence indicating that such concepts of legal analysis ever formed part of traditional customary law. The cases just cited provide just one example of how foreign, English, legal notions became infused into customary law.

Africans in general, far from asserting their "traditions" on this matter, tended to be self-conscious and many informers would deny the existence of any such customs as allowed the betrothal of young children.[35] Indeed, there is no reason to suppose that most of the informers would be deliberately lying about the relevant customs. With the advent of European rule, the relevant practices quickly began to die down and became less noticeable to a casual observer. The individuals indulging in such practices became less assertive, particularly when they lived within the vicinity of a boma.[36]

Thus, in one case which came before the Mzimba District (Native) Court in 1911, J sued M for the return of £1 and a number of blankets which M had received in consideration for the betrothal of his little daughter to J. It transpired that neither M nor J had wanted to be seen as the chief instigator of the transaction. When J came to M's place to claim his "bride", M simply pointed at the girl and told J to take her (by force). J refused to do so because, on his own admission, he was afraid of the boma. Instead, he asked M to bring the girl to his (J's) place for him. A stalemate developed and the

whole transaction fell through.[37] The parties in this case were clearly well aware that their intended transaction contravened European precepts of social justice. Sometimes the mere knowledge of what Europeans would disapprove induced "self-correcting" processes within African communities.

b) Marital Status

The question whether the married status of a person constitutes a bar to subsequent marriage under customary law cannot fully be answered without taking into account existing marriage legislation. In particular, mention must be made of the legal implications of the provisions of the Marriage Act (cap. 25: 01).[38] A person married under this Act cannot contract a subsequent marriage under any law during the subsistence of the statutory marriage. The relevant statutory provisions, which represent the imported English law rather than African custom are examined at a later stage in this study.[39]

It is still a basic principle of the law of the country that a man who is married under customary law may enter any number of subsequent marriages under customary law. The mere fact that the first marriage is blessed by Christian marriage rites does not alter the legal position as regards the man's ability to take two or more wives. The whole relationship between the African institution of polygyny and the teaching and rules of Christian missions is considered in detail in a later chapter.[40]

In those communities which have adopted Islam as their religion, there is no evidence that the Quaranic rule which restricts the number of wives a man may marry to four only has

modified African customary law. The Yao constitute the largest group of Africans who follow the Islamic faith in Malawi. In many Yao marriages, a mwalimu (local muslim preacher or teacher) is called to perform a religious rite. However, in basic matters of marriage law traditional African custom prevails.[42] In 1954, J.D.N. Anderson observed, with respect to the Yao of Nyasaland, that there were "occasional complaints that a man [had] ... exceeded the four [wives] which Islam allows".[43] Anderson made this observation to stress the absence of any strong Islamic influence on Yao marriage customs,[44] rather than to suggest that the limit to four wives had become established among Yao muslims. Of course, however, a "complaint" against a muslim who takes more than four wives[45] can still be made on purely religious grounds, in the same manner as a "complaint" may be made against a Christian who takes an additional wife. However, except in the case of Asians,[46] religious doctrines as such are not legally enforceable. They can only be enforced if they become part of local custom. There is no evidence that the Islamic rule restricting a man to four wives was ever, or is now, part of Yao custom.

As a general rule, a woman cannot enter into a subsequent marriage during the continuance of a prior marriage.[47] While a marriage involving a woman who is already married to another man is regarded as irregular, what this means in precise legal terms is not an entirely straightforward matter. The following examination of actual judicial decisions underlines the uncertain state of the law.

In patrilineal systems, where marriage involves the payment of malobolo (bride price), there is a principle which states

that noone should be in possession of two or more malobolo with respect to one and the same woman. In the case of V.J. Chimombo v. J. Silungwe (1979),[48] the National Traditional Appeal Court explained the principle as follows:

> Where two men pay lobola in respect of the same woman, the first man to pay is the one legally married and entitled to her, and should the second man purport to live with the woman, he should be guilty of elopment and the legal husband may maintain an action for her return and damages.[49]

The person who receives the malobolo is liable to the second man for the malobolo paid by the latter. If sued for damages by the legal husband, the second man may also be entitled to proceed against the guardian for indemnity.[50]

In Charles Chinula v. Elija Kacheche (1940),[51] A. Kacheche (son of the respondent) was married to E. Chinula (daughter of the appellant). E. Chinula committed adultery with N. Moyo when her husband was away; a child was born as a result of the adultery. The respondent received two head of cattle from N. Moyo as compensation for the adultery. Later, the respondent sued the appellant for the return of the malobolo (2 head of cattle and 5/-) which had been paid on behalf of A. Kacheche. Apparently, it was at E. Chinula's insistence that the respondent had brought the suit for the return of malobolo as she wanted to be free to remarry. The suit for the return of malobolo was, in essence, a petition for divorce. In fact, E. Chinula (the appellant) had meanwhile already received one cow from N. Moyo, apparently as malobolo for E. Chinula.

The court of Native Authority M'Mbelwa Jere (Mzimba) refused to grant the return of malobolo. E. Chinula was ordered

to return to her father-in-law, the respondent. Interestingly, however, the court also ordered the appellant to hand over to the respondent the cow which the former had received from N. Moyo (in connection with the intended second marriage of E. Chinula). The appellant (Charles Chinula) was dissatisfied with M'Mbelwa's decision and appealed to the District Commissioner. The appeal was upheld and the District Commissioner made the following pertinent observation in relation to the cow given by N. Moyo:-

> If Chinula received the cow as part of payment for a new "dowry" he was wrong as there had been no divorce between the parties in any native court. If Chinula received the cow as compensation for adultery he had no right to do so as according to native custom, such compensation is payable only to the husband or his relatives.[52]

The District Commissioner then proceeded to dissolve the marriage between A. Kacheche and E. Chinula. He also ordered the return of two head of cattle and 5/- originally claimed by the respondent. He further ordered that the appellant should return the cow received from N. Moyo to the latter and not to the respondent. He finally observed:

> As to whether N. Moyo now marries E. Chinula, that is a matter for the parties concerned and not for anyone else.[53]

The decision underlined the principle referred to above, namely that noone should be in possession of two malobolo with respect to one woman. While the appellant was still in possession of the malobolo received on account of his daughter's first marriage, he could not legally receive "new" malobola or adultery damages on account of the same daughter. In effect, the case underlined the view that under customary law a woman cannot

contract a valid marriage during the subsistence of another marriage to another man.

The original order by NA M'Mbelwa was, in principle, possibly not very different from that of the District Commissioner. Although there is no record of the reasons for the order, it seems likely that the Native Authority court had envisaged an eventual divorce between A. Kacheche and E. Chinula and a subsequent marriage between the latter and N. Moyo. M'Mbelwa's order was apparently an attempt to effect a "gradual divorce", whereby E. Chinula would remain with her father-in-law until N. Moyo had fully recouped the "father-in-law" for the malobolo paid to the appellant. The cow originally paid by N. Moyo to the appellant would have been given to the respondent in part payment of the malobolo which would have been due from the appellant to the respondent upon the anticipated divorce between A. Kacheche and E. Chinula. The cow would then have been treated as part payment of malobolo due from N. Moyo to the appellant.

In David Mfune v. Lyson Baloyi (1981),[54] before the National Traditional Appeal Court, the husband (D.M.) failed to prove that the marriage between his former wife and another man had taken place before his own marriage to the woman had been validly terminated. The husband (the appellant), put forward a rather ingenious argument. Soon after his marriage to the woman in question, it was discovered that the latter was already pregnant with another man's child. Upon this discovery, the woman's father, the respondent (L.B.), returned the malobolo he had received from the appellant. The respondent's case

was that the return of malobolo had terminated the marriage. The appellant, however, argued that according to the relevant Ngoni customary law, the fact that a woman is found to be pregnant by another man at the time of marriage does not automatically nullify the marriage. The husband, it was argued, could still accept the validity of the marriage, except that part of malobolo would have to be returned. The appellant maintained that this had been his intention when he had sent the wife back to her parents and when he had accepted the malobolo proffered. Confirming the finding of the lower appeal court, the National Traditional Appeal Court found as a fact that the whole, and not just part, of the malobolo had been returned to the appellant. The court observed, however, that:-

> Even if the lobola was paid back, if it was paid after the respondent had already allowed his daughter to be married to somebody else the respondent would still be liable to the appellant ... because unless all the lobola was paid back the marriage was still in subsistence and the respondent could [not] properly allow his daughter to be married to somebody else.[55]

It was held, however, that the appellant had failed to show that the malobolo had been returned after the respondent had already given his daughter to another man.

The cases just cited do indicate that a subsisting marriage constitutes a bar on the part of the woman to any marriage with a third party. This is not simply to say that polyandry is not recognised under customary law. Even if the intention of the woman is to abandon her husband, the cases seem to state that she cannot contract a valid marriage with another man before the first marriage has effectively been terminated. The proper

procedure for a woman who wants to leave her husband and marry another man is to wait, or to institute proceedings, for the dissolution of the first marriage before contracting a second marriage. This also extends to widowed women, since death does not ipso facto bring a marriage to an end as is the case under English law.[56]

The general rule that a woman cannot enter into a subsequent marriage during the continuance of a prior marriage would appear to have been applied less strictly to marriages contracted under matrilineal systems than to lobola marriages. However, even in relation to the latter marriages, the courts have not always been consistent in their approach.[57]

In one case, brought before the Blantyre District Court, a married woman contracted a second marriage with another man. After five years, the first husband instituted proceedings, for the restitution of conjugal rights. The court held that there was no point in forcing the woman to go back to her first husband. Instead, the court ordered the second husband to pay 10/- to the first husband as compensation for the latter's "loss of a wife".[58]

In the more recent case of Matimati Nkhwazi v. Dailes nyaPhiri (1982),[59] the wife left her husband because the latter was inflicted with leprosy. Without formally divorcing the husband, she married another man. The first husband instituted proceedings, for the return of the wife. The court of first instance did not grant the order for the return of the wife. Instead, it ordered the dissolution of the first marriage on the ground of the husband's leprosy. The respondent, the wife,

was ordered to pay K16 compensation to the petitioner. The husband appealed to the Nkhata-Bay Traditional Court of Appeal, where both the divorce and the award of K16 ordered by the lower court were upheld. The husband finally appealed to the National Traditional Appeal Court.

The National Traditional Court observed that, under the relevant Tonga law, the respondent should have asked for a divorce or some other arrangement by the respective parents before marying another man. It was further observed by the court that the husband's illness, however serious, did not entitle the wife to a divorce. Significantly however, the court ordered the dissolution of the first marriage on the ground that the subsequent marriage between the respondent and the other man had become a fait accompli. The subsequent union was thus accepted as constituting a valid marriage.

There is a sense in which even these latter decisions underline the idea that a marriage contracted by a woman during the subsistence of a prior marriage to another man is irregular. The cases do show that the first husband has a right of action against either the wife herself or her intended second husband. More importantly, the cases do not rule out the possibility that the wife can be ordered to return to her first husband. Yet the decisions implicitly recognised the legal validity of marriages contracted in this way. Analysed in the terms of English law, the decisions convey the idea that under customary law, a married woman does not necessarily lack the legal capacity to contract a new customary marriage. In other words, a marriage contracted by a woman during the subsistence of an earlier

marriage to another man is not void ab initio. Such a marriage is merely subject to certain rights which a court may enforce against either the woman or her second partner, in favour of the first husband.

It does not appear that there are any major differences in the substantive principles of the various communities on this matter. The lack of uniformity in court decisions seems mainly to underline the general phenomena of customary-law courts, whereby decisions are guided more by the circumstances of each case than by abstract rules or principles. Thus, there are cases where it is clear that the woman and her relatives are against the first marriage and that it is only the second marriage which has a chance of lasting. In such cases the principle that a married woman lacks the legal capacity to contract a valid marriage may be played down or altogether ignored in order to preserve the subsequent marriage. This approach is partly necessitated by the greater extent to which the existence of a customary marriage depends on the wishes of the people involved rather than on any governmental authority.

Still, the distinction between matrilineal and patrilineal systems may be a relevant one. It will be shown later that it is more important under the patrilineal than under the matrilineal systems that a man is validly married to a woman when it comes to the determination of the man's rights over the children borne by the woman. The question, and principles regarding, whether or not a marriage has been properly constituted may thus tend to receive greater emphasis under patrilineal than under matrilineal systems.

c) Prohibited Degrees

In customary law the degrees of relationship within which marriage is forbidden are very much wider than those of English law.

In the past, even the clan constituted an exogamous unit. A clan is the largest familial group, with somewhat vague boundaries. It contains all the people who are supposed to be descended from a common ancestress (in matrilineal systems) or ancestor (in patrilineal systems). Clans were very important in the past, particularly among the Chewa and related groups. For important social purposes, the lineage constituted the highest level of social grouping. The clan, which would comprise a number of villages and an even greater number of lineages, was mostly important as a unit of political action. Still, marriage between members of the same clan was forbidden. People of the same clan were known by a common family name, which was also the name of the clan, like Banda, Phiri or Mwale. Thus, one general rule was that people with an identical family name could not marry each other.[60] Nowadays, clans have lost their former importance. People with the same clan name may marry each other, so long as they are not descendants of a known common ancestor or ancestress. People are usually able to trace their ancestry up to the fifth or sixth generation. It ought to be pointed out, however, that even today, marriages betwen people who have the same family name are rather rare.

As a general rule, blood relatives are not allowed to marry each other under customary law.[61]

In many communities, however, cross-cousin marriages are allowed. Among such matrilineal people as the Chewa, such marriages were even preferred, for, as Lucy Mair observed, "the youth [could] follow the rule that he must live at his wife's home without leaving his own village".[62] In her study of one area comprising four villages in Dedza District, Mair noted that of the 73 marriages contracted in the area, 22 (about 30%) were between cross-cousins. In the same villages, an even higher proportion of the marriages were intra-village ones.[63]

The familiarity already existing among all the parties concerned in cases of cross-cousin marriages may contribute to happier relations between husband and wife. Some of the tensions inherent in the relationships between the respective kin of the husband and the wife are eliminated. On the other hand, it was predominantly in relation to cross-cousin marriages that the practice of child-betrothal and forced marriages used to flourish. Such marriages often underlined a social ideology under which the interests and happiness of the individual spouses were subordinated to the wishes of the elders and the interests of larger social groups.[64]

Furthermore, the parties to a cross-cousin marriage are people who have interacted with each other in other roles, namely those of blood relatives. It is thus possible that such parties may have difficulties in adjusting to the roles of husband and wife. There may even be a tendency to view their new roles and relationship less seriously than would be the case between complete strangers. Thus, in the case of

Namfuko v. Awali and Akunjawa (1935),[65] which came before the Chiradzulu District Commissioner, Namfuko and Akunjawa were cross-cousins who had been married for several years. Later Akunjawa, the wife, ran away with Awali with the intention of marrying him. In a suit for divorce and compensation by Namfuko, the wife contended that her marriage to the petitioner was not a "real one", but merely a "cousin marriage". As such, the wife contended that the marriage was not a legally binding one. The attitude of the respondent in this case shows how some people may tend to view marriage between cross-cousins as a species of social arrangement distinct from, and less solemn than, marriages involving people who are not related to each other. In the relevant case, however, the court correctly rejected this view and emphasised that even the so-called "cousin marriage" was a legally binding marriage.

Marriages between cross-cousins have tended to decline with the decline in arranged marriages. Indeed, such marriages do not seem ever to have been popular among people following the patrilineal system.

Marriage between close affines is also forbidden. In general, however, the range of affines a person may not marry seems to be much more limited than that of blood relatives. Each community has its own rules and within one community practices change from time to time.

Marriage between father-in-law and daughter-in-law or mother-in-law and son-in-law is universally forbidden. In some communities people within these relationships may not even eat

food in the presence of each other. Marriage between any parent of a husband and any parent of a wife is equally forbidden. On the other hand, in many systems of customary law, a man is allowed to marry the uterine sisters of his wife irrespective of whether or not the latter is deceased. Indeed, in some societies in the olden days, the husband of an elder sister had a prior right to marry the younger sisters of his wife. Other suitors had to pay a token gift to him before they could marry the younger sisters.[66] However, although a husband may marry the sister of his wife,[67] marriage between the brother of a husband and the sister of a wife may not be permitted. Again, however, in many societies, a widow may marry her deceased husband's brother. Normally, however, the brother of a deceased husband does not marry but "inherits" the widow.[68]

It is useful to bear in mind that ultimately, it is the opinion or view of the parents of the parties rather than an abstract code of prohibited degrees which matters most. Within certain limits, if the parents on both sides have no objection to a proposed marriage, the marriage is likely to take place. The general guiding principle has been described by Radcliffe-Brown in the following words:-

> ...the rules or customs relating to prohibited or preferred marriages have for their social function to preserve, maintain, or continue an existing kinship structure as a system of institutional relations. Where a marriage between relatives would threaten to disrupt or throw into disorder the established system it tends to be disapproved or forbidden, and the greater and more widespread the disturbance that would be caused by a marriage, the stronger tends to be the disapproval which it meets with.[69]

The customary-law bars to marriage on the basis of affinity and consanguinity do not appear to have been much of a topical issue with the missionaries. This is perhaps to be expected. The extended nature of African kinship ties, emphasised by the classificatory terminology employed in establishing relationships,[70] meant that exogamous groupings within African communities were much larger than was the case under church law. Thus, many prohibitions based on church law were also to be found under African customary law.[71] Of the few exceptions were issues about the marriage of a widow to the brother of her deceased husband and the marriage of a man to the sister of his wife. But then, these same marriages have been a subject of controversy even in relation to English law.[72] The marriage of widows to their deceased husbands' brothers, for example, was a major issue in the Livingstonia Mission Presbytery early in this century. Donald Fraser, a missionary of comparatively liberal views, made several attempts to have the practice legalised by the church. In October, 1911, he successfully pushed through Presbytery a motion to this effect. A year later, however, the motion was annulled.[73]

4. Essential Consents

It is socially desirable for all key members of the families of both parties to approve a proposed marriage.[74] For legal purposes, however, only the consent of the following categories of people may be absolutely necessary.

a) The Parties

At least in theory, as already noted, marriage under customary law is to be regarded as a pact between two familial

groups rather than just as an agreement between the prospective husband and wife. Normally, it is the agreement between the parties' "marriage guardians"[75] and not any agreement between the parties themselves, that is said to constitute the contract of marriage.[76] Hence, the question arises whether the consent of the parties themselves is really essential to the validity of the marriage contract.

Even within purely indigenous systems of law, it was standard procedure to obtain the consent of both parties before the conclusion of formal marriage negotiations. Although the consent of the boy (or man) would seem to have been regarded as more essential,[77] it was normally the consent of the girl (or woman) that required formal expression.

Normally, marriage negotiations commenced with courtship and an agreement between a boy and a girl to become husband and wife. Once the two had agreed upon a marriage, they would exchange information indicating which of their respective relatives would be responsible for formal negotiations. Formal negotiations were invariably initiated by the boy's side, and it was therefore the boy who first apprised his elders of a proposed marriage. Apart from a gift (chikole) which was given by the boy to the girl, it was in fact this exchange of information - as to the identity of those responsible for the negotiations - that distinguished a relationship which was intended to develop into a marriage from one that was intended to remain a mere casual affair. The boy's relatives would not open formal negotiations until they had been formally requested to do so by the boy. The consent of the latter to the eventual marriage was

normally inferred from his request to his relatives to open negotiations. On their part, the girl's relatives would normally not proceed with any negotiations before they had formally obtained the girl's consent. In general, it was not necessary for the boy and the girl publicly to declare in the presence of each other their intentions to become husband and wife.

Even in cases where parents selected spouses for their children,[78] and where formal marriage negotiations were not preceded by any courtship or agreement between the intended spouses, the consent of the latter would normally be obtained at least before they could be called upon to commence cohabitation.

On the other hand, it is important to remember that the freedom to accept or reject a marriage on the part of the parties was often exercised within a multiplicity of accepted constraints. A couple would, for example, accept a proposed marriage because, as cross-cousins, they felt obliged to marry each other according to the wishes of their parents. A member of the Ngoni aristocracy, to take another example, would feel bound to go through with a marriage that had been arranged to cement vital political alliances even though he or she had a different personal preference.[79] Such constraints, however, were not necessarily inconsistent with the presence of consent on the part of the parties.

Whether, on the other hand, the consent of the parties was regarded as an essential condition for legal validity is not conclusively established by the available evidence. Even were

it not legally essential, the consent of the parties could have been insisted upon for the purely practical purpose of enhancing the chances of happy marriages. Although it was by no means an outstanding feature of traditional African family life, companionship in marriage could not have been completely ignored as a factor to successful relationships. There is the possibility that the consent of the parties was designed to have a secondary or supportive role, as opposed to a constitutive one, in the formation of marriage. A party who had consented to a marriage could more readily be expected to honour his or her marital obligations than one who had entered into a marriage grudgingly or through compulsion. The fact that in some cases marriage could be arranged for very young children without any real consensual capacity is indeed indicative of the possibility that the consent of the parties was not essential to the legal validity of a marriage.

At the present day, it is a well-established principle of customary law that the consent of both parties is essential to the validity of marriage. In the Restatement, Ibik notes - with reference to all principal African groups in Malawi - that the consent of both spouses to marry each other is essential to the validity of marriage.[80] It has not been possible to identify a recent or entirely authoritative judicial decision on the point. In Kamcaca v. Nkhota (1968),[81] the High Court of Malawi listed the consent of parties among the essentials of a valid customary marriage. In the relevant instance, however, the court was concerned more with Southern Rhodesian, than with Malawian, customary law.

It is mainly in the decisions of the early District Courts and in certain official communications of colonial administrators that one may find pronouncements of the principle under consideration. Petitions for "divorce" on the ground that a marriage had been contracted without the consent of a petitioner were quite common during the early years of the colonial administration. (The petitions were almost invariably brought by women or girls. This tends to suggest that marriages arranged against the wishes of boys were less frequent. For it is unlikely that men would have been any less inclined to use the courts to free themselves from unwanted marriages than women.)[82] Some of the petitions do not provide typical examples of the traditional power of parents over their children in matters of marriage; they simply indicate that even in the period immediately preceding the establishment of colonial rule and for some years afterwards, there had been many dealings in women slaves. Some of the women had simply been captured by their alleged husbands.[83] Others had been given away by their own relatives, initially not by way of marriage, but in settlement of some debt or as compensation for homicides.[84] Many of the typical examples of marriage arrangements made without the consent of the wives involved children of tender years. Cases where adult girls or women were concerned tended to involve other complications besides the mere absence of consent. In one suit, for example, it transpired that the person who had forcibly given the woman in marriage was not the latter's immediate relation, but someone the woman chose to describe merely as "this man". Thus, in challenging the validity of the marriage, the petitioner relied not only on the absence of her

consent, but also on the fact that the person who had given her away was not competent to do so or to act as her nkhoswe.[85]

There is no doubt as to the broad legal principle followed by the courts in the relevant cases. Reference has already been made to a judgement of the Blantyre District Court in 1911 in which it was stated that:

> Besides conformity with native custom in the matter of ankhoswe etc., free consent of both principals is necessary to a valid marriage.[86]

It may be recalled that in the relevant case, a girl who had been given in marriage while still of tender years and without her consent was entitled to leave the alleged husband (respondent), and the marriage in question was "annulled". Although not stated in the same concise manner, this principle was underlined by decisions in many other cases.[87]

Some of the judgements, however, would seem to have put a gloss on the principle. Thus, in one case which was decided by the same Blantyre District Court,[88] a woman petitioned for "divorce" on the ground that she had not been consulted in the arrangement of her marriage to the respondent. Since the inception of the marriage, however, she had lived with the respondent for several years and three children had been born. The fact that the petitioner had not been consulted in the arrangement of the marriage would clearly seem to have been accepted by the court. Yet, the petitioner was still ordered to return to her husband and was warned that orders regarding compensation and custody of children would be made against her if she did not do so.[89] Notably, it was observed that the petitioner had lived

with the respondent for a very long time within British rule without making any objection to the marriage. As such, it was held, she could not be allowed to deny the validity of the marriage.

The relevant decisions seem to imply that a marriage that was invalid at its inception for want of consent on the part of one party could retrospectively be validated, either by subsequent consent, or by mere ~~inability~~ failure on the part of the relevant party to challenge the validity of the marriage at the earliest possible opportunity.

The colonial administration never expressly legislated against "forced marriages". In the 1930s, pressure had been put on the Colonial Office to look into the question of the freedom of women in British dependencies regarding marriage arrangements. Allegations had been made, particularly with reference to East Africa, that African girls were being forcibly dragged into marriages against their wishes, and that colonial administrations in the dependencies were doing nothing at all to alleviate the plight of such girls.[90] The relevant administrations, including the administration in Nyasaland, were requested by the Colonial Office to consider the possibility of introducing legislation on the matter.[91] The administration in Nyasaland argued against the proposal for legislation. One of the arguments advanced by the administration was that the alleged cases of coercion had generally ceased to occur. The other argument was that sufficient safeguards existed through the combination of customary law itself and colonial administrative institutions. The relevant passage of the Governor's reply to the Colonial Office read:

> (b) In the extremely remote case of attempted coercion, a girl would not hesitate to complain to the village headman, or to the [Native Authority] or [District Commissioner] if necessary.
> (c) If a complaint of this nature were brought before a Native Court and attempted coercion proved, the parent responsible would be publicly reprimanded, ordered to pay costs and probably fined for breach of native law and custom.92

This clearly underlined the readiness of colonial officials to intervene on behalf of the individual against the authority of the kin.

Indeed, the intervention of colonial officials in African family matters constituted a major factor in the establishment of the principle that the free consent of the parties was essential to the legal validity of marriages under customary law. Of course, this was not the only factor. The teaching of Christian missions and the availability of economic opportunities outside traditional kinship structures, greatly undermined the prestige and authority carried by age, and, helped to foster the notion of individual liberty as a fundamental principle of social life. Still, any proposition that the consent of individual spouses was essential to the validity of marriages would largely be futile in the absence of the superior authority of colonial courts to reverse the decisions of senior family members.

It must be emphasised that since the early times of colonial rule, the tendency even among African traditionalists was to emphasise the importance of consent, as opposed to asserting that parents had any legal power to impose arranged marriages on their children. The importance of obtaining the consent of

the parties in marriage arrangements was already widely recognised even before European intervention. It is not very likely, however, that a chief or some other outside authority within purely traditional African society could intervene in a marriage arrangement in order to uphold the wishes of an unwilling party. The character of traditional African society was such that the preservation of the authority of the old over the young, and the subordination of the wishes of individuals to the interests of whole kin groups, received greater emphasis than the promotion of individual freedom. Perhaps only where a proposed marriage was palpably inappropriate - for example, if it was clearly incestuous - could an outside authority intervene.

b) The Bride's Guardian

Strictly, the principal parties to a marriage contract under customary law are not the spouses themselves, but certain of their senior relatives, commonly known in English as "marriage guardians". The question as to which of the spouses' relatives may act as marriage guardians is briefly considered at the end of this discussion.

Without exception, the consent of the bride's guardian is absolutely essential to the validity of marriage under customary law. Without the guardian's consent or approval, a relationship entered into by a woman is regarded as mere friendship (chibwenzi in chiChewa or chibwezi in chiTumbuka), whatever the views or intentions of the parties themselves.[93] In some cases, the man may even be held liable in damages to the guardian for "illicit intercourse" or - should the relationship involve the

removal of the woman from her guardian - for elopement.[94]

There should not be much confusion in practice whether or not a guardian has rendered his consent or approval to a marriage. Although there are generally no prescribed methods or formalities whereby guardians may express their consent, such consent is normally expressed with sufficient publicity and formality as to leave no doubt as to its existence. Furthermore, the existence of consent is made obvious through the guardian's participation in certain key formalities. In patrilineal systems where the payment of malobolo by the groom's side to the bride's side constitutes a vital ingredient of marriage, it is the bride's guardian who is the principal recipient of malobolo. The receipt of malobolo or participation in some agreement regarding the same on the part of the guardian will be evidence of his consent to the marriage. In matrilineal systems, a marriage is not legal unless the girl's guardian and the boy's guardian meet or otherwise come to stand surety (chinkhoswe) for the marriage.[95] In general, any normally constituted marriage involves, at the end of the formalities, the handing over of the girl by her guardian to cohabit with the boy.[96] The guardian would not hand over the girl to the boy unless he (the guardian) consents to the marriage.

However, matters may not always be so straightforward. Difficulties do, for example, arise when an unmarried girl is made pregnant or simply runs away and begins to cohabit with a man. The guardian of the girl can bring an action against the man (or the man's legal guardian) as noted above. If, after receiving the compensation, the guardian does not take the girl

away, but leaves her to continue cohabiting with the offending man, doubts may arise as to the nature of the resulting relationship between the parties.

In Gerald Phiri v. John Kumwenda (1938),[97] the Atonga Tribal Council Native Authority court had ordered the appellant to pay £2 5/- to the respondent as compensation for the appellant's adultery with the respondent's wife. On appeal to the District Commissioner, the appellant contended that the respondent and his alleged wife were not validly married and therefore that he could not be liable for adultery to the respondent. To substantiate this claim, he referred to a previous case in which the respondent had been ordered to pay £1 10/- for an illicit union with the woman in question. In the same previous case, however, the respondent had also been ordered to "regularise" his union by paying "dowry". The appeal was dismissed and it was held:

> There is no doubt that the fact that John, respondent, was ordered to pay dowry proves that his marriage with the woman was binding.[98]

The dowry ordered had not in fact been paid. Still, the existence of a binding marriage was inferred from the fact that no-one had appealed against the order as to dowry. All the parties were said to have been in agreement with the order. This was taken to represent consent to the marriage on the part of all the people involved, which included the woman's guardian.

In Tadeyu Nkhata v. Daina nyaKaunda (1938),[99] also an appeal from the Native Authority court of the Atonga Tribal Council, the same appeal court reached a different conclusion. The

appellant had asked for the respondent's hand in marriage. The latter agreed but refused to permit the appellant to contact her parents. The two eloped. In fact, the respondent was already married to another man who had paid £5 in malobolo. The respondent's mother took the appellant to court where the latter was ordered to pay £4. This amount was described as "dowry". The mother, however, refused to accept this amount and could only accept £2. Later, the respondent left the apellant, whereupon the latter sued to recover the £2. His claim was dismissed by the A.T.C. The appellant appealed to the District Appeal Court, contending that the £2 had been paid as dowry which should be recoverable upon desertion by the respondent. On the respondent's part, it was contended by her mother that the £2 had not been received as malobolo, but as compensation for the adultery/elopment. The mother pointed out that her side had refused to accept the £4 ordered because they knew that their daughter was already married. They could not take their daughter back from the appellant, she contended, because the daughter had "proved adamant". The appeal was dismissed in the following words:

> In my opinion this (£2) could not have been dowry. Her previous husband paid £5 and parents would not accept £2 from another man. They would undoubtedly have claimed compensation for adultery. If £2 was dowry, where was the compensation for adultery?[100]

In other words, it was found as a fact that there had been no intention on the part of the respondent's guardian to consent to a marriage between the latter and the appellant.[101] Yet, the decision may be questioned in its endorsement of the entitlement of the respondent's mother to compensation for her own

daughter's adultery. One would have thought that the people entitled to the compensation were the relatives of the legal husband (if the latter was away as seems to have been the case) rather than the respondent's relatives.[102]

Instances of confusion as to whether or not a woman's relatives have consented to a marriage are not confined to lobola-paying systems. In David v. Kunyalaka (1934),[103] David wanted to marry Kunyalaka. He approached Kunyalaka's relatives with a formal proposal of marriage. David was told that the woman, Kunyalaka was already married to a man who was then in Southern Rhodesia. David insisted, however, undertaking to meet all the legal liabilities should the husband institute any proceedings against Kunyalaka or her relatives. The relatives accepted this offer and David and Kunyalaka commenced cohabitation. Apparently, no formal chinkhoswe was instituted. No formal proceedings by the previous husband or his relatives were brought against the arrangement. No formal divorce had taken place between Kunyalaka and her absentee husband. The union between David and Kunyalaka had lasted for eleven years and four children had been born when David discovered that the hut tax he had been paying for Kunyalaka (through Kunyalaka's guardian) was not being registered in his (David's) name but that of Kunyalaka's previous husband. David took Kunyalaka to the court of Native Authority Mpama.

The suit hinged on whether or not there was a valid marriage between David and Kunyalaka. In the course of the hearing before the Native Authority, Kunyalaka's relatives denied that David was Kunyalaka's husband and contended that the

relationship in question had been mere "chibwenzi". The Native Authority agreed with this contention. It "dissolved" the union and ordered the respondent to pay 10/- compensation. (After finding that there was no marriage it is not clear why the award of compensation was made.) The appellant appealed to the District Commissioner, contending that his marriage to the respondent had been properly constituted and that he still wanted his wife for whom he had paid hut tax for eleven years. The District Appeal Court held that David could not claim that his union had been properly constituted simply because of long cohabitation and the fact that his relationship with the respondent had not been actively opposed by the latter's relatives:

> The union was merely "chibwenzi", an "illicit" union and therefore respondent is free to end it whenever she desires.[104]

Having thus decided, however, the court went on to observe that the conduct of the respondent and her relatives was not altogether justifiable:

> The same facts make it clear that she [respondent] undoubtedly expected David to become her husband and that her relatives acknowledged David, if not as her proper husband in the absence of a divorce from Saulos [the previous husband], then as her lover. The fact that Elepere [the official guardian of the responent] never took action to prevent the union continuing or even starting, coupled with his failure to have David's name entered in the census has convinced me that although he accepted the union he was not prepared to lay himself open to a case for compensation and that the paying of all the taxes in Saulos' name by him was to manufacture evidence of his own integrity in the matter. He has attempted to run with the hare and hunt with the hounds without doubt.[105]

The respondent was ordered to pay back all the taxes paid for her by the appellant.

c) The Groom's Guardian

The cases just recounted demonstrate the pitfalls of negotiating one's own marriage without the help of one's relatives or guardian.

Under strict traditional law, the consent or approval of the groom's guardian is also essential to the validity of marriage.[106] Strictly, it is in the name of the groom's guardian that the proposal of marriage to the bride's people is made. It is also to the guardian that the reply is addressed. In patrilineal systems, the significance of the guardian's consent was further enhanced by the fact that the guardian constituted the principal donor of the malobolo.[107] With the introduction of wage labour, many young people can pay their own malobolo without depending on their parents or relatives. This has tended to reduce the practical necessity for the guardian's consent. In practice, however, even those people who can furnish their own malobolo act through their guardians or relatives. In a rural setting, it is highly improbable that a young man would negotiate his own marriage without enlisting the help of his elders. On the other hand, married men who simply seek additional wives do often conduct their own negotiations. At the present day, however, a marriage where the boy has duly paid his malobolo and obtained the consent of the girl's people may not be considered invalid simply because the boy's guardian has not given his consent or approval. Indeed, this fact seems to be taken for granted by the courts - so much so that there is hardly any decision specifically covering the point, although cases in which it is potentially relevant arise

from time to time.[108] Although the traditional insistence on the consent of the parties' guardians is as strong as ever as far as female parties are concerned, it has tended to be relaxed in the case of male parties.

However, a man who negotiates his own marriage without the involvement of his kin may have difficulties in enforcing his marital rights. It is to the kin, particularly the guardian, that a man turns when confronted with a hostile wife and hostile in-laws. The support of the kin cannot be relied on if the latter had not been consulted in the marriage arrangements. It is their involvement which constitutes the best evidence of the existence of a marriage. Without such involvement, the wife and her relatives may, however unjustifiably, altogether deny the existence of a marriage with impunity. From the viewpoint of the man's own kin, his relationship with the woman is as good as a mere chibwezi. Upon his death, there may be noone to look after his interests in the marriage.

In matrilineal systems, it is less certain that a man could contract a valid marriage without the consent of his guardian. Where malobolo have been paid, the courts will normally infer the existence of a valid marriage from the payment and receipt of the malobolo. They do not normally ask whether or not the man's guardian consented to the marriage. In matrilineal systems, on the other hand, the first question the courts will ask, if there is any dispute as to the existence of a marriage, is whether there are guardians from both sides who stand surety for the marriage. In David v. Kunyalaka (above), for example, the evidence of the respondent and her relatives

denying the existence of the marriage was very suspect, as the District Commissioner pointed out. Yet they succeeded in their defence, at least on the question of whether or not there had been a valid marriage. Matters would very likely have been different had the appellant produced his own guardian as a witness to the alleged marriage.

A Note on Guardians

In general, it is the senior brother of one's mother who acts as one's guardian in matrilineal systems. In some cases, a woman's senior uterine brother may also act as her guardian. Indeed, a relationship of conflict may sometimes emerge between a mother's brother and a senior uterine brother over the guardianship of a group of sisters.[109] In the absence of either of these people, any other senior member of the matrilineage may act as a marriage guardian.

In theory, and this was also true of actual practice in the olden days, the consent of the parents of the parties was not legally required. The father in particular was regarded as a stranger and his consent was sought purely out of courtesy. Over the years, however, the role of the father in this respect has grown in importance. In a study of the matrilineal people of Dedza District, Lucy Mair stresses, for example, that:

> Whatever may have been the case in the past, or elsewhere today, in Kaphuka village [in Dedza], it is regarded as normal for children to be brought up by their own parents, and unnatural for them to go to the mother's brother while the parents' marriage is in being. The matrilineal principle is not carried to the point of denying the father all authority over his children. It is definitely he, and not the mother's brother, whose consent is required for their marriage, and for the removal of a daughter by her husband. It is clear that the modern tendency is for the father's

> authority and responsibility to increase relatively to that of the mother's brother.[110]

Speaking of the matrilineal systems in general, cases in which the father and not the maternal uncle has acted as the marriage guardian of a party have come up with much regularity. The tendency for the father's authority to increase is indeed one of the most visible transformations in the social life of matrilineal people. Particularly in urban areas, among the working classes, the position of the father as the legal guardian of his children is almost taken for granted. This development without doubt underscores the enhanced character of the nuclear family as a discrete autonomous social unit and the diminishing influence and authority of the wider kin groups.

In patrilineal systems, a father, a father's brother, a paternal grandfather and even a brother can act as a guardian. In rare circumstances, one's aunt - father's sister - may also assume the role of a guardian.[111] In some cases, most notably among the Tonga of Nkhata-Bay District, either the patrilineal or matrilineal principle may operate to determine a person's marriage guardian. In theory, the matter should be resolved by reference to the legal nature of the marriage between a party's father and mother. If malobolo had been paid, then the patrilineal principle should operate. If not, then the matrilineal system may operate. In practice, the determination of one's guardian is often the outcome of intricate social manoeuvres by members of the family of a party's father (bakuchirumi, lit. on the man's side) and members of the family of a party's mother (bakuchikazi, lit. on the woman's side).[112]

In some special circumstances, a complete stranger may act as a marriage guardian. A person who has settled among complete strangers may rely on a substitute or surrogate guardian. Normally, even a stranger in a village assumes a particular position within the maze of relationships of consanguinity and affinity which hold the village together. There will thus be people within the village whom he or she regards as father, brother etc., and any one of these people can act as a marriage guardian. Even European administrators and missionaries occasionally stood surety for marriages of freed slaves or people who had otherwise lost contact with their relatives.[113] Cases of this nature may be said to show the flexibility of customary law and its adaptability to different conditions. On the other hand, as will be argued later, they may also be indicative of the strain involved in the application of traditional customary law to modern conditions.

NOTES

Chapter Two

1. The laws of marriage and divorce in Malawi have been restated by J.O. Ibik, The Restatement of African Law, Vol.3 (London : Sweet and Maxwell, 1967).

2. For an illustrative discussion on the subject, see J. Clyde Mitchell, The Yao Village (Manchester : Manchester University Press, 1956), esp. pp. 46-109.

3. These vary in character from thatched round huts to brick houses with corrugated iron roofs.

4. J. Van Velsen, The Politics of Kinship - A Study in Social Manipulation Among the Lakeside Tonga of Nyasaland (Manchester : Manchester University Press, 1964), p. 28.

5. This is, for example, the sense in which the Ngonde in Karonga dist. may use the term. See Ibik, op. cit., p. 105.

6. The Sena in Nsanje dist., for example, employ the term in this sense. See Ibik, op. cit., p. 165.

7. The Chewa of Dedza dist. are a good example. For a fuller discussion, see Lucy Mair, "Marriage and Family in the Dedza District of Nyasaland", Vol. LXXXIX (1949-51), The Journal of the Royal Anthropological Institute, p. 103 at p. 104.

8. For example : among the Tonga of Nkhata-Bay Dist., see Van Velsen, op. cit., p. 43; and among the Yao, see Mitchell, op. cit., p. 145.

9. Ibid.

10. Meaning, the mbumba of Mr Mayele.

11. Ibid.

12. See Mitchell, op. cit., pp. 149-52.

13. For example, the Sena in Nsanje.

14. Op. cit., p. 133.

15. See Ibik, op. cit., p. 65.

16. T.D. Thomson, Notes on African Customs in Nyasaland (Zomba : Govt. Printer, 1957), pp. 1-2.

17. African Systems of Kinship and Marriage, Radcliffe-Brown, A.R. and Forde, Daryll (eds.) (London : Oxford University Press, 1950), p. 9.

18. See Margaret Read, "The Moral Code of the Ngoni and their Former Military State", Vol. XI (1930), Journal of the Institute of African Languages and Culture, p. 1 at p. 14.

19. Arthur Phillips (also as ed.), Survey of African Marriage and Family Life (London : Oxford University Press for International African Institute, 1953), p. XV.

20. Radcliffe-Brown, op. cit., p. 43.

21. The Family, Sex and Marriage in England 1500-1800 (abd. edn.) (Middlesex : Penguin Books Ltd., 1979), p. 69.

22. This was, for example, a common complaint by members of the UMCA in their monthly publication, Central Africa. See e.g. Letter of Bishop of Zanzibar, June 1889, in Vol.17 Central Africa (1889), p. 131. The Rev. W.P. Johnson (one of the pioneers of the UMCA in Malawi) noted that the problem with African converts was not a simple matter of polygyny, but one complicated with what was described as "clan life with its mark of lust and evil". He was referring specifically to one convert who had married a second wife "with minimum choice of his own". He urged to the effect that the "really healthy substratum of ties of father and mother; husband and wife" should be cleansed of the "evil" influences of "clan ties". Vol.18 Central Africa (1889), p. 16.

23. Op. cit., see e.g. p.8 where he describes Yao law.

24. For a discussion of these duties see below.

25. "Marriage and Family in the Dedza District", pp. 106-7.

26. Op. cit., pp. 13.

27. Ibid.

28. Ibid.

29. See Mair, note 25 above. See also James MacDonald, "East Central African Customs", in Vol. XXII (1893) JRAI, p. 99.

30. See MNA, files nos. BA1/2/1, BA1/2/2, BA1/2/3, BB1/1/1 and BR1/1/1. For a fuller discussion of the subject, see Martin Chanock, Law, Custom and Social Order : The Colonial Experience in Malawi and Zambia (Cambridge : Cambridge University Press, 1985), pp. 145. Emily N. Maliwa, "Customary Law and the Administration of Justice in Malawi, 1890-1933" (M.Phil thesis, University of London, 1965).

31. S v. N, civ. case no. 10 of 1909, MNA BA1/2/1.

32. J v. A, civ. case no. 223 of 1911, MNA BA1/2/1.

33. K v. K, Blantyre District (Native) Court civ. case no. 170 of 1912, MNA BA1/2/1. Up to 1968, the country's legal tender was in the old British Sterling (£); with 20 shillings (s)

in £1 and 12 pennies (d) in one shilling. The present legal tender is the Kwacha (K). 100 tambala = 1 Kwacha. £1 decimalised sterling = K2.447 (approx.).

34. Bt. District (Native) Court civ. case no. 194 of 1912, MNA BA1/2/1. See also in the same court, civ. case no. 195 of 1912, MNA BA1/2/1.

35. See e.g. observations of Lucy Mair, "Marriage and Family in the Dedza District", p. 106.

36. A government post usually headed by a Resident or District Commissioner. Lit., boma means government.

37. John v. Myazani, civ. case no. 45 of 1911, MNA BR1/1/1. The plaintiff's suit for the return of the payments he had made was dismissed, ostensibly on the ground that he was late in bringing the action. This in itself was another example of the use of an English-law concept to a customary-law dispute.

38. First enacted as the British Central Africa Marriage Ordinance, no. 2 of 1902. For details, see Chap. 5 below.

39. See mainly Chaps. 5 and 8 below.

40. Chap. 8.

41. It is not in every such marriage that a mwalimu is called. Many Muslims marry without his presence.

42. See Ibik, op. cit., pp. 6-27; Mitchell, op. cit., generally; and J.D.N. Anderson, Islamic Law in Africa (London : HMSO, 1954), pp. 162.

43. Op. cit., p. 167.

44. Some background documents on Anderson's findings can be found in the MNA, file no. NS1/20/1.

45. The impression created by talking to ordinary African Muslims is that most of them are in fact ignorant of the rule limiting the number of wives a man can have.

46. Under the Asiatics (Marriage, Divorce and Succession) Act (cap. 25:03).

47. Ibik, op. cit., see relevant pages on capacity.

48. NTAC civ. app. case no. 42 of 1979. All cases from this court are unreported.

49. Transcript of the judgement.

50. Ibid. See also memorandum of J. O'Brien (Agt. Provincial Commissioner, Northern Province) encl. in a letter dated 28th Sept., 1936 to the Chief Secretary. MNA S1/918/31.

51. Mzimba District civ. app. (Native Authority) no. 6 of 1940 (originally no. 115 of 1940 of N.A. M'Mbelwa). MNA BR4/1/1.

52. Transcript of DC's judgement.

53. Ibid.

54. NTAC civ. app. no. 76 of 1981.

55. Transcript of the judgement. See also P. Mtambo v. Charles Saidi (1964), a case which came before the High Court of Malawi : civ. app. (Local Ct.) case no. 28 of 1964. MNA 6.5.6F/16118.

56. See below, Chap. 4 as to the legal status of widows.

57. See Mzimba District Court, civ. cases nos. 86 and 103 of 1911, MNA BR1/1/1, T. Banda v. nyaLungwe, Chintheche dist. civ. app. (NA) case no. 4 of 1938, MNA BC3/1/1.

58. Bt. District Court, civ. case no. 127 of 1920, MNA BA1/2/5. See also Fort Manning (Mchinji) Dist. Ct., civ. case no. 20 of 1930 and case no. 21 of 1931, MNA BJ1/2/1.

59. NTAC, civ. case no. 63 of 1982.

60. See Ibik, op. cit., pp. 10. See also Read, op. cit., p. 15; H.S. Stannus, "Notes on some Tribes of British Central Africa", in The Royal Anthropological Institute of Great Britain and Ireland, Vol. XL (1910), p. 285 at pp. 307. For a discussion of Chewa clans, see Samuel Josia Nthara, Mbiri Ya Achewa (The History of the Chewa), (trd. by W.S.K. Jere) (Wiesbaden, Franz Steiner Verlag SMBH, 1973).

61. Ibik, op. cit., pp. 10.

62. In Arthur Phillips (ed.), Survey of African Marriage and Family Life (London : Oxford University Press, 1953), p. 18.

63. "Marriage and Family in Dedza District", p. 105.

Mair's tables display the following percentages:- Liwenga vge. 40%, Matope vge. 14%, Tampangani vge. 40% and Kaphuka vge. 88%.

64. Supra.

65. Civ. app. (Native Authority) case no. 7 of 1935, MNA BD1/1/1.

66. See M. Sanderson's observations on the Tumbuka, "Some Marriage Customs of the Wahenga, Nyasaland", Journal of the African Society, Vol.22 (1923), p. 34. See also case of Councillor Karonga v. Headman Kanyoli decided by Haythorne Reed, J. on 13th July, 1931 at Karonga. MNA S1/918/31. The plaintiff in this case was claiming that he had a preferential claim over his younger sister-in-law. The case was dismissed,

but the fact that the plaintiff might have been entitled under strict Ngonde custom tended to be confirmed.

67. According to Simon Roberts, "Matrilineal Family Law in Malawi : A Comparison of Two Systems", Vol.8 Journal of African Law (1964), p. 78 at p. 79, the Lomwe may be an exception to this. Roberts' observation is not, however, confirmed by any other writer. See for example, Ibik, op. cit., pp. 33-34.

68. For a discussion of "Widow Inheritance", see Chap. 4 below.

69. Op. cit., p. 62.

70. Supra.

71. For observations to the same effect, see Aylward Shorter, African Culture and the Christian Church (London : Geoffrey Chapman, 1973), pp. 159-61.

72. See Law Commission, Report on Nullity of Marriage, Law Comm. no. 33 (1970) London, HMSO. Bromley's Family Law (4th ed.) (London : Butterworths, 1971), pp. 25-26. See also below, Chap. 5.

73. See John McCracken, Politics and Christianity, pp. 195-96.

74. This should also be true even with respect to a marriage contracted under the Marriage Act.

75. See below as to who may act as a "marriage guardian".

76. See below

77. See Lucy Mair, Survey, pp. 80-84.

78. The Tumbuka used different terms for a marriage initiated by the boy himself - nthengwa yakufikira and one initiated by the parents, nthengwa yakufikizga. See T. Cullen Young, Notes on the Customs and Folk-lore of the Tumbuka-Kamanga People (Livingstonia : Mission Press, 1931), p. 58.

79. See Read, op. cit., p. 14.

80. See e.g. p. 9 with reference to the Yao.

81. 1966-68 ALR (Mal.), p. 509.

82. Of course men could also resort to polygyny as an outlet to unwanted marriages.

83. See, e.g., civ. case no. 138 of 1909 and civ. case no. 196 of 1910 before the Bt. Dist. Ct., MNA BA1/2/1.

84. E.g. case no. 142 of 1909, Bt. Dist. Ct., MNA BA1/2/1. Another case of this nature was reported by the Chiradzulu District Commissioner in a letter dated 8th Oct., 1936 to the Provincial Commissioner (SP), MNA SN1/23/1.

85. Bt. Dist. Ct. civ. case no. 32(?) of 1909, MNA BA1/2/1. See also Bt. Dist. Ct. civ. case no. 212 of 1916, MNA BA1/2/1.

86. See text to note above.

87. See e.g. Bt. Dist. Ct. civ. case no. 196 of 1910, MNA BA1/2/1 and Mzimba Dist. Ct. civ. case no. 5 of 1911 and case no. 112 of 1912, MNA BR1/1/1.

88. Civ. case no. 5 of 1911, MNA BA1/2/1.

89. Orders to this effect were indeed made in the following cases : Bt. Dist. Ct. civ. case no. 1914, civ. case no. 212 of 1916, MNA BA1/2/2. Ncheu Dist. Ct. civ. case no. 42 of 1929, MNA BS1/1/18.

90. Documents relating to this subject can be found in MNA, file no. S1/918/31. The main pressure group in the United Kingdom was the St. Joan Social and Political Alliance. There was also the semi-official Committee for the Protection of Coloured Women in the Crown Colonies which had been set up by the U K Parliament.

91. Ormsy-Gore (Colonial Office) to H. Kittermaster (Nyasaland Governor), 17th Feb., 1936, MNA S1/918/31.

92. Harold Kittermaster to CO, 17th Dec., 1936, MNA S1/918/31.

93. See Ibik, op. cit., pp. 9. For some of the older cases on the matter, see : Bt. Dist. Ct. civ. cases nos. 116 of 1909, 148 of 1909 and 85 of 1911, MNA BA1/2/1. Also no. 9 of 1932, MNA BA4/1/1. For more recent decisions, see below.

94. See below, Chap. 3.

95. See Malawi High Court cases : Amani Ali v. Christina Mhango, civ. app. (TC) case no. 15 of 1970, 16 JAL (1972), p. 176; Brown Elias v. Beatrice Magaisa, civ. app. (TC) case no. 7 of 1970, 16 JAL (1972), p. 175. Also NTAC cases : Gawani v. Kaliati, civ. app. case no. 67 of 1981 (unreported); and R. Banda v. George Enelesi, civ. app. case no. 101 of 1979 (unreported).

96. See Ibik, op. cit., pp. 14.

97. Chintheche Dist. Ct. civ. app. (NA) case no. 13 of 1938, MNA BC3/1/1.

98. Transcript of judgement.

99. Civ. app. (NA) case no. 17 of 1938, MNA BC3/1/1.

100. Transcript of judgement.

101. See also Charles Chinula v. Elijah Kacheche above; Raswell Chirwa v. Plainess Phiri, Chintheche Dist. Ct. civ. app. (NA) case no. 24 of 1939, MNA BC3/1/1; Luanja v. Lungu, NTAC civ. app. no. 61 of 1978 (unreported). In this last case it was held that chapamsana, payable on account of an elopement, was not malobolo and therefore that there was no marriage. See also Gondwe v. Kumwenda, NTAC, civ. app. case no. 94 of 1977.

102. See below, Chap. 3.

103. Chiradzulu Dist. Ct. civ. app. (NA) case no. 3 of 1934, MNA BD1/1/1.

104. Transcript of judgement.

105. Transcript of judgement. See also a judgement of the same court in August v. Mbajika, civ. app. (NA), case no. 7 of 1936, MNA BD1/1/1. A man had been allowed to build a hut for a woman and to pay tax for her without any proper marriage being instituted between the two. The court accepted that the relationship was mere friendship. Nevertheless, the woman was ordered to pay back some of the expenses incurred by the man.

106. See Ibik, op. cit., pp. 9.

107. The parent or guardian's duty to pay malobolo is not dependent on the boy's inability to pay. Furthermore, once the parent has paid malobolo he cannot hold the same as a debt against the boy. See NTAC, case of D. Mbene v. B. Mbene, civ. app. case no. 13 of 1977 (from Karonga Dist.).

108. See e.g. Gerald Phiri v. J. Kumwenda above (note 97); T. Nkhata v. D. nyaKaunda above (note 99).

109. See Mitchell, op. cit., pp. 152-182.

110. "Marriage and Family in Dedza District", pp. 105-6.

111. See a Govt. Memorandum on Native Customs in Nyasaland, Marriage, Divorce and Succession, Govt. Printer, Zomba, 1930. See NTAC case of S. Mhone v. T. Mkandawire, civ. app. no. 143 of 1978, where it was observed that under no circumstance should malobolo be given to the woman's mother - in other words, a mother should not act as a guardian of her daughter.

112. See Van Velsen, op. cit., esp. p. 41 et seq., but also Chaps. three and four generally.

113. See e.g. Bt. dist. ct. civ. case no. 4 of 1916, MNA BA1/2/2. Parties to an irregular marriage decided to reconcile their differences and formalise their union. The District Commissioner stood surety for the woman. Also see Kakhobwe v. Kakhobwe NTAC, civ. app. case no. 102 of 1981. The case is considered much later in connection with the interpretation of subordinate legislation on the registration of customary marriages.

CHAPTER THREE

CUSTOMARY LAWS OF MARRIAGE AND DIVORCE - The Rights, Obligations and Implications of Marriage

Marriage creates new legal relationships and entails certain rights and obligations, on the part of the parties themselves and, on the part of third parties. Naturally, the diversity of traditional social systems implies a diversity in the customary laws governing matrimonial rights and duties. The main division is between matrilineal and patrilineal societies, although variations may be found within each of these systems. In many important respects, the relevant principles of traditional customary law are not only inconsistent with European conceptions of social justice, but are also ill-suited to modern conditions of African life - a fact clearly brought out by some of the court cases considered below.

It will be recognised, especially from the discussions in the next chapter, that questions regarding matrimonial rights and obligations tend to arise mostly at the time of the breakdown of marriage. Thus, many of the legal rights and liabilities which accrue on marriage are not covered in the present chapter, but are discussed in the next chapter, which deals with the dissolution of marriage and related matters. In the following discussions, the only issues examined are those which tend to arise during the subsistence of a marriage.

1. Choosing the Matrimonial Home

One of the main distinctions between the matrilineal and patrilineal systems of marriage practices is manifested in the

principles governing the choice of the matrimonial home. This is one area of customary marriage law about which there have been some public expressions of dissatisfaction, especially with reference to the position under the matrilineal systems.[1]

a) The Law Under Matrilineal Systems

Strictly speaking, neither spouse has the right to dictate to the other as to where the matrimonial home should be set up. In matrilineal societies the husband is by law required to reside at his wife's village. In practice, however, it is the hope and intention of most men eventually to obtain permission to take their wives to their own villages. Such consent, by the wife's guardian, may be given as a matter of course after a period of observation during which the man's behaviour and ability to take good care of the woman are assessed. It is also possible, with the consent of the wife's guardian, for the man to take the wife to his village immediately after the marriage. This usually happens where the man has a hereditary position of authority in his village, for example, if he is a village headman or a chief.[2] A man who because of his work has to reside elsewhere may also be allowed to take his wife away immediately after the marriage. A token gift may be given to the guardian upon the removal of the wife from her village. Such a gift is not malobolo and does not change the rights of the parties, for example, as regards the affiliation of children. It may be noted in parenthesis that there is an obligation on the part of the man to build a house for his wife in the latter's village. This obligation may be waived where it has been agreed that the husband should take the wife away immediately after the marriage.[3]

In principle, when the husband takes the wife away from her home, he does not do so as of right, but by virtue of the consent of the wife's guardian or, sometimes, the consent of the wife herself. Where the wife and her people refuse to let the husband take her away, the husband must cohabit with her in her village. If he refuses to do so but insists that the wife should follow him, he may be found guilty of desertion and the wife can divorce him. Thus in N v. K (1909),[4] N sued K claiming the return of K's daughter, who had been given to N in marriage. K stated that he had not taken his daughter away from N, that he had only insisted that N should build a house in the village and not take the daughter away. The daughter - N's wife - corroborated her father's evidence and further stated that she did not want to go to N's village but wished to remain in her father's village. The Blantyre District Court held in favour of the defendant and ordered N to build a house within six weeks or else an order of "separation" (divorce) would be granted.[5]

The power of the woman's family to determine the location of the matrimonial home has not, however, always been upheld by the courts. A husband may not, for example, be required to follow the wife and build a house each time the latter's guardian shifts to a new site. In U v. A (1911),[6] U petitioned the Blantyre District Court for the return of his wife who had followed her mother to a new site. U had already built a home for A at the site where they had been living before the shift. U refused to follow A and her mother to the new site. The court decided in favour of the petitioner. The wife was ordered to return to her husband at the old site. The presiding

magistrate observed:

> A man cannot be expected to be constantly moving to suit his mother-in-law's whims.[7]

Again, in K v. K (1910),[8] the husband had been living with his wife at the wife's mother's home. On the death of her mother, the wife decided to leave the old site and sought to go and live with her uncle at a place far more inconvenient for the husband, who had a job with a company. The husband had also secured accommodation on the company's land. The wife was ordered by the court to go and stay with the husband at the accommodation secured by the latter.

Chimbamba v. Alise (1938)[9] was an appeal from Native Authority Nkulo to the District Commissioner, Chiradzulu. The Native Authority court had ordered the appellant to leave his village and build a house at his wife's village. The appellant contended that the order was against an express agreement between the appellant, on the one hand, and the wife and her relatives on the other, to reside at the appellant's village, where the latter had a business and a permanent house. In pursuance of this agreement, the parties had lived at the appellant's village for about three years. Then one day the wife left for her village, ostensibly to attend a funeral. When she failed to return, the appellant petitioned the Native Authority court for her return. The Native Authority court ordered the wife to return on the condition that the appellant should build a house in her village. On appeal to the District Commissioner, it was found that the respondent and her relatives were not keen on the marriage and were merely using the

appellant for material gain. The District Commissioner ordered the wife to return to the appellant within one month, without the condition that the appellant should build a house in her village. When she failed to return, the marriage was dissolved on the ground of her desertion.

The order of the lower court was rather surprising, though not entirely unusual. Even the District Commissioner, however, noted that the order had been strictly in accordance with customary law, although he did not follow the alleged law. Strictly, the house which a husband builds in the wife's village is supposed to constitute a matrimonial home for both the husband and the wife, not just for the wife. The house is not some kind of payment or gift by the husband to her people. Yet the order of the lower court would clearly seem to imply that the house was some sort of payment by the husband.

True, in principle, an agreement allowing the wife to reside at the husband's village or place of work does not altogether revoke the husband's obligation to build a matrimonial house in the wife's village. Such an agreement simply suspends the obligation. It does not alter the basic legal nature of the marriage as an uxorilocal one. The order of the lower court in the above case would only have been in strict accordance with customary law if the court had not also ordered the respondent to return to her husband's village.

Thus, in matrilineal societies, marriages are as a rule uxorilocal. The husband is supposed to build a house in his wife's village and to live there for the duration of the marriage. The tendency among the European magistrates was to

interpret the matrilocal principle rather narrowly. The principle was rarely allowed to operate outside its narrow traditional context. A variety of pretexts were readily used as bases for avoiding the full implications of the principle. It is useful to note that the matrilocal principle was consistent with the high degree to which the conjugal unit of husband and wife was open to the external influences of the senior kin. In other words, the principle was inherently inconsistent with the European conception of marriage as basically a matter between husband and wife.

b) The Law Under Patrilineal Systems

In patrilineal, lobola-paying systems, marriages are, generally speaking, virilocal, that is, the wife is supposed to follow the husband to his village and reside there during the duration of the marriage.

Even here, however, a man is under an obligation to provide a house for the wife. If he has more than one wife, he should build a house for each of them.

Among the Ngoni of olden days, the very arrangement of the huts of polygynous wives was governed by some intricate rules.[10] From the position of each hut, people could tell the status of each wife and consequently the legal status of the children born of each wife in relation to succession. Thus, in the case of a Ngoni chief, his wives were assigned to different huts either to the right (lusungulu) or to the left (kwa gogo) of the hut of the mother of the chief. The successor to a vacant chieftainship always came from the lusungulu

and never from the kwa gogo. The issue of the arrangement of huts was, for example, at the core of the bitter succession dispute which followed the death of Zwangendaba Jere.[11]

Even in patrilineal systems, the location of the matrimonial home is a matter which is not always free from difficulties.

In some cases, the malobolo may not have been paid by the husband to the wife's relatives. As a matter of principle, it is the payment of malobolo that justifies the removal of a woman from among her people to the husband's home. In S v. K (1913),[12] K married S's brother's widow. S had not asked for malobolo because K resided in S's village. Later, K decided to move, but S refused to let his sister-in-law leave with K. It was held that K could only remove S's sister-in-law after the payment of malobolo.

No authority has been found in relation to cases where the woman's relatives do not want to receive malobolo for their daughter even though the husband is able and willing to lobola.

Modern conditions, particularly the introduction of the cash economy are usually blamed for the high malobolo and the whole commercialisation of the system. In fact, there is sometimes a reverse tendency, whereby parents look askance at the receiving of "payments" for the marriages of their daughters. The reasons for this attitude are many. Some of these reasons have something to do with the view that the charging of malobolo amounts to a sale of the bride. This, of course, is a gross misunderstanding of the whole system of lobola

marriages.[13] It is useful to mention that parents who are perfectly aware that a lobola marriage is not a sale, may nevertheless refuse to accept malobolo as a safeguard against, in the words of the National Traditional Appeal Court in Nicholas Msukwa v. Ellen Msowoya (1979):

> ...the sort of people who, after paying dowry, regarded a wife as an item of property, and not as a lifetime partner, and that they would treat a wife in any manner they wanted.[14]

In other words, a parent may refuse to accept malobolo in order to ensure that his daughter will not be mistreated on the basis of the misguided idea that the payment of malobolo gives a husband the right to do whatever he wants with his wife.

Another reason for a refusal to accept malobolo may be the desire on the part of the woman's parents to follow the matrilineal system of law as regards residence and children. This is likely to happen among patrilineal people who live in close proximity to matrilineal communities or among those groups, like the Tonga of Nkhata Bay,[15] who previously used to follow matrilineal practices. Among such people, whether or not a man is asked to pay malobolo, and whether or not he is allowed to take the wife to his village, is not always a simple matter of following an established principle, but the outcome of involved manoeuvres between the two families concerned.

In predominantly and exclusively patrilineal communities, parents who refuse to receive malobolo for their daughters normally allow the husbands to take the wives away. However, there do not appear to be any specific rules on the matter.

A parent who refuses to accept malobolo may not command much sympathy from the courts. The inclination of the courts may be to hold against a person who has deliberately refused to follow the established practice. The law may thus be interpreted in favour of a husband who is willing to honour traditional practice, but who has been prevented from doing so by the wife's guardian. Nevertheless, a court could have difficulties resolving the issue. Strictly, the refusal of the guardian to accept malobolo could be interpreted as a refusal to sanction the marriage. Thus, the husband could not be held to have any right to remove the woman from her village. This would clearly seem to be one of those issues of customary law in relation to which some deliberate reform may not be out of place. One possible change would be to allow the spouses themselves to decide, without giving either of them an automatic veto. Should they fail to agree, a court's decision should not depend on any rigid rule, but on the relative merits of the case of either party. In other words, a principle analogous to the one obtaining in English common law[16] could be applied.

Another kind of difficulty is presented by cases where malobolo have been paid, but where the husband seeks to leave his original village for some other place. Is the wife obliged to follow the husband?

This question arose in the Mzimba case of Zebron Tembo v. Margret and Ellen Jere.[17] The case is an important one because it also deals with the law as regards matrimonial property. Margret and Ellen Jere, the defendants, were sisters and were also members of the Jere aristocracy. Margret was the elder

sister and the first (and senior) wife of Zebron Tembo, the plaintiff. Ellen was Zebron's second wife (mbiligha). Zebron had also a third wife, Roda Ziba. Zebron was the son of a rather prominent and historical figure within the Livingstonia Mission, Mawelero Tembo.[18] For a long time, all the parties had been living at Njuyu with the father and father-in-law, Mawelero. This was the original home of Zebron. What seems to have sparked off the whole dispute were the constant quarrels between the two sisters on the one hand and Zebron's third wife, Roda on the other. Jealousy between the wives was the root cause of the dispute. Soon, these quarrels embittered the relationship between Margret, the first wife and her husband, Zebron. When Zebron threatened to "dismiss" Margret, Zebron's father intervened in favour of the daughter-in-law, and another quarrel ensued between Zebron and his father. This was the final straw. Zebron applied for a government permit to emigrate to the neighbouring, Northern-Rhodesian district of Lundazi.

Accompanied by his third wife, nyaZiba, Zebron collected some of the cattle he had received on the marriages of Margret and Ellen's daughters and left for Lundazi in September, 1936. The defendants were left behind at Njuyu with their father-in-law, Mawelero. While in Lundazi, however, Zebron paid the 1937 hut tax for his first two wives. Upon the death of his father in the same year, 1937, Zebron went back to Njuyu with a view to fetch his two wives, sons and cattle and bring them to Lundazi. Margret and Ellen not only refused to follow Zebron to Lundazi, but when Zebron attempted to collect the family

cattle, Margret blocked the cattle kraal. Zebron, in his own words, did not "wish to cause problems"; he left without the cattle. He immediately wrote a letter to the District Commissioner of Mzimba District, seeking the latter's assistance in his quest to bring his two wives and property to Lundazi. The matter was referred to the court of Native Authority M'Mbelwa Jere, where Zebron instituted formal legal proceedings.[19] He demanded that his two wives should be ordered, together with the sons and cattle, to follow him to his new home in Lundazi. Speaking for herself and her sister, Margret refused to go to Lundazi.

> I don't want to live elsewhere but here where my father had married me on the village where my father-in-law died and my husband's own village.[20]

She also made it clear that she had no intention of divorcing her husband. Zebron's sons too refused to join their father. The latter expressed the view that what their father really wanted was not the children or the wives, but the cattle.

It was held by M'Mbelwa's court that there was no ground for ordering a divorce, that the defendants had sound reasons for refusing to follow their husband and that the court could not force them to do so. It was ordered that the Jeres should remain at their husband's original home, that if Zebron wished to move to Northern Rhodesia, he should shuttle between his new and old homes to visit his wives. It was further ordered that Zebron should return the cattle he had so far removed from Njuyu. The court declared that the wives, children and property at Njuyu were all Zebron's. Nevertheless:

> The cattle, which were paid as dowries from Nyajeres' daughters must be used at Nyajeres' own houses; and if he [Zebron] wishes to do something with these cattle, he must consult with them [Jeres] and agree together. Should there be any difficulty that may happen while Zebron is in Rhodesia, the sons must consult their father or report to him. Zebron should not take cattle without [the] knowledge of his wives, but he must ask or consult with them.
>
> If Zebron tries to take cattle secretly or by force, the court will order that all property go to Nyajere - inferring that he dislikes them.[21]

The impression left after the proceedings was that all the parties were satisfied with M'Mbelwa's judgement. Yet, several months later, Zebron wrote to the District Commissioner, Mzimba, complaining against M'Mbelwa's judgement. In the letter, Zebron stated his position by asking a series of rhetorical questions as follows: He had paid everything (malobolo) for his wives who together with the children and the property were his. Why were they still at Njuyu? NyaJere was "claiming" all property. Why? She had not brought any cattle with her when she married him. Where did she get the powers to snatch children and cattle from him? Why should he return the cattle (he had so far removed) to Njuyu? Who would look after the women and who would pay tax for them? He had the permission of the Boma to go to Northern Rhodesia. Why was he being ordered to go to (visit) Njuyu? He ended by declaring that if his wives and the cattle followed him to Northern Rhodesia, the matter would rest; but if they refused, then he was appealing against M'Mbelwa's decision.[22]

Native Authority M'Mbelwa had forwarded the record of his judgement on the case to the District Commissioner, together with a lengthy explanatory note in which it was stated, inter alia, that:

> The object of the claim of cattle by Margret Jere is based upon custom of the Angoni, that the property of one house cannot be removed and put into another house although the houses belong to one husband. That is to say, Zebron Tembo wished and still wish[es] to take the cattle (dowry) paid for their daughters to Rhodesia and use them there with his third wife Roda Ziba, which is truly contrary to the native custom. Her claim for cattle in the second place is to try to make her husband return to Njuyu, or leave the cattle there in care of his sons and his wives, so [that] whenever he wishes to do anything with them, he can do so after the arrangements and agreements have been made by them all together.... The court ordered him to return cattle for fear that he could use them without proper consultation with two wives, to prevent use of cattle against customary law.... He is not forced to return, the court only advised him to go and exercise his right of inheritance to property etc. of his late father [Mawelero] Tembo. The court was satisfied with his promise that he would shuttle.23

The Commissioner was in complete agreement with M'Mbelwa and was also of the view that neither M'Mbelwa nor himself had power to order anyone to go to a foreign country. Meanwhile, Zebron had lodged a formal appeal which he soon withdrew and then finally asked for a retrial, stating - with some justification - that M'Mbelwa and all the sub-chiefs in the area were related to the defendants and therefore unfit to try the case. The Commissioner suggested that a special panel of people unconnected with the parties should try the case. Zebron agreed, but the Provincial Commissioner was against the idea. It was finally agreed that the case should be retried by the neighbouring Native Authority Chikulamaembe. Chikulamaembe's decision was that he could not force the defendants to follow Zebron. It was also observed that Zebron had initially left for Lundazi without consultation with his senior wives and this was wrong. After further negotiations and persuading, however, it was agreed that the parties should resettle in a neutral place. The area of sub-chief Chindi Jere was agreed upon.[24]

The foregoing case may be regarded as somewhat weak on the relevant principle which will be stated presently. Firstly, the defendants were not "ordinary" wives, but members of an aristrocracy. Thus, an otherwise male-orientated justice might have been bent a little to suit this particular case. Secondly, the husband in this case was not proposing a simple shift in the location of the matrimonial home, but a move to a foreign country. This might have weighed against him. Yet, it is useful to note, respectively, that even those least likely to be impressed by the defendants' family background - the District Commissioner and Native Authority Chikulamaembe - reached the same conclusions as M'Mbelwa's. The fact that the new site was in Northern Rhodesia should also be put into perspective. Both Northern Rhodesia and Nyasaland were under the same British colonial power. Thus, even in a strictly legal sense, Northern Rhodesia was not truly "foreign" territory. More importantly, whatever was the view of the European administrators, to the Africans in South and Central Mzimba, Lundazi was hardly regarded as foreign territory, particularly during the relevant period. It was mainly the legal principles involved, rather than other considerations, which had influenced the decisions in the case.

It would seem that even where the husband has paid malobolo for his wife, it is not so much a case of the husband having the right to decide where the parties shall live as a matter of the law pre-determining that the village of the husband shall be the matrimonial home. Thus, particularly when the husband's move to a new place is motivated by no good

reason, the wife may be justified in remaining at the original home. Customary law may even operate to prevent the husband from depriving the wife of the matrimonial property. By remaining at the village of the husband, the wife cannot be guilty of desertion. Whether or not the husband is to be regarded as having deserted the wife may depend on whether or not the latter has been left with any option to join the husband. Of course, the location of the matrimonial home can always be changed by agreement between the parties.

Thirdly, there are cases of inherited widows who refuse to abandon the homes of their deceased husbands for the homes of their new husbands. It may be noted that such cases are rare because in most cases the person who inherits a widow belongs to the same village as the widow's deceased husband.

In the case of Timoti Sakala v. George Sakala (1982),[25] the National Traditional Appeal Court rejected a claim that it was the custom in Mzimba District that a man who inherits a widow could not move her from the place where her husband had died and had been buried. It is likely that claims of the existence of such a custom are based on the existence of some religious rituals in the olden days which might have been necessary before a widow could be removed from her deceased husband's place of burial. In practical terms, it can be inconvenient, uneconomical and utterly disruptive to remove someone from a place where she might have spent many years and formed many valuable attachments. Otherwise it would indeed appear to have been the custom in Mzimba to allow the new husband to remove the widow or widows.

The custom was in 1940 severely criticised by a District Commissioner in Mzimba in connection with Native Authority M'Mbelwa's judgements in the case of Simon Gondwe v. John Gondwe (1939).[26] The plaintiff, Simon Gondwe, was the undisputed heir to his deceased brother's three widows, children and property. However, Simon Gondwe had not been living in the same village or, indeed, in the same area as his deceased brother. The children and the widows did not want to leave their village and join the plaintiff. The latter's attempts to "collect his inheritance" were obstructed by the defendant, who was one of the sons of the deceased and, on his own admission, part of the "inheritance" due to the plaintiff. When the case was brought before M'Mbelwa, the defendant made it clear that he did not dispute his "father's" (the plaintiff's) right to the "inheritance"; but stated that he and others did not want to leave their place, that if the plaintiff wanted to inherit them he should come and join them at their place. After failing to reconcile the parties, M'Mbelwa delivered a judgement authorising the plaintiff to go and fetch the widows, children and property. A letter from M'Mbelwa to that effect was delivered to the local chief (NA Mtwalo), but the latter refused to help. The plaintiff attempted to effect M'Mbelwa's order by self-help, but was repulsed with threats of violence by the defendant.

The matter was brought back to M'Mbelwa. Meanwhile the first widow had relented and joined the plaintiff. The children - including the defendant - and the other two widows held to their earlier position. The third widow, for example, stated

that she liked the plaintiff and would be very glad to be with him, but only on the condition that he moved to the home of her late husband.[27] The plaintiff retorted that he did not mind whether or not the widows liked him; all he wanted was for them to join him and help him in his work.

Unfortunately for the plaintiff, M'Mbelwa's court went back on its earlier judgement. This time the court held that the defendant and the widows were not to blame. It was decided that it was the plaintiff who was to blame for having left his original home (the deceased brother's village) and built elsewhere. The court held that the defendant could not be compelled to move where the plaintiff had settled. It was up to the plaintiff to follow them. The plaintiff appealed to the District Commissioner. After reading both the first and second judgements of M'Mbelwa's court, the District Commissioner, W. Thatcher, made the following observations:

> I have cross-examined [the] appellant who can advance no other reason for demanding his family to join him than that it is according to custom and that his sons should be near him to help him and work for him: Neither of the respondents[28] had had any connection with [the] appellant's new village - they have lived either at their present site or abroad. Appellant lived at respondent's present site from 1908 to 1935 when he moved to his present abode .... He had left in anger after a quarrel with his deceased brother.[29]

The District Commissioner went on to state that his inquiries had disclosed that M'Mbelwa's first judgement had been in accordance with native law. He was not sure about M'Mbelwa's reasons for the second decision, but observed:

> It seems that there must have been good and sufficient reasons for a complete reversal of their previous

> judgement, and it appears to me that [the] preservation of personal liberty and choice of action must provide a good and sufficient reason for refusing to compel a number of reasonable and responsible individuals to uproot themselves and their belongings and follow the wanderings of one, possibly not so reasonable individual. Native law and custom must be respected and preserved in so far as it does not conflict with natural justice and the changing and in this case more reasonable, ideas of modern times.30

Here is one example of a rule of customary law being expressly rejected on the basis of its inconsistence with Western European conceptions of social justice. Thus, although a man who inherits a widow may under traditional law be entitled to remove her from her deceased husband's village, the power to remove her may be subject to her consent or acquiescence. The courts have clearly tended to emphasise personal liberty instead of traditional rights on this aspect of the law.

2. Domestic Rights and Duties

The domestic rights and duties of the husband and wife are generally the same in all African communities. Under modern influences, certain basic differences between matrilineal and patrilineal societies have become less pronounced.

To provide accommodation, food and clothing for the wife and children, and sexual companionship for the wife, are regarded as some of the basic duties of a husband. It is also the duty of the husband to protect his wife and children. Discharging this duty may also involve taking legal action on behalf of the wife for torts committed against her. In a decision of a Traditional Court in Rumphi District, confirmed by the National Traditional Appeal Court in 1979, a husband who failed to consult a herbalist to protect his wife against

sorcery was held to have committed a matrimonial offence of sufficient gravity to warrant the wife's petition for divorce.[31]

There is some doubt whether a husband to a marriage contracted under the matrilineal system has a legal duty to maintain his children. Such children are regarded as belonging to the wife and her people, and the primary responsibility for their maintenance is said to fall on their maternal uncle or other member of the wife's mbumba.[32] In one case decided in 1935, the Native Authority Machinjili ordered a husband who had divorced his wife to pay £1 10/- as compensation. The wife claimed that this was not enough as there were children to be cared for. She appealed to the District Commissioner. Dismissing the appeal, the District Commissioner observed:

> This court sees no reason why it should upset or alter in any respect the decision of the native court. This court is not aware that the appellant has any claim under Yao custom to a larger sum of compensation than that awarded by the native court .... Such compensation is granted as a temporary assistance for a divorced woman, suddenly deprived of the support of her husband.[33] It is not regarded as a sum payable in respect of the maintenance of the children of the marriage until they grow up. The custody of the children in local native custom remains with the mother and similarly the responsibility for their maintenance rests with her and her family.[34]

More recently, the National Traditional Appeal Court has stated in a number of cases that under the chikamwini (matrilineal) system, the husband has a moral, but not a legal, duty to maintain his children.[35] This view of the law is also underlined by Ibik in the Restatement.[36]

It is worth noting, on the other hand, that all the relevant panels involved in the Restatement recommended a change in the law so that the father should be under a legal duty to

maintain, clothe, feed and educate the children of the marriage. The recommendation was an aspect of a broader recommendation to the effect that the father should assume and be allowed to exercise full parental rights over the children.[37] In the olden days, when children were more of an economic asset than a liability, there was perhaps less objection to placing the duty to maintain the children of the marriage on a third party. At the present day, even in rural areas, bringing up children can be a costly task. Even in matrilineal communities, it is the father and the mother who decide on the number of children they want to have. The children's maternal uncle or other relative of the wife has little say in this matter. Yet, under the traditional system he may be legally bound to maintain any number of children the other man decides to have. The system can easily be abused by unscrupulous men who, while maintaining that the responsibility for the maintenance of their children falls on the wives' relatives, do not themselves assume corresponding responsibilities with regard to their sisters' or nieces' children.

The most important objection to the traditional system is that, today, it is rarely followed in practice. There is hardly any noticeable difference in the way fathers care for their children between patrilineal and matrilineal communities. Fathers under the latter system generally assume the same responsibilities towards their children as those assumed by fathers under the patrilineal system.[38] It is useful to note in this regard the apparent absence of any cases where husbands married under the matrilineal system sue either their wives or

their wives' guardians for the maintenance of children. Cases of this nature would be flooding the courts were it the case that fathers did not regard themselves as responsible for the maintenance of their children.

In upholding the duty of a husband to maintain the children of the marriage the law would be doing little more than confirming a generally accepted practice. This development constitutes the most important aspect of the ascendency of the nuclear family as a social and economic unit and the diminishing influence, authority and responsibilities of wider kinship groups.

Indeed, the enhancement of the nuclear family at the expense of wider kinship ties constitutes one of the central features of the legislative reform accomplished under the Wills and Inheritance Act, enacted in 1967.[39] If a man married under customary law dies intestate, the Act basically operates to ensure that the larger fraction of the intestacy will devolve upon his wife or wives, children and the deceased's actual dependants.[40] Under traditional customary law, relations outside the nuclear family would have an equal or greater claim. The claim of such outside relatives was, generally speaking, greater under matrilineal than patrilineal systems. This was mainly because, under matrilineal systems, a man's responsibilities were owed principally to the children of his sisters and not to his own children. A man's own children were principally the responsibility of his brother-in-law (the children's maternal uncle).[41] The other fraction of an intestacy will still devolve in accordance with customary law. The Act purports

to maintain the difference between patrilineal and matrilineal systems by differentiating the sizes of the portions of the intestacy which will devolve in accordance to customary law. The fraction subject to customary law is smaller (1/2) under the patrilineal systems than (the 3/5) under the matrilineal systems.[42]

In practice, many women contribute as much or sometimes even more than their husbands to the acquisition of food, clothing and even accommodation for the family. In rural, indigenous economies, food is acquired by both husbands and wives, mainly through cultivation.[43] Between husbands and wives there tends to be a more or less balanced share of tasks - from the clearing of freshly occupied pieces of land, through planting and weeding, to the harvesting of crops. Although there is no demographic information on the subject, it seems clear that an increasing number of wives in urban, Westernised communities work for wages or salaries to supplement those of their husbands.[44]

Nonetheless, there are certain duties which may be said to represent the minimum required of every wife. These include: exclusive sexual relationship with the husband, the preparation of food, the day-to-day maintenance of the matrimonial home and the feeding and cleaning of children.[45]

An important feature of customary-law marriages is that some of the matrimonial rights and obligations may be enforced by or against people other than the spouses themselves. A wife whose husband is away may proceed against the latter's relatives for maintenance or divorce. In matrilineal systems, a

husband's right that he should be given a plot of land for cultivation creates a correlative duty not so much on the part of the wife as on the part of the wife's guardian to provide the piece of land. At least during the initial years of marriage, in matrilineal societies, the husband may be under an obligation to hoe for his in-laws, as well as for his wife.

3. Rights Over Children

In many matrimonial disputes children have provided the main bone of contention. Disputes about children are far more common, for example, than disputes about the division of family property. This is to be expected for, as already mentioned, the essence of marriage in traditional African communities has been its function as a mechanism for the determination of "ownership" of children. In theory at least, the issue of children provides a further example of important differences between people following the matrilineal and those following the patrilineal systems of family life. Yet, especially at present, the relevant customary-law principles are by no means always definite or certain. The following discussion is confined to the examination of the law relating to the affiliation of children. The rules governing the rights of the parties on divorce are examined in the next chapter.

A child born out of wedlock is affiliated to the matrilineage or patrilineage of which the mother is a member.[46] Where the matrilineal system is followed, the mother's brother is the person who acts as the principal legal guardian of the child. Where the patrilineal system is followed, either the maternal grandfather or the maternal uncle will be the principal legal

guardian. However, there is no rule under customary law which would prevent a child born outside wedlock being affiliated to the genitor's family, either by a court order or by an arrangement between the parties concerned. Where the natural father is asked to maintain and educate the child, for example, it may be assumed that the intention is to affiliate such child to the father.[47] So too where the father is allowed to take the child upon payment of expenses incurred for the latter's upbringing, the assumption will be that the father is thereby invested with the rights of a legal guardian.

Subsequent lobola marriage between the natural parents of a child born outside wedlock normally has the effect of affiliating the child to the father and the father's patrilineage. However, it is always prudent in such a case for the question of the child to be specifically included in the marriage negotiations. Mere payment of damages for illicit sexual intercourse does not give the genitor any rights over the child. Subsequent marriage by the mother to a person other than the natural father of a child born outside wedlock does not invest the husband with any rights over the child. The fact that the husband may be caring for the child does not make any difference as far as the former's legal rights are concerned.

As a result of the enactment of the Wills and Inheritance Act, 1967, on the other hand, the child itself may acquire some rights as a dependant.[48] Conversely, in matrilineal systems, should the husband have acquired any children from his previous associations with other women, his subsequent marriage does not invest his wife's people with any rights over such

children. It is not clear whether under the Wills and Inheritance Act such children would inherit upon the wife's intestacy.[49] In either case, however, it is useful to remember that in the broad social sense, the relationship between one spouse and the children acquired by the other spouse will be that of father-and-child or mother-and-child respectively. Marriage between the relevant people would undoubtedly be regarded as incestuous.

As far as the question of affiliation is concerned, obviously it does not make any difference in matrilineal systems whether or not a child is born within wedlock. In either case the child is affiliated to the mother's mbumba. Applying the matrilineal principle in its pristine vigour, the relationship between a man and his children may be regarded as being purely biological. Even to his own children the father/husband is a "stranger". According to Lucy Mair's informants, the husband under the matrilineal Chewa:

> ...is described as "borrowed" (ngongole) or as tonde obwereka, a stud animal (literally, borrowed male). "He begets children and goes home".[50]

The maternal uncle and not the father is the one who is the legal guardian. The maternal uncle would be the one responsible for the marriage arrangements of the children, for payments of fines or damages incurred by them, and for the general supervision of their upbringing. The father may nevertheless be responsible for the maintenance of his children. This responsibility would, however, fall on him only indirectly through his broad obligation to render assistance to his wife.[51] It is

the maternal uncle who would recover damages for injuries caused to the children; who would have the power to call upon the services of the children, and the authority to chastise them. In the context of modern life, the maternal uncle would be the principal recipient of gifts or remittances from working children. Corresponding to his indirect responsibility to maintain his (or more correctly, his wife's) children may be the husband's indirect claim to the services of the children through the mother.

There can be little doubt, however, that the importance of the father has greatly increased. With many of the matrilineal people of today, the father can hardly be described as a mere "borrowed bull". His social and economic importance to the children is scarcely less than that of his counterpart in patrilineal systems. Although maternal relatives continue to press for their traditional interests in children, the tendency has been to leave the responsibilities on the shoulders of the fathers. This is particularly true where responsibilities of a modern nature, such as the payment of school fees, are involved. While contact with patrilineal peoples and the teachings of Christian missionaries have clearly played their part, the increased importance of the father among the matrilineal people of Malawi must largely be seen as an aspect of the impact of modern social and economic forces on African family life in general.[52]

It must be emphasised that the increased importance of the father does not constitute evidence that matrilineal people are becoming patrilineal. Lineages among matrilineal people almost

universally continue to be traced through their mothers as opposed to their fathers. The strengthening of the social bond between fathers and their children reflects the enhanced position of the nuclear family in society. it is not an indication of any switch of attachment on the part of children from their mothers' families to the families of their fathers. A child these days would be inclined to view himself or herself as belonging first and foremost to his father and mother as opposed to belonging to his maternal uncle. However, when it comes to extending the network of relationships beyond the nuclear family, it will still be the relatives of the mother rather than those of the father who take precedence.

The general principle among the patrilineal people is clear. The payment of malobolo establishes the affiliation of children to the people who pay the malobolo. Indeed, it is as though the malobolo constitute a payment for the reproductive capacities of the wives.[53] Thus, normally, children are affiliated to their father's patrilineage. The principal legal guardian of the children is their father. In his absence, a paternal uncle (he is also called father) or a paternal grandfather will normally fill the position of principal legal guardian. In the absence of any of these an aunt can also act as a legal guardian.

From some of the old cases decided in Native Authority M'Mbelwa Jere's area (Mzimba District), it would clearly seem that among the Ngoni people the patrilineal principle was in the olden days very rigidly adhered to. The Ngoni authorities would go to great lengths to avoid as much as a hint of anything

that would seem to compromise this principle.

Thus in George Shaba v. Filimon Ngulube (1937),[54] X, a cousin (even in the African sense) of George Shaba had married Filimon Ngulube's daughter. Malobolo had been duly paid. After a while, X's wife ran away to her village whereupon X followed her and stayed there as well. Later, X went abroad for work and died there. His wife, four sons and three daughters continued to live in the wife's village. One of the daughters got married and the malobolo received for her remained in the village of X's wife. X's eldest son was the person alleged to have given his sister away. The malobolo was presumably also in his hands. No immediate relatives, apart from his own children, had survived X. The closest relative was apparently a certain lady who had since migrated to Northern Rhodesia.

The plaintiff, George Shaba, was a son of X's deceased sister. Much younger than even X's eldest son, Shaba was apparently the closest relation on X's side. He sued X's father-in-law for the return of X's widow, children, and the property received in respect of X's married daughter. Both the defendant (and M'Mbelwa's court) readily admitted the plaintiff's power to collect what was demanded. At the same time however, it was also implicitly admitted that X's sons were his rightful heirs. The plaintiff vouched that the property to be collected would be used solely for the benefit of X's sons and not for the plaintiff himself. The court of Native Authority M'Mbelwa tried to persuade the widow and the children to go with the plaintiff. Both the widow and the children refused

to leave. According to the widow, she would have gone back to her husband's village had the person recalling them been the lady in Northern Rhodesia, but not the present plaintiff whom she said she did not know. The court thought that the defendant was responsible for this resistance. It was held, however, that the widow and her children could not be compelled to go with the plaintiff,[55] in which case the defendant would have to return the malobolo paid for X's widow as well as that received in respect of X's daughter.

Clearly, had X's sons been living in their father's original home, it is highly unlikely that the plaintiff would even have attempted to assume any form of control over them. On X's death, X's eldest son and not the plaintiff would have taken charge over his deceased father's affairs. The underlying principle of the plaintiff's claim, and the courts' endorsement of it, would clearly seem to have been that X's eldest son was not entitled to assume control over his father's family so long as he was staying with his mother's father (the defendant), as this would only serve as a backdoor for the defendant to assume control over X's children. The martial concerns of Ngoni law[56] and the fact that the majority of the wives would be members of rival if subjugated tribes may well account for such rigid adherence to the patrilineal principle. The District Commissioner to whom the defendant in the above case had appealed was astounded by M'Mbelwa's decision. He observed:

> There is little doubt that the foundation of the original Angoni law was based, perhaps on slavery, but in any event it is based upon the father's duty to his chief and headman in time of war, where the tribe could only succeed if all the men, or prospective men were available to

> the chief. This is now changed and [the] Government has affirmed the right of any man to move away from his tribal area and live where he wishes without hindrance.[57]

With reference to M'Mbelwa's specific order, the Commissioner, observed:

> It means Shaba (plaintiff) will make a monetary gain on people in whom he himself admits has no right whatsoever .... But I fail to see why a distant relative or in fact anyone should benefit by a payment to himself in exchange of a right which has ceased to have any effect and exists only in the strict letter of Angoni law....[58]

The Commissioner, nevertheless, let the order as to the return of malobolo paid for X's widow stand. As to malobolo for the daughter, and the whole principle upon which M'Mbelwa's court had attempted to persuade the widow and the children to join the plaintiff, it was recommended that M'Mbelwa's council should consider changing the relevant Ngoni law.[59]

It would also clearly seem, in strictly patrilineal areas, that the mere fact that a husband has not paid malobolo due to his wife's people does not automatically affiliate children of a marriage to the mother's kin group. Of course, in order to secure payment, the wife's people can hold on to the children until malobolo have been paid. On the marriage of the first daughter, the wife's people may retain the malobolo paid for her, or if it is received by the husband's people, the latter may be obligated to hand it over to the wife's people. Receipt of the daughter's malobolo by the wife's people discharges the husband from any further obligation to pay and vests in him the full rights over children.[60]

Where the parties divorce or one dies before any malobolo are paid, the husband may still be entitled to the children on the condition that he pays the malobolo. Thus, in Leah Chipeta v. Yakobe Jere (1939)[61] the husband had not paid malobolo up to the time of divorce. The court of Native Authority M'Mbelwa ordered that the husband should pay malobolo and claim his children.[62]

Where there are no good reasons for late payment, this may be taken as evidence of an unwillingness to legalise the marriage and the husband may lose the children. Thus in Elias Khunga v. Richard Chawinga (1945)[63] the husband did not profer any malobolo for fifteen years after being ordered to. There was no reason for the delay and the court could only view his subsequent willingness to pay as having been prompted by the impending marriages of the daughters of the marriage. The parties had divorced in court fifteen years before and the court had ordered that the husband could take the children if he paid malobolo. After fifteen years delay, his attempt to pay malobolo and get the children was rejected.

However, there are certain areas where patrilineal and matrilineal systems operate side by side and cases where the parties are from different marriage systems. In such cases, the non-payment of malobolo tends to be taken almost for granted as evidence of the parties' intention to contract their marriage in accordance with the principles of matrilineal customary law.[64] There are also some parents who, for one reason or another, do not want to demand malobolo for their daughters. In purely patrilineal communities such as those in Mzimba or

Karonga, a decision by the wife's parents not to claim malobolo should not automatically entitle them to the children. There does not appear to be any express rule of customary law providing for such cases. It is very likely, however, and this would be in accordance with the spirit of the patrilineal principle, that a court would give the husband or his relatives the option to pay malobolo and claim the children should any need arise for such a claim. In other words, customary law is unlikely to be interpreted in such a way as to give the wife's people the option to trade malobolo with children.

A man who has paid malobolo for his wife will also be entitled to any child born of an adulterous act between his wife and another man. This is an ancient principle, but was confirmed by the National Traditional Appeal Court as recently as 1979 in John Nyirenda v. Durton Mapunda.[65] This was a case where the natural father attempted to gain possession of a daughter born of a married woman. The messenger sent to collect the daughter was severely beaten by the legal husband of the daughter's mother. In a court case which ensued, the legal husband demanded payment for the cost of bringing up the child as a condition for the release of the girl to the natural father. The court of first instance ordered the natural father to pay four cows and K20 for the daughter. This award was eventually upheld by the National Traditional Appeal Court. The court expressed its agreement with the husband's argument that since the child had been born when the mother was still his wife, the child legally belonged to him and not the genitor. It must be emphasised that the issue here is not one of evidence -

namely, that a child born during wedlock is presumed to be the natural issue of the husband - but one of law. Proof that the issue is the natural child of another man is irrelevant.

4. Liability for Illicit Sexual Relations

Actions arising from illicit sexual relations account for a large portion of family-law litigation under customary law.[66] With the exception of certain ritualistic sexual arrangements practised in some communities,[67] it is perhaps true to say that under customary law, any sexual relation between man and woman outside marriage is actionable against either the male or both the male and female partners. The English term, "adultery" is widely used indiscriminately to describe a variety of illicit sexual relations. This is a reflection of indigenous vocabularies in which one and the same term may be used to describe, for example, intercourse in violation of the marital bed as well as intercourse betwen unmarried partners. This, however, does not signify any absence of conceptual distinctions amongst various forms of sexual misconduct. Important distinctions are drawn between various forms of illicit sexual relations.

The seriousness attributed to each particular offence depends, very broadly, upon either of the following considerations, namely, the marital status of the female partner and whether or not any pregnancy results from a particular sexual encounter. Within these two broad bases, there are other factors upon which further distinctions can be drawn. In general, there can be little doubt that the principles upon which liability for illicit sexual relations is based reflect

traditional African social conceptions by which men tended to be regarded as having some form of proprietary interests or rights in women. This will hopefully become apparent in the course of the following discussion, which examines the law regarding the most common forms of illicit sexual relations. In an ascending order of seriousness, these are as follows.

a) Intercourse With an Unmarried Woman Without Pregnancy

Even a mere act of sexual intercourse with an unmarried woman, which does not result in pregnancy, constitutes a civil offence under customary law on the part of the male partner against the legal or physical guardian of the woman. The age and the consent of the woman to the intercourse are, strictly speaking, irrelevant insofar as civil liability is concerned.[68] The injured party is not the woman herself, but her guardian and her family as a whole.

Different views may be entertained as to the exact nature of the injury for which more-or-less standardised damages tend to be awarded.[69] In W. Zgambo v. W.S. Luhana (1978),[70] the National Traditional Appeal Court described the damages awarded in such cases as being compensation for the "deflowering" of the girl. This would indeed seem to have been true among the patrilineal Ngoni of olden days. As Margaret Read pointed out, a form of partial love-making, ukuhlobonga, was allowed among unmarried Ngoni girls. However, if intercourse led to the rupture of the hymen, the man responsible would pay heavily to the parents of the girl "to compensate for lost lobola".[71] Parents of a bride who had not preserved her virginity before marriage would expect to receive reduced malobolo. The girl

herself would be disgraced. Among the well-to-do, a vital prestigious ceremony preliminary to marriage - the umsindo - would be denied to a girl who had been deflowered.[72] Cram, J., perhaps had this practice in mind when, in Chitema v. Lupanda (1961), he referred to:

> ...the well-recognised principle of African customary law that the girl was in the nature of her father's chattel... and that [through her intercourse with a man] he suffered damage to his property. He suffered family disgrace and dishonour, and, as the girl lost some of her value in the marriage market, he could suffer pecuniary loss, which would amount to damage.[73]

The material aspect to the basis of liability should not be exaggerated. Indeed, with respect, the above observation by Cram, J., is misleading to the extent that it tends to embody the false notion that marriage involving the payment of malobolo amounted to a sale of the woman. It is useful to note that, although it is among the patrilineal people that actions of this nature are frequent, even under the matrilineal systems, the guardian of a woman has the power to take action against the offending man.[74] Yet among the matrilineal people the question of loss of malobolo does not arise. Moreover, it was not among all patrilineal people that virginity was regarded as a sine qua non to a respectable marriage. Even among the Ngoni of today, the question of a bride's virginity is hardly raised in marriage negotiations. More importantly, while it may avail the defendant to allege that the woman in question has been leading a promiscuous life, such a defence does not arise simply because of proof that the woman is not a virgin. It would really seem to be the intangible injury to family pride and honour that provides the general basis for liability in these cases.

Perhaps not surprisingly, some European magistrates were hesitant to award damages on the mere basis that a man had had sexual intercourse with a woman. In Chinyama Banda v. Esinat nyaBanda (1938),[75] the Atonga Tribal Council (Chintheche/ Nkhata-Bay District) had ordered a man (appellant) to pay £2 10/- to the relatives of a woman (respondent)[76] as damages for sexual intercourse with her. The man appealed to the District Commissioner, claiming that the respondent had invited him to her house and therefore that his conduct was not contrary to customary law or alternatively that the £2 10/- was excessive. It was also alleged that a marriage had been contemplated between the parties. There was also some suspicion that the sexual intercourse had taken place upon a promise of payment by the man. More awkwardly, the action had been brought by the woman herself, who incidentally had also been responsible for revealing the indiscretion to her parents. Whatever the circumstances of the alleged offence, the African assessors sitting with the District Commissioner were of the view that the parents of the woman were entitled to the damages ordered by the Native Authority court. The District Commissioner followed this advice and upheld the award of the lower court. He nevertheless made the following comment:

> ...I consider that the respondent in allowing the appellant to step in her house with her, has done wrong and is severely reprimanded.
>
> I cannot understand why a woman such as this is not, according to native law and custom, considered to hold any responsibility for the adultery for it seems to me that a bad woman would readily entice a man to commit adultery with her knowing that the native court will order the man to pay compensation to her family.[77]

In Site Manda v. Andreya Mhoni (1939)[78] the same District Commissioner went further and actually reversed a decision of a Native Authority awarding damages to the respondent (Mhoni) on account of his daughter's sexual intercourse with the appellant (Manda). The Commissioner's decision was based on the considerations that the daughter in question was unmarried, was old enough to assume responsibility for her actions, and that she had not been made pregnant. The majority of the magistrates, however, fully adhered to the traditional rule. As must be clear from Chitema v. Lupanda[79] and Zgambo v. Luhana,[80] both the High Court of Malawi and the National Traditional Appeal Court have recognised and applied the traditional rule.

b) Impregnating an Unmarried Woman

Impregnating an unmarried woman is treated as a more serious offence than merely having sexual intercourse with her. The differences in the seriousness of the two offences can be seen, for example, in the case of K.G. Chiphwafu v. J. Mkwapatila (1966).[81] The case came before the Ntchisi District Local Appeal Court by way of appeal from a Local Court of first instance. The latter had ordered the appellant to pay £40 damages for impregnating the respondent's daughter. On appeal, it was found that the appellant had not made the daughter pregnant, but had merely had sexual intercourse with her. The award of £40 damages was accordingly reduced to £20. The distinction between the two offences was also the basis of the decision of the High Court in Chitema v. Lupanda, which will be considered below.

In practice, the prospective defendant is first given the option to marry the pregnant woman before legal action is brought against him. It is usually only when the offender has refused to marry the girl that action is brought against him. It does not follow, however, that an offer of marriage by the offender automatically absolves him from legal liability. The parent of the girl can choose to recover damages first before entertaining any proposal of marriage. It is also possible that the parent of the woman may not be in favour of any marriage.

In principle, sexual intercourse with a married woman is regarded as a more serious offence than making an unmarried woman pregnant. In terms of the damages awarded, however, the two offences do not seem to be treated very differently.[82] This is particularly true where a school girl is involved. The courts, especially the National Traditional Appeal Court, take a very serious view of pregnancies involving school children. Thus in Francis Chakwawa v. Florence Pingani (1981),[83] Chakwawa had been ordered by the Blantyre Traditional Court to pay K150 to the parents of a school girl whom he had made pregnant. Chikwawa appealed to the National Traditional Appeal Court against the decision. In dismissing the appeal, it was stated:

> ...Their Lordships [the judges of the Traditional Court] wish to endorse in this court that when such things are done to girls who are about to go to school or wish to continue with schooling they take a very serious view of such incidents.[84]

The appeal was not only dismissed, but the award of K150 was enhanced by K50 to K200.[85]

The difference between impregnating a school girl and impregnating an ordinary girl or woman is highlighted, for example, by the case of James Banda v. Esther Mphande (1980).[86] Banda had been ordered by a lower Traditonal Court to pay K140 compensation for making Mphande's daughter pregnant. The lower court had proceeded on the assumption that the girl in question was at school. The girl had been attending a typing school - not part of the structure of formal education. On appeal to the National Traditional Appeal Court, it was held that a girl in a typing school was not a "school girl". The appeal was therefore allowed and the award of K140 was reduced to K50. In another identical case, an award of K201 was reduced to K60.[87]

According to a 1976 judgement of the National Traditional Appeal Court, the higher damages awarded in respect of school girls are intended to reflect the frustrated expectations of the parents and relatives of the girl and the expenses incurred on the education already covered by her.[88] A pregnant girl will almost invariably be expelled from school. Her chances of a career are thereby greatly diminished. A girl whose education has been disrupted will also tend to have a limited range of suitors many of whom may be regarded as unsuitable by ambitious parents. Apart from the purely personal loss on the part of the parents, the higher damages awarded with respect to school girls would clearly also seem to underline a punitive element. The courts seem to be concerned as a matter of national policy about the advancement of women in the field of education.[89] The higher damages are partly

intended to express societal disapproval of the relevant behaviour and to serve as a warning to prospective offenders.

The damages awarded are not for any supposed injury to the girl herself, but to compensate her parents and relatives.

Indeed, the law governing liability for illicit sexual relations underlines another general principle of traditional customary law. Under strict traditional law, a woman was not accorded the status of an independent legal person. She was treated not merely as a perpetual minor but also merely as an object of rights and liabilities. Thus, the woman's consent to an act of illicit intercourse was not, as already stated, relevant to the determination of liability. Her character may constitute a relevant issue. Evidence, for example, could be adduced that the woman had been leading a life of promiscuity. This does not, however, constitute a complete defence. At the court's discretion, it may be taken into account in the assessment of damages.[90]

Where the woman's character appears to serve as a complete defence, the question of evidence may really be what is at issue. If the man denies paternity, the woman's loose character may persuade the court to accept such a denial. More crucial in the whole question of the woman's legal position is the fact that, strictly, she has no locus standi to proceed against the man responsible for her pregnancy.[91] Thus, even if the woman does not want to proceed against the man, this cannot prevent her parents from doing so. By corollary, if the parents of the woman do not wish to bring any action against the man, the woman has no remedy under traditional customary law.

In practice, however, the traditional principle is not always strictly adhered to. A court may not necessarily refuse to entertain an action merely because it has been brought by the woman herself instead of her parents. This is not merely an example of the flexibility of customary-law procedures, but also an indication of the gradual recognition of the status of women as independent legal persons under customary law. In theory, an action brought by the woman herself is regarded as being prosecuted on behalf of the parents. The award itself may be granted in the name of the parents rather than the woman herself. In some cases, however, the courts have abandoned even such merely formal adherence to the traditional principle.

In Charles Nkhoma v. Dorothy Thokozani (1981),[92] the National Traditional Appeal Court dismissed an appeal against the decision of the Blantyre Traditional Court which had ordered the appellant to pay K151 "for giving the respondent a child". The woman's claim would seem to have been for the maintenance of the child. The lower court had nevertheless awarded damages for the illicit sexual intercourse rather than for the maintenance of the child. In the course of its judgement, the National Traditional Appeal Court observed that under customary law, an illegitimate child belonged to the mother and the biological father was not duty bound to maintain the child. The court could not therefore order any specific amount to be paid for the child. With respect to the award for damages, the court addressed itself to the question whether the respondent was entitled to sue under customary law. It was observed that,

in normal circumstances, the suit should be brought by the parents or guardian of the woman. The court noted, however, that:

> ...in certain circumstances this is not possible. An urban setting is the case in point. The girl might leave Mzimba to seek employment in Blantyre. She finds a man who pretends that he will marry her and the girl becomes pregnant. In this circumstance it would really be difficult for the girl to cause her parents or guardian to come all the way from Mzimba to Blantyre to summon the man. The situation is very complicated when the girl comes from outside the country, may be from South Africa. It would be very difficult for her to summon her parents or guardians. In this situation therefore the girl has got a locus standi in that case.[93]

The award of K151 was held to stand.

It is worth mentioning that under the general law of Malawi, the Affiliation Act (cap. 26:02), an unmarried woman with a child can initiate affiliation proceedings against the putative father. An order against the putative father for the maintenance of the child may be obtained in a Magistrate's Court. It is not possible to say how often women actually make use of this remedy.

More relevant to the present discussion, however, is the question whether any analogous remedy exists under customary law. As already noted, the National Traditional Appeal Court in Nkhoma v. Thokozani,[94] for example, affirmed the traditional principle that a putative father of a child born outside wedlock cannot be compelled to pay for the maintenance of the child.

Yet, the National Traditional Appeal Court has not been consistent on this matter. In Steeve Augusto Kalombe v. Anne Michongwe (1980),[95] for example, an order was made against the

putative father to deposit K100 in a Post Office Savings Account for the maintenance of a child born outside wedlock. The court further ordered that withdrawals from the account should be made by both the father and the mother. This was to ensure that the money should be used specifically for the child. More interestingly, the court also seemed to lay down as a general rule that "each time a court makes an order for maintenance [it] should also order the free movement of the child" - between the father and the mother. This was clearly an innovation, patterned on affiliation orders of Magistrate's Courts and without any antecedent principle under traditional custom.

In the High Court case of Chitema v. Lupanda,[96] Cram, J., would seem to have been of the view that an order for the maintenance of the child born out of wedlock could be made under customary law. The case had originated from the Zomba African Urban Court where the appellant had been ordered to pay compensation to the parents of the respondent in respect of sexual intercourse between appellant and respondent and the subsequent birth of a child. The appellant had also been ordered to put another sum of money on trust for the maintenance of the child. The appellant appealed against both orders - the first one on the ground that only the respondent's parents and not the respondent hereself could sue for damages, and the second order on the ground that paternity had not been proved. With regard to the appeal against the first order, the High Court held that the point raised by appellant was merely procedural and that an award of damages in favour of the responent's parents could

properly be made although the action had wrongly been brought by the respondent herself.

The appeal against the second order relating to maintenance was allowed. It was found that sexual intercourse had indeed taken place between the appellant and the respondent. It was on the basis of this finding alone that not only was the lower court's award of damages to the respondent's parents upheld, but the damages were also enhanced, to take into account the fact that the appellant was a teacher of the respondent. The High Court agreed with the appellant that paternity had not been proved. The court drew a distinction between questions of evidence and questions of procedure and indicated that the former had to be decided in accordance with the general law.[97] It was therefore stated that in an affiliation application, the evidence of the mother required corroboration. In the instant case, it was held that there had hardly been any corroboration. Furthermore, the girl had not named the appellant until after the birth of the child and after she had been beaten by her parents. The date of the alleged sexual intercourse suggested either that the baby had been born prematurely or that the appellant was not the father of the child. No evidence of a premature birth was produced. Cram, J., observed:

> It is a cardinal principle of justice that a man is not responsible to maintain an illegitimate child unless he is proved to be the father. Once it was decided that the standard of proof in a civil court had not been attained so as to fix paternity on the appellant in my respectful view no order could be made against him in respect of the child. I do not consider any customary law would make a man responsible for maintenance of a child that was not his own and any such law would be declared repugnant to justice in terms of the [Nyasaland] Order in Council.[98]

The clear implication here was that an affiliation order could have been issued had the appellant been proved to be the father of the child. Still, there is no guarantee that an order for maintenance can be obtained as of right under customary law. Whether such an order can be obtained in any particular case would still seem to depend largely on the whim of a particular judge or judges rather than on any established legal principle.

c) Marital Infidelity

Sexual intercourse between a married man or woman and someone other than the lawful spouse - adultery in the proper sense of the term - is a complex and involved subject. Only the main points of law involved are considered in this discussion.

Firstly, it is useful to consider the question whether or not under customary law adultery constituted a criminal offence, as well as being a civil wrong.

According to one widely held view, death was in the olden days a common punishment for adultery.[99] In other words, adultery was treated as a criminal, rather than as a civil, offence.[100] George Simeon Mwase made the following observation, which was part of his general criticism of European justice in Nyasaland:

> Adultery is one *[*law*]* which gives a lot of doubts in the way the whiteman decide it. The whiteman's law asks this as a civil case which has no much importance. *[[*By*]]*[101] The country's *[*African traditional*]* law, this is one of the capital charge or the capital crime which *[[*was*]]* followed with death sentence by consuming the both culprits with fire, or a nobkery *[[*knobkerrie*]] [[*or*]]* even a spear would play his flesh or her flesh until they were both perished. Their dead organs were not to be cared for. And sometimes both the culprits were to be driven

> away by cutting parts of their bodies such as ears, arms, nose or something else in the way of emasculation.[102]

There is hardly any evidence upon which the existence of such a practice as described above may be confirmed or denied.

The possibility that at some period adultery was punished by death cannot, of course, be ruled out altogether.[103] It is worth remembering that in traditional African societies, adultery was a wrong not only in the legal sense, nor was it regarded merely as antisocial behaviour, but it was also seen to lead to supernatural consequences. Events such as epidemics or misfortunes in battle were sometimes attributed to indiscreet conduct among members of relevant communities.[104] Furthermore, in ancient societies in general, death tended to be applied to a wide range of offences, as it was one of a very limited range of available punishments. Theft and murder, for example, would carry the same penalty of death - the difference in seriousness between the offences being reflected only in the manner of execution.

Another more likely possibility is that in traditional African communities, parties to an illicit sexual association, particularly if found flagrante delicto, were not protected by the law against violent acts of self-help by, or on behalf of, the injured party. The offending man, in particular, could have been regarded as a "wild pig" which could be killed with impunity. Thus, even without being a capital offence, adultery would have carried with it the risk of death at the hands of the offended person. Of course, this is true even today. Under the imported English criminal law, however, an offended spouse

would not be acting within the law if he or she carries out violent acts of self-help against the offenders. Extremely violent acts of retaliation could lead to criminal prosecution.[105]

Whatever the position was in the remote past, it seems clear that the treatment of adultery as a capital offence was not part of customary laws in the period immediately preceding the introduction of European rule. At least, the apparent disappearance of such practices as described by Mwase had nothing to do with the advent of European rule.

It was mainly from the early 1930s that the courts began to treat adultery as both a criminal (although not a capital) and a civil offence. In addition to compensation orders, fines and, occasionally, terms of imprisonment, began to be imposed on account of adultery.[106] The Native Authorities were mainly responsible for this development. Clearly, the practice of imposing fines for adultery (in addition to compensation orders) had no immediate precedent in traditional African practice.[107] The fines imposed used to be significantly lower than the damages awarded to the offended parties.[108] This in itself perhaps is an indication that adultery was seen primarily as a civil offence and only secondarily as a crime. The African authorities probably believed that a decline in moral standards could be checked through the instrument of law. As Martin Chanock observes, the authorities:

> ...viewed the rate of adultery as a sort of index of moral decline and they were concerned to use the law and courts as weapons to punish and control it.[109]

Criminal sanctions for adultery, and not mere civil compensation, were probably seen as a more adequate way to underscore the law's concern for moral values.

European magistrates in their appellate role were not altogether consistent in their decisions concerning cases of adultery. In some cases, the fines imposed by Native Authorities were upheld; in other cases, the fines were disallowed on the very ground that adultery was only a civil offence.[110]

In 1946, a circular from the Chief Justice, E.E. Jenkins, to all District Commissioners (magistrates) expressed doubts as to the advisability and legality of imposing fines or terms of imprisonment for adultery.[111] The Chief Justice also refused to treat adultery as a criminal offence in Joseph Supedi Limbani v. Rex (1946).[112] It was held in this case that the principle upon which adultery was being treated as a criminal offence had not been satisfactorily established under customary law.

At present, the question whether adultery is a criminal (as well as a civil) offence is of mere academic or historical interest. As was pointed out by Cram, J., in Isaya Mpozera v. Victor Mwachuma (1965),[113] no person ought to be convicted of a criminal offence unless the offence is prescribed in a written law.[114] There is at present no written law under which adultery is made an offence. Equally important is the fact that at present, the courts at all levels invariably treat adultery solely as a civil offence.

It is a straightforward principle of customary law that a husband is entitled to recover damages on account of adultery

committed by his wife. Intercourse with a married woman is regarded as an injury to the husband and not to the parents of the woman.[115] In fact, in places like Mzimba, the woman herself, but more usually her parents, are also liable to compensate the husband.[116] As well as recovering damages from the man who commits adultery with the wife, the husband may also recover damages from the woman herself or her guardian. In some cases, the action for damages against the other man has been brought by the wife herself or her parents. In Vailess Mulweni v. Alexander Chirwa (1935),[117] for example, the wife to an adulterous association brought an action for damages against her male partner. The damages were awarded in the name of the husband. The woman herself was also ordered to pay damages to her husband for the adultery. In cases of this nature, the lawful husband may not subsequently proceed against the other man for further damages. The proper course for the husband would be to proceed against his wife or her parents for the damages.[118] Normally, the latter would hand over to the husband the damages they recover from the offending man. Actions of this type normally involve wives with absentee husbands. The wife or her guardian would bring the action as an act of expiation and in the hope of minimising her own liability to the husband.

A question often raised in relation to African customary laws in general is whether the definition of adultery extends to any unseemly conduct short of actual sexual intercourse. From most of the decided cases in Malawi, it would clearly seem that a distinction exists between "adultery" and unseemly conduct short of actual sexual intercourse.

Unseemly conduct between a married woman and another man is also actionable under customary law.[119] That this offence is distinguished from actual adultery is underlined by the fact that it is treated less severely than adultery. Thus, in one appeal case before the Mzimba District Commissioner,[120] the appellant admitted to having invited the respondent's wife to a bush at night. It was found that no adultery had taken place. The lower, Native Authority, court had nevertheless ordered him to pay £2 10/- compensation and a fine of 12/6. The appellant successfully appealed against the amount of damages awarded, contending that it equalled the amounts usually payable in cases of actual adultery. The District Commissioner agreed and the damages were reduced to £1. In James Abner Mwale v. Hawtrey Jailos Kalilu (1959),[121] the lower court had ordered the appellant to pay £6 as compensation for his alleged adultery with the respondent's wife. On appeal to the High Court, it was held that adultery had not been proved, but only the lesser offence of kunyengana. The award of £6 was reduced to £3.

On the other hand, it is useful to bear in mind that in the courts administering customary law, adultery need not be proved by direct or particularly strong evidence. Conduct showing undue familiarity easily leads to the inference of actual adultery. Thus, in practice, it can be a delicate exercise to distinguish between cases of actual adultery and cases of mere indiscretion short of adultery. Thus, in Levi Gelesomo v. Alex Mzoza (1976),[122] the appellant sought to deny liability for adultery by claiming that he had only been guilty of the lesser offence "of escorting the respondent's wife". It was held that adultery could be inferred from the facts admitted.

Apart from the fact that the wife's adultery may give rise to an action for damages, such adultery also constitutes a matrimonial offence upon which the husband may seek divorce.[123] Any remedy against the offending third party is not regarded as a substitute for possible divorce proceedings. Rather the two are regarded as complementary.[124] However, a husband may not be allowed to recover damages against the wife (or her parents) on the basis of the same act of adultery upon which an order of divorce has been obtained.[125] Furthermore, if it is shown that gross misconduct on the part of the husband (for example neglect) has contributed to the wife's adultery, this may affect the husband's entitlement to whatever remedies are available.[126]

The customary law governing liability for illicit sexual relations is almost exclusively geared towards the social control over access to women. It can be seen that the relevant principles focus almost entirely on the protection of men's rights in women. Thus, whereas a husband may sue a third party who commits adultery with his wife, the wife has no corresponding right to proceed against a woman who commits adultery with the husband.[127] Such obvious double standards in the law have attracted much attention in some parts of Africa. In Kenya, for example, the Commission on the Law of Marriage and Divorce recommended that a wife should have a right of action for damages against a woman with whom her husband has committed adultery.[128] This is now part of the statutory marriage law of Tanzania.[129] In Malawi, Ibik's panels were unanimous in recommending that the wife should be entitled to the

same right of action as the husband.[130] So far, there has been no indication of any change in the law.

Traditionally, the wife had no claim to any exclusive sexual relationship with her husband. The husband's adultery was an offence only in relation to the legal guardian of the co-adulterer and not in relation to the wife. The common view was that the wife lost nothing by the husband's adultery. In any case, the husband could legally contract further marriages with other women. Thus, unless the husband's adultery was persistent and was accompanied by neglect or other matrimonial misconduct, it did not constitute a ground upon which the wife could seek divorce.

The modern tendency has been towards legal equality between men and women. Thus, although women may still be expected to ignore sporadic acts of adultery by their husbands, legally, even a single act of adultery by the husband would justify the wife to seek divorce.[131] As the following discussion will show, at present, the wife may even be legally entitled to divorce her husband if the latter contracts another marriage with another woman.

d) Polygyny

As already indicated,the question of polygyny is considered elsewhere in this study.[132] However, there is one point which calls for immediate attention.

It is of course one of the main features of marriage under customary law that it is potentially polygynous. In theory, there is no limit on the number of wives a man may take. As

already observed, even those Africans who have adopted Islam are not legally limited to any number of wives.[133]

The point which calls for immediate attention here relates to the fact that under traditional customary law, a man's subsequent marriage to another woman did not entitle the first wife to a divorce. It must be noted that under customary law the court will normally dissolve a marriage once it is clear that there is no prospect for the marriage to continue.[134] The court will dissolve a marriage even where the party seeking the divorce has no valid grounds. Thus, even under strict traditional customary law, a woman would be granted divorce if she did not want to form part of a polygynous relationship. However, apart from the fact that (and perhaps because) such a wish would be regarded as anti-social, the woman would be held to be responsible for the breakdown of the marriage. Thus, where applicable, she could be ordered to return part or all the malobolo paid by her husband. In other cases, she could be ordered to pay compensation for wrongfully divorcing her husband. She could also forfeit other important claims, for example, as regards family property or even children.[135]

Under the law as just described, the wife of a husband who intends to take another woman has no real alternative to submitting to a polygynous relationship. The law would penalise her if she opts for a divorce. However, the courts have been interpreting the law rather differently. From a number of actual court decisions, it would appear that under customary law today the wife is entitled to opt out of a customary marriage if such a marriage has become polygynous in fact rather than merely in potential.

The tendency to depart from the strictly traditional approach can be traced to the older decisions of European magistrates involving people who professed to be Christians. The magistrates were normally reluctant to make orders which would adversely affect women who had chosen to opt out of polygyny on account of their religious beliefs.

Thus, in Atuleje v. Machaka (1938),[136] a woman married under customary law petitioned the court of Native Authority Nchema for divorce on the grounds of desertion and neglect on the part of the husband. Actually, the real problem was that the petitioner could not bear children. Being a Christian, however, she objected to her husband taking a second wife. The husband, nevertheless, took another wife. It can be noted in parenthesis that in a typical African traditional setting the wife's objection to the husband's wish to take another wife would have been viewed with unreserved reprobation. The husband's conduct would not only have been in accord with traditional practice, but would have been the only recommended course of action. The Native Authority in this case granted the divorce and, in accordance with tradition, ordered the petitioner to pay £1 10/- compensation for wrongful divorce. The petitioner appealed to the Chiradzulu District Commissioner against the order for compensation. The District Commissioner found that there had been neither desertion nor neglect on the part of the respondent, but that the parties had become incompatible because of the woman's Christianity and the man's polygyny. He quashed the order for compensation, observing that:

> This is one of those cases where mutual separation without any further liability on either side is most desirable.[137]

The High Court of Malawi was to develop this principle even further.[138]

In contrast, the courts would seem to have been less prepared to accept conversion to Christianity as a good excuse on the part of a man to put away his extra wife or wives. Thus, in an old case, where a man wanted to put away his second wife because he had become a Christian, the District magistrate in Ncheu had the following to say:

> Listen [the man] has acted very [inconsiderately] in this matter, he was a baptized Christian in 1913 and married his second wife in 1914. He now turns the woman and her children away because he is a Christian and may not have two wives - The court can not prevent him from turning the woman away under such circumstances but is of the opinion that he should make liberal provision for the woman and child.139

The man was ordered to pay compensation amounting to £3, a very substantial sum in 1916. Recently the National Traditional Appeal Court adopted an almost similar view on the question. In Chiwaya v. Chiwaya (1977),[140] the court stated that a husband could divorce a wife on the ground that he had been converted to a religion which required only one wife. He would, however, be liable to compensate the divorced wife. Thus, it would appear that the traditional principle has been extended only in favour of women. The concern of the courts in the relevant cases is not the morality of polygyny as such, but its implications on the social status of women.

The courts continue to uphold the principle that a marriage contracted under customary law (even if such marriage is also blessed by a Christian ceremony) is potentially polygynous. An existing customary marriage with one woman will under no circumstance invalidate a subsequent customary marriage with another woman.[141] Even in the olden days, however, consultation with the first wife was demanded by social etiquette. Failure to do so, however, did not invalidate the subsequent marriage. It did not change anything in the legal positions of the parties. There are indications in judicial dicta that the social requirement, that a man who intends to take a second wife should do so only after consultation with his existing wife, is acquiring a legal character.

In Poya v. Poya (1979),[142] the National Traditional Appeal Court expressed the view that: "under tradition, it is cruelty for a husband to marry another wife without the consent of the first wife". The term "cruelty" was clearly used in the legal sense to mean a matrimonial offence rather than in the mere social sense. In Mphaweni Wasili v. Mary Wasili (1979),[143] the National Traditional Appeal Court advanced the even more far-reaching proposition that: "a man who marries a second wife against the wishes of the first wife, that was cruelty". Of course, the implication of this proposition was not that the absence of consent on the part of the first wife would vitiate the subsequent marriage. Still, the proposition that a man is committing a matrimonial offence if he takes a second wife against the wishes of the first wife has important implications.

Particularly in modern times, there can be very few women who would not protest against their husband's intentions to take subsequent wives. Christianity, together with the impact of secular education, wage-labour and the money economy have altered people's attitudes towards polygyny. Although the indigenous communities may still be described as "polygynous", this must probably be taken to mean merely that polygynous marriages are legally recognised and socially tolerated rather than that such marriages are regarded as ideal.

Increasingly, the notion of monogamy as the ideal form of marriage is gaining ascendancy. No longer does the possession of many wives confer the same, if any, measure of prestige as it used to in the olden days. In the first place, the number of wives and children (which used to be a measure of wealth and success) does not often reflect a man's real wealth or worth in modern times. In many cases, such possession of many wives merely reflects the degree of willingness on the part of the man to accept a lower standard of living. Even the rural areas (where subsistence farming constitutes practically the sole basis of sustenance) are affected by the strains and stresses of a cash economy. Few men can support more than one wife without straining their (usually-already meagre) resources. In urban and semi-urban areas, polygyny simply tends to lead to the transfer of the man's resources from the existing wife to the new one. In many cases, the tie with the first wife merely tends to degenerate. The state of polygyny has in some cases come to represent a mere transitory stage between marriage with one woman to marriage with another. Educated women or women

with independent means - ideal for a polygynous man - are unlikely to tolerate a polygynous state of marriage. Many have come to loathe and regard it as degrading and as a mark of their inferior status under traditional law.[144] Even women with very litle formal Western type of education tend to view polygyny as an affront to their dignity and self-respect. Women who agree to marry married men sometimes do so only in the hope, usually well-founded, that they would eventually displace previous wives.

Even in the old traditional societies, it is unlikely that polygynous households did not present special difficulties. The all-tranquil polygynous households depicted by such enthusiastic Africanists as the late Jomo Kenyatta of Kenya must surely be seen more as ideal-types to which people aspired than as everyday phenomena.[145] Societies where women cheerfully encouraged their husbands to take additional wives, where co-wives and their children received equal treatment and equal love, where there was no jealousy or possessiveness, but only the unstinting co-operation of the wives[146] rather belong to the realm of utopia. Partiality in the treatment of wives, jealousy, discord, the resort to (and accusations of) witchcraft and the use of love potions, and many other problems were traditionally acknowledged as inherent in polygynous families.[147] The highly supportive nature of closely-knit social groups, together with the fact that the economic and social welfare of individuals depended less on the activities of the nuclear family than on the wider family, tended to ameliorate the harsher aspects of polygyny. In conditions

where the nuclear family is becoming more important, and where the supportive role of the wider kin-group is diminishing, the difficulties attaching to polygyny become more intolerable.

Even in the olden days, such women as Kenyatta described in Facing Mount Kenya, who urged their husbands to contract further marriages, must have been few. The only usual cases when women would want their husbands to take subsequent wives were those which involved the latter's own sisters or close relatives. In particular, if a woman was unable to bear children, she would normally want her sister or other female relation to bear children for her. Even today, the desire for children remains the most, and possibly the only, widely and readily-acknowledged rationale for polygyny. It is worth remembering that even in olden times, only a fraction of the men in a given community actually took more than one wife.

Even nowadays, contracting marriage under customary law is not a commitment to polygyny. Many people who contract marriage under customary law do so simply because this is to them the only normal and familiar way of getting married, and not because they seek to follow each and every practice associated with customary marriage. The above proposition by the National Traditional Appeal Court would seem to underline this very fact. Its implication is that even if a woman is married under customary law, she has a right that her husband should not impose on her a polygynous way of life which may well be revolting to her. The correlative duty implied by this right, however, is not that the man cannot take a second wife. All that is implied by this right is that, if the husband does take

a second wife, he will be held responsible for the break of the marriage if the wife decides to opt out of the resulting polygynous relationship. It is submitted that in modern conditions, this is a sound principle and one can only hope that it will be strengthened by subsequent court practice or even legislation.[148]

NOTES

Chapter Three

1. See below, Chap. 4, on matrimonial property.

2. See Mair, "Marriage and Family in Dedza District", p. 104 as to Chewa law.

3. See also discussion on family property, Chap. 4.

4. Bt. Dist. Ct. civ. case no. 34 of 1909, MNA BA1/2/1.

5. A divorce was subsequently granted, in case no. 75 of 1909, op. cit.

6. Bt. Dist. Ct. civ. case no. 233 of 1911, MNA BA1/2/1.

7. Transcript of judgement.

8. Bt. Dist. Ct. civ. case no. 199 of 1910, MNA BA1/2/1.

9. Chiradzulu Dist. Ct. civ. app. (NA) case no. 23 of 1938, MNA BD1/1/1.

10. See Narama Coissoró, The Customary Laws of Succession in Central Africa (Lisbon : Estudos de Ciências Politicas e Sociais, 1966), pp. 204-209.

11. See Pachai, The History of the Nation, pp. 23-4, but mainly Pachai (ed.) in, The Early History of Malawi (London : Longman Sp. Ltd., 1972), pp. 181.

12. Mzimba Dist. Ct. civ. case no. 70 of 1913, MNA BR1/1/1.

13. See Lyndon Harries, "Christian Marriage in African Society", in Survey, pp. 360. Also see Aylward Shorter, African Culture and the Christian Church, pp. 167, for general discussions of the subject of malobolo.

14. Civ. app. (Karonga) no. 40 of 1979. The court further stated that a wife must be loved, protected and maintained and not used as "a productional tool".

15. See Van Velsen, op. cit.

16. See Dunn v. Dunn [1948] 2 All E.R. 822.

17. The case had originated as no. 131 of 1937 at NA M'Mbelwa's court, MNA NNM1/17/4.

18. Mawelero Tembo was one of the first African converts of the Livingstonia Mission in Ngoniland. He also became one of the first local teachers in the area.

19. The matter could have been referred to NA M'twalo Jere in the first instance, but M'twalo was a brother of the defendants. Even M'Mbelwa, however, was a relative of the defendants.

20. Record of Proceedings at NA M'Mbelwa's court, op. cit.

21. M'Mbelwa's judgement, op. cit.

22. Undated letter, Zebron to DC, Mzimba, MNA NNM1/17/4.

23. M'Mbelwa to DC, 23rd May, 1938, MNA NNM1/17/4.

24. In a letter dated 30th June, 1938, from NA Chindi to NA Chikulamaembe (op. cit.), Chindi refused to admit Zebron to his area, stating that Zebron was "troublesome". Zebron eventually left for Lundazi and settled there, leaving his two wives and their children behind.

25. NTAC civ. app. case no. 29 of 1982.

26. Mzimba Dist. Ct. civ. app. no. 1 of 1940 (no. 98A of 1939 of NA M'Mbelwa) MNA NNM1/17/4, also BR4/1/2.

27. This was also the original home of the plaintiff, but due to a quarrel with the deceased, he had left the village and area and settled elsewhere.

28. A brother of the first defendant was later joined as co-defendant.

29. Judgement of DC, op. cit.

30. Ibid.

31. Magson Gondwe v. Lackness nyaNkhambule, NTAC civ. app. case no. 75 of 1979. The courts clearly did not view the woman's claims as repugnant to or inconsistent with the general law penalising people who make witchcraft accusations or who profess to be witchfinders.

32. See, discussion on children in Chap. 4.

33. It is very doubtful whether this is how the African litigants saw the matter. The origin and purpose of such compensations are obscure. In the olden days in some societies, if a party wanted to divorce, some item - for example an arrow, a stick or a coin - would be handed to the other party (or the party's guardian) to signify the divorce. It is possible that the practice of compensating a "divorced" spouse originated from the practice of handing a token.

34. Bt. Dist. Ct. civ. app. (NA) case no. 3 of 1935, MNA BA1/12/1.

35. Mary Njanje v. Wallace Mhango, NTAC civ. app. case no. 58 of 1981. Alexander Kachingwe v. Teleza Kachingwe, NTAC civ. app. case no. 89 of 1981. See also following note.

36. Op. cit., pp. 19. This view of the law can be contrasted with the practice of the High Court under which maintenance orders with respect to chikamwini marriages were regularly made. See e.g. in Kandoje v. Mtengerenji 1964-66 ALR (Mal.), 558. Kalimbuka v. Malunga, Supreme Court of Appeal, case no. 1 of 1965, MNA 6.5.6F/16118 and Matimati v. Chimwala 1964-66 ALR (Mal.), 34. Even the NTAC itself has not always followed the principle that the father only has a moral rather than legal obligation to maintain the children. In particular, the court has not followed the principle in cases arising in urban areas such as Blantyre.

37. Op. cit.

38. See Ibik, op. cit., Lucy Mair, "Marriage and Family in Dedza District", pp. 118-19.

39. Cap. 10:02. An earlier attempt, the Wills and Inheritance (Kamuzu Mbumba Protection) Ordinance, in 1964 did not materialise. See MNA, file no. PH/1/1/5 for relevant documents. There is no intention in this study to delve into the involved question of succession. For some discussions on the law, see : Coissoró, op. cit.; Ibik, 4, Restatement of African Law, Malawi II (Land and Succession) (London : Sweet and Maxwell, 1971). Simon Roberts, "Malawi Law of Succession : Another Attempt at Reform", 12 JAL (1968), p. 81: Nyasaland Government Memorandum no. 2 (Marriage, Divorce, Succession and Inheritance) (Zomba : Govt. Printer, 1939); See also J.D.A. Brooke-Taylor, Land Law in Malawi (unpublished text, 1977).

40. Sections 16 and 17.

41. See citations in note 39.

42. Section 16. For accounts of the dissatisfaction among Africans with the law under matrilineal systems, see Lucy Mair, "Marriage and Family in Dedza District", Mair observed:

> The disposal of a dead man's property affects commoners as well as chiefs and headmen. With the Ngoni the principle is simple; it is divided among his sons. With the Chewa it is distributed by a brother, who may make such modifications as he thinks fit in the traditional rule that it should all go to his sisters' sons. There is today great dissatisfaction with this rule, and a man's sons sometimes bring into court a claim for a share of the property. (p. 117)

See also Coissoró, op. cit., p. 132; and discussion of the Wills and Inheritance Bill in Parliament in Hansard (5th Session, First Meeting on the 3rd, 4th and 6th Oct., 1967), p. 39.

43. The inactive African husband, who spends all day drinking under a tree while the wife does all the farming, as portrayed in the Western media is not very evident in Malawi or neighbouring countries. In fact, the popular misconception in this part of Africa is that women do only light farm work. See e.g. account of Dunduzu Chisiza (a leading Malawian nationalist in the 1950s and 60s) in Africa What Lies Ahead (New York : Africa-America Institute, 1962), p. 17.

44. The following table, showing the economically active population in Malawi in 1977, may provide just a rough idea about the levels of women's involvement in food production and wage-earning:

ECONOMICALLY ACTIVE POPULATION (1977 census)

	Males	Females	Total
Agriculture, hunting, forestry and fishing	936,099	996,023	1,932,122
Mining and quarrying	2,140	34	2,174
Manufacturing	67,723	14,668	82,391
Electricity, gas and water	4,003	210	4,213
Construction	44,985	2,467	47,452
Trade, restaurants and hotels	50,150	12,458	62,608
Transport, storage and communications	22,776	624	23,400
Financing, insurance, real estate and business services	3,824	670	4,494
Personal services	67,170	15,353	82,523
Activities not adequately defined	32,942	14,032	46,974
Total labour force	1,231,812	1,056,539	2,288,351

Source: 2 Europa, World Survey, 1986 (London : European Publications), p. 1713.

45. See Ibik, op. cit., Vol.3, pp. 20.

46. See Jailos Banda v. Tafwala Chavula, NTAC civ. app. case no. 48 of 1981; J. Gawani v. Enelesi Kaliati, NTAC civ. app. case no. 67 of 1981; and Mary Njanje v. Wallace Mhango, NTAC civ. app. case no. 58 of 1981.

47. In S.A. Kalombe v. A. Michongwe, NTAC civ. app. case no. 32 of 1980, the putative father was ordered to pay K300 for the maintenance of the child. The NTAC also ordered the "free movement" of the child between the parties. It is not clear, however, whether this amounted to an affiliation or whether the father was merely given some rights over the child. What really matters in such cases, it would seem, is the intention of the

mother and her people. If they want to give up the child, there is no law to prevent them from doing so.

48. Sections 16-17. See also Ethel Namero v. Green, Diana and Fillimon Namero, NTAC civ. app. case no. 78 of 1980.

49. The term "children" as used in the Act may be wide enough to allow such children to participate in the wife's intestacy.

50. "Marriage and Family in Dedza District", p. 119. See also Coissoró, op. cit., p. 122.

51. Lucy Mair, Ibid., points out that responsibility does not extend to maintenance after divorce. This obligation would seem to be only a moral rather than legal obligation.

52. As to the implications of the Wills and Inheritance Act, see above discussion on domestic duties.

53. See I. Schapera's analysis of Tswana law in A Handbook of Tswana Law (London : Oxford Univ. Press, 1938), pp. 140.

54. Mzimba Dist. Ct. civ. app. (NA) case no. 1 of 1937 (NA's M'Mbelwa civ. case no. 208 of 1936), MNA NNM1/17/4.

55. See Gondwe v. Gondwe, note 26 above.

56. See M. Read, "The Moral Code of the Ngoni"; also see the introductory chapter 1.

57. Judgement of DC, note 54 above.

58. Ibid.

59. It is interesting that about two years later, in Gondwe v. Gondwe (note 26 above), M'Mbelwa reversed his own decision on an issue not dissimilar to the one in Shaba v. Ngulube. In fact, in Gondwe v. Gondwe, the plaintiff was in an even stronger position than the plaintiff in Shaba v. Ngulube. It would clearly seem that M'Mbelwa was indeed in the process of changing the Ngoni law.

60. See Simon Chavula v. Kamzati Nyirenda, Mzimba Dist. Ct. civ. app. (NA) case no. 17 of 1934, MNA NNM1/17/4. See below, Chap. 7. Thomas N. Khonde v. Mateyo Gondwe, Mzimba Dist. Ct. civ. app. (NA) case no. 2 of 1934, MNA BR4/1/1. See also Mzimba Dist. Ct. civ. cases nos. 27 of 1913, MNA BR1/3/2 and no. 54 of 1911, MNA BR1/1/1.

61. Mzimba Dist. Ct. civ. app. (NA) case no. 19 of 1939, MNA NNM1/17/4.

62. This decision was reversed by the DC, but upon an entirely different point of law.

63. Mzimba Dist. Ct. civ. app. (NA) case no. 3 of 1945, MNA BR4/1/1.

64. See Mary Njanje v. Wallace Mhango (note 46 above).

65. Civ. app. case no. 4 of 1979 (from Karonga). See also S. Nakayanje v. Mumanyeghe Kalagho, NTAC civ. app. case no. 87 of 1978 (Karonga).

66. There are no actual figures on this matter. Still one can get a rough impression of the frequency of this type of disputes from court records.

67. For example, Yao purification rites for a widow which involved sexual intercourse with a stranger. See Coissoró, op. cit., pp. 124-25. And Chewa ceremonies preparatory for marriage, see Mair, "Marriage and Family in Dedza District", pp. 106-107.

68. The age of the female partner is obviously a factor with respect to criminal liability under the Penal Code.

69. In Mzimba, one cow or a money equivalent used to be the standard amount of damages. Today, the damages can go as far as K60 or higher particularly in the NTAC.

70. Civ. app. no. 105 of 1978.

71. "The Moral Code of the Ngoni", p. 4.

72. Ibid.

73. 1961-63 ALR (Mal.), 162 at p. 168.

74. See e.g. in Chitema v. Lupanda (above) itself.

75. Chintheche Dist. Ct. civ. app. (NA) case no.(?) of 1938, MNA BC3/1/1.

76. See below as to the "right" of the woman to sue.

77. Judgement, Ibid.

78. Chintheche Dist. Ct. civ. app. (NA) case no. 9 of 1939, MNA BC3/1/1.

79. See below.

80. See note 70 above.

81. High Court of Malawi Civ. App. (Local Court) Case No. 3 of 1966 (unreported), MNA 5.4.2.R/12896.

82. Two cows or a money equivalent was standard in Mzimba. There are also special cases involving school children. These are treated even more seriously.

83. NTAC civ. app. case no. 45 of 1981.

84. Transcript of judgement.

85. The court took a similar stand in Edward Namuse v. Maxwell Manda, NTAC civ. app. case no. 85 of 1981. (Compensation raised from K60 to K151); Tobias Malira v. James Ngwendemere, NTAC civ. app. case no. 86 of 1981 (raised from K25 to K180).

86. NTAC civ. app. case no. 50 of 1980.

87. L.M. Kanyinji v. Kelesin Thawe, NTAC civ. app. case no. 27 of 1980.

88. Newton Msukwa v. John Kayange, NTAC civ. app. case no. 68 of 1976.

89. One would clearly hope that such concern could even better be underlined by allowing such girls to continue with their education at the earliest possible opportunity. Education policy is of course not a matter for the courts.

90. See e.g. G. Mwale v. A. Nkhoma, NTAC civ. app. case no. 4 of 1982.

91. H. Chaona v. Sinoliya Sinkireya, NTAC civ. app. case no. 81 of 1980.

92. NTAC civ. app. case no. 61 of 1981.

93. Transcript of judgement.

94. Note 91 above.

95. Civ. app. case no. 32 of 1980. See also Chaona v. Sinkireya (note 91 above), where, after stating that the woman had no locus standi, the court in fact went on and ordered the man to pay K7 per month for the maintenance of the child.

96. 1961-63 ALR (Mal.), 162.

97. In African courts no such distinction is drawn and matters of evidence are dealt with in accordance with customary law.

98. Judgement.

99. See note 102 below.

100. For the purposes of the present discussion, the equally controversial question as to whether there was a distinction between civil and criminal offences under customary law will not be considered specifically, but it will be assumed that some such distinction existed.

101. Double square brackets stand for square brackets inserted by Mwase's editor.

102. Robert I. Rotberg (ed.), Strike a Blow and Die, (London : Heinemann Educational Books Ltd., 1975), p. 115. See also Read, "Moral Code of the Ngoni", p. 17 and Stannus, op. cit., p. 290. For some official discussions of the subject within the Nyasaland administration, see Judicial Circular no. 4 of 1946, from the Chief Justice, E.C. Jenkins, to all magistrates, dated 26 March 1946 and correspondence in response to the circular, MNA NSE/14/3. See also Martin Chanock, Law, Custom and Social Order, pp. 192-200, for a more scholarly analysis of the subject.

103. Doubts as to the existence of the practice, are expressed by Rotberg, in a note to Mwase's passage quoted above. See also Chanock, Ibid.

104. See e.g. the Ngoni, "Moral Code of the Ngoni", generally. See also Bt. dist. civ. case no. 262 of 1913, MNA BA1/2/2, where a wife attributed the death of her infant child to the adultery of her husband. Divorce was granted in her favour on this ground. See also Bt. dist. ct. case no. 8 of 1931, MNA BA4/1/1, where a pregnant woman fell ill and blamed this on the husband's adultery.
It must be noted that in such accounts as Mwase's, the term adultery was used in the Biblical sense of all forms of intercourse outside wedlock.

105. For example, for murder. The fact that one is provoked by the adultery may in certain circumstances operate as a partial defence. See e.g. Regina v. Alayina High Court, 1923-60 ALR (Mal.), 510; Chasiyana v. Regina Federal Supreme Court, 1923-60 ALR (Mal.), 730 and Greyson v. Regina Federal Supreme Court, 1961-63 ALR (Mal.), 22.

106. See e.g. Fort Manning (Mchinji) Dist. Ct. civ. app. (NA) case no. 3 of 1936 and no. 2 of 1940, MNA BJ1/1/1. Mzimba Dist. Ct. civ. app. (NA) case no. 37 of 1945 and no. 7 of 1940, MNA BR4/1/2.

107. The only possible exception was the case of chiefs' wives. Even here, punitive damages rather than criminal sanctions would seem to have been the penalty.

108. A typical example is the case of Paulos Ndhlovu v. David Chavula, before NA M'Mbelwa's court, case no. 7 of 1940 (note 106 above). The injured husband got £3 in compensation. The fine imposed was only 10/-.

109. Law, Custom and Social Order, p. 193.

110. See e.g. Mzimba Dist. civ. app. (NA) cases: nos. 44 of 1946, MNA BR4/1/2; no. 7 of 1940 (see no. 108 above), where fines were allowed to stand. Cf. Zomba Dist. Ct. civ. app. (NA) case no. 4 of 1939, MNA BV3/5/1 where a fine was disallowed.

In case no. 12 of 1944 (Zomba) the fine was allowed to stand. In Chintheche Dist. Ct. civ. app. (NA) case no. 5 of 1939, MNA BC3/1/1 the fine was also allowed to stand.

111. See note 102 above.

112. High Court Civ. App. (Local Court) Case No. 4 of 1946.

113. High Court Civ. App. (Local Court) Case No. 10 of 1965, MNA 6.5.6F/16118.

114. See esp. section 18(8) of the Independence Constitution. Cram, J., also invoked Rule VIII of the Procedure Rules.

115. See e.g. Charles Chinula v. Elija Kacheche, note 42 of Chap. 2.

116. See Maston Mwale v. Jailos Lukhere, NTAC civ. app. (Mzimba) case no. 96 of 1978. See also Ibik, e.g. with respect to Ngonde law, op. cit., Vol.3, p. 119.

117. Mzimba Dist. civ. app. (NA) case no. 203 of 1935. (From NA M'Mbelwa), MNA NNM1/17/4.

118. See Maston Mwale v. Jailos Lukhere, NTAC civ. app. case no. 96 of 1978.

119. Bt. Dist. Ct. civ. case no. 62 of 1924, MNA BA1/2/2; Mzimba Dist. civ. app. (NA) case no. 5 of 1934, MNA BR4/1/1; Bt. Local Ct. civ. case no. 705 of 1955, MNA 2.25.11.R/10.554; Essam Kamanga v. Overton Mtegha, NTAC civ. app. case no. 6 of 1982; Jankeni Thayo v. Sadomba, NTAC civ. app. case no. 6 of 1979; and R. Juga v. F. Samu, NTAC civ. app. case no. 44 of 1980. Also see Ibik, op. cit., Vol.3, pp. 20.

120. Patrick v. Davison, civ. app. (NA) case no. 2 of 1945, MNA BR4/1/1.

121. High Court Civ. App. (Sub Court) Case No. 1 of 1950, 6 NLR (1946-52), 169.

122. NTAC civ. app. case no. 69 of 1976.

123. This is of course the most common ground for divorce.

124. Thus in Mzambani v. Khuntho, NTAC civ. app. case no. 121 of 1979, the NTAC insisted on giving the injured husband the opportunity to sue the other man before divorcing his wife on the ground of the latter's adultery.

125. See W. Chigombo Nyirenda v. Omega Kondowe, NTAC civ. app. case no. 10 of 1983. See also Mzimba Dist. Ct. civ. case no. 146 of 1911 - where the husband was only allowed to recover half the malobolo paid as he had already recovered some property from the wife on account of the latter's adultery. MNA BR1/1/1.

126. See Blantyre Urban Local Court civ. case no. 2163 of 1955, MNA 2.25.11.R/10,554. See also C. Gondwe v. P. Mkandawire, Mzimba Dist. civ. app. (NA) case no. 4 of 1939 - where damages of £4 awarded by the lower court were reduced to £1 as the husband had mistreated the wife. MNA BR4/9/1.

127. Ibik, op. cit., Vol.3, pp. 21. See also Zomba Dist. Ct. civ. app. (NA) case no. 4 of 1939, MNA BV3/5/1. A wife's attempt to recover damages from a woman who had committed adultery with her husband was rejected.

128. Recommendation no. 72 and section 83 of the draft Bill. See Report of the Commission (Nairobi : Govt. Printer, 1968), pp. 64 and 175.

129. The Law of Marriage Act, 1971, sections 72-74.

130. Op. cit., Vol.3, pp. 21.

131. See Ibik, op. cit., Vol.3, pp. 23.

132. See Chap. 3, text to notes 39 and 40.

133. See Chap. 3, text to notes 42-45.

134. See Chap. 4 below.

135. See following Chap. 4 below.

136. Chiradzulu Dist. Ct. civ. app. (NA) case no. 2 of 1938, MNA BD1/1/1.

137. Judgement.

138. See Kandoje v. Mtengerenji, 1964-66 ALR (Mal.), 558. See Chap. 8 below for discussion of the case.

139. Mariya v. Listen, Ncheu Dist. Ct. civ. case no. 12 of 1916, MNA BS1/1/3.

140. NTAC civ. app. case no. 118 of 1977.

141. See Moyo v. Soko, NTAC civ. app. case no. 132 of 1978. Also Kandoje v. Mtengerenji (above, note 138).

142. NTAC civ. app. case no. 380 of 1979.

143. NTAC civ. app. case no. 86 of 1979.

144. See e.g. report of the Kenya Commission on the Law of Marriage, pp. 21. See also Maria Rosa Cutrufelli, Women of Africa - Roots of Oppression (trans. by Nicolas Romano) (London : Zed Press, 1983), pp. 52.

145. Jomo Kenyatta, Facing Mount Kenya (London : Martin Secker and Warburg Ltd., 1938), pp. 170-78.

146. Ibid.

147. See Aylward Shorter, op. cit., p. 174. Also Cutrufelli, op. cit., pp. 56-7.

148. This is basically now the position under the Tanzania Law of Marriage Act. See Kenya Report, op. cit.

CHAPTER FOUR

CUSTOMARY LAWS OF MARRIAGE AND DIVORCE - Dissolution of Marriage and Consequent Rights and Obligations

This is the last of the three chapters dealing exclusively with the rules governing marriage and divorce under customary law. The chapter offers a review of the rules governing divorce, custody of children, matrimonial property, and the rights and liabilities which accrue on the death of a spouse.

1. Divorce

Divorce is one of the areas of customary family law which most clearly displays the impact of modern influences on traditional African social practices. The following discussion delineates the main features of customary divorce law and highlights the main changes taking place.

a) The Right to Seek Divorce

Either spouse may seek divorce from the other. There is no legal discrimination on the basis of sex as to who is entitled to divorce; although it is possible that social pressures against seeking divorce weigh more heavily on women than men.

As already noted, marriage under customary law is not simply a matter between a man and a woman, but a social pact between two familial groups. This raises the question whether apart from, or even instead of, the spouses themselves, any outside person - notably a marriage guardian or a parent - has the power to seek the termination of marriage.

It is perfectly in order for a marriage guardian or any senior member of a family to initiate divorce proceedings on behalf of a spouse, with the permission or approval of the spouse. In fact, particularly where a woman is concerned, it is traditionally more appropriate that the proceedings should be initiated and conducted by the guardian rather than the spouse. The same holds in a case where a husband seeks to divorce his wife. It is traditionally more appropriate to bring divorce proceedings against the wife's guardian and not the wife herself. This would be particularly prudent if the husband intends to claim compensation or the return of malobolo. The ever-growing tendency for wives to institute and conduct divorce proceedings on their own behalf, and for husbands to bring matrimonial proceedings against wives directly and not through the latter's guardians, must be noted as an example of modern influences.

The pertinent question, however, is whether a guardian could institute divorce proceedings without the prior consent or approval of the spouse concerned. According to Ibik's Restatement,[1] divorce proceedings instituted in this way would seem to be impermissible throughout Malawi. Indeed, as a matter of general social policy, the courts perhaps ought not to countenance any dissolution of marriage at the bidding of an outside person against the wishes of both spouses. The need for individual freedom is here compounded by the social desirability of lasting marital unions and should thus easily outweigh any consideration for the traditional authority of guardians or elders. The role of guardians or parents in a

marriage should be sanctioned only to the extent that it is constructive and not destructive.[2]

From the decided cases - which are not many or extensive - it would indeed seem that, as long as the spouses themselves want a marriage to continue, an attempt by a third party to initiate a divorce will be doomed to failure. It should be easy enough for a court to reach a decision where the attempt to secure a divorce has been motivated by sheer spite or purely selfish considerations.[3] Even where valid reasons are adduced, the approach has been to warn the erring party, rather than to actually order a divorce. The tendency has been to address the problem constituting the basis for the intended dissolution of marriage. For example, where a wife still wanted to remain with her husband although the latter had ill-treated and neglected her, the court merely ordered the husband to mend his ways and refrained from dissolving the marriage as requested by the wife's guardian.[4] In another case decided in 1912, a husband had not paid the malobolo due to the wife's people. The wife's guardian wanted the marriage dissolved, but the wife still wished to remain with her husband. The Mzimba District Court refused to dissolve the marriage but ordered the man to pay malobolo for the wife.[5]

It must be noted in relation to the above cases that within a purely traditional setting, the wishes of the parents would have easily prevailed. In the development of the law towards greater individual freedom, the presence or availability of new judicial structures, which were superimposed over traditional familial authority, was a sine qua non.

b) Procedure for Divorce

This is a rather involved subject and the law is by no means certain.

The most basic question today is whether a customary marriage may only be dissolved by a decree of a court or whether extra-judicial divorce is still legally possible. Firstly, however, it is necessary to deal with the basically traditional aspects of the law.

In traditional African communities, divorce was normally effected by an arrangement between the two families of the spouses. In other words, divorce normally occurred outside state or political structures. This was consistent with the fact that marriage was essentially a social pact between two social groups. It is far from clear whether divorce was merely the recognition of a breakdown of marriage or whether it consisted in the fulfillment of prescribed procedures.

It is perhaps even inaccurate to refer to traditional processes by which marriages were dissolved as "procedures for divorce". In general, the processes of terminating marriages were first and foremost processes of reconciliation. Only when reconciliation had failed did the matter become one of divorce. Which of the relatives of the spouses would take part in a given marital dispute largely depended on the seriousness of the dispute and its possible consequences on the marriage. Seemingly minor disagreements were expected to be resolved between the spouses themselves, without the involvement of any third party. Relatively more serious quarrels

would be settled by the wife's or husband's senior relatives, depending on where the spouses resided. Only when the matter could not be resolved by the resident relatives was there need to invite the guardian or parents of the other spouse. Where a dispute threatened to break the marriage, it was essential that the families of both spouses should be represented. Should the two families fail to reconcile the parties, a divorce settlement would be reached and the marriage would accordingly be brought to an end.

There could be serious disagreements between the two families, for example, as to the return of malobolo or the distribution of matrimonial property, or the control over the children of the marriage. Generally, it was only in such cases that a forum outside the two families, (for example a chief or a chief's council) would be involved. Then, the matter would strictly no longer be one of divorce, but one about the specific issue of disagreement, for example, the return of malobolo.

As a general rule, the consent and cooperation of the wife's and husband's guardians(or family representatives) were essential to the dissolution of marriage. It is not clear whether and to what extent divorce by unilateral repudiation on the part of one spouse was ever allowed under customary law. At present, assuming that extra-judicial divorce is still possible, it is unlikely that the courts would approve of a divorce by unilateral repudiation. In Isaya Mpozera v. Victor Mwachuma (1965),[6] the High Court expressed the view that, if such type of divorce had ever existed under customary

law, the court would be "obliged to declare it repugnant to justice and morality...."[7] It must be noted, however, that once a spouse accepts the unilateral repudiation of the other as constituting divorce, a court may not have any real alternative to accepting the dissolution of the marriage. In such a case, perhaps, the divorce could be regarded as having been effected by mutual consent or repudiation, rather than by unilateral repudiation. Indeed, in the few cases where divorce seems to have been effected by a unilateral act of one party, it has invariably been the other party, who has contended that the unilateral act amounted to a divorce.[8]

In patrilineal systems, a divorce did not normally become effective until malobolo had been returned by the wife's people to the husband, or unless some other settlement regarding malobolo had been reached. Questions of malobolo, particularly where there were children, were usually complex, so that there was rarely much room for informality. Whether or not malobolo had been returned (and therefore whether or not a divorce had been effected) was an even more critical matter if the wife intended to remarry. Where the malobolo had not been returned, the second "husband" could be sued for adultery or for enticing somebody's wife.[9] Furthermore, the children born of the second marriage could be regarded as belonging to the first husband.[10] In matrilineal systems, in contrast, there was a greater tendency to informality in the dissolution of marriages. It was sometimes possible for a woman and her people to dissolve a marriage simply by dismissing and sending away an unwanted husband.[11]

Since the beginning of the colonial rule, the tendency has been to take divorce suits to the courts. Formal court proceedings have nowadays replaced informal arbitral proceedings as the common or normal way of effecting customary-law divorces. In some cases judicial divorce is inevitable. Divorce is almost invariably accompanied by ill-feeling between the parties and such ill-feeling sometimes spreads to other members of the respective families of the parties, thereby rendering informal divorce arrangements impossible. Irreconcilable claims regarding the refund of malobolo, the distribution of matrimonial property, or the custody of children must no doubt constitute the main reason for taking divorce suits to the courts. However, people have been taking divorce suits to the courts even where there are no such claims to be settled and even where both parties want to divorce. The possible legal and social implications of this call for attention.

Practically throughout the colonial period, there was clear legal recognition of extra-judicial divorce in the case of customary-law marriages. There was implicit recognition of such divorces, for example, under Native Authority rules or District Council by-laws which provided for the registration of customary-law marriages and divorces. Even as they stand today, a typical clause (providing for the registration of divorces) in the relevant instruments commences as follows:

> Whenever a non-Christian marriage registered under these by-laws or under any Native Authority Rules previously in force in the District is dissolved by a court or according to Moslem law or according to native law and custom, the party ... etc.[12]

This shows a clear recognition that marriage could be dissolved in accordance with customary law otherwise than by a court.[13] The courts also used to readily accept extra-judicial divorce.[14]

At present, it is not at all clear whether extra-judicial divorce is still legally possible or whether the courts have exclusive power to dissolve customary-law marriages. The question was left open in Khondiwa v. Mtambalika (1965),[15] in which Cram, J., did express doubts as to the continued admissibility of extra-judicial divorces after the passing of the Local Courts Ordinance in 1962. In Maggie Chitekwe v. Navicha (1965),[16] the High Court actually held that customary-law marriages could only be dissolved in a Local Court and that extra-judicial divorces were no longer legal. The relevant section of the Local Courts Ordinance[17] (and now of the Traditional Courts Act) did not expressly prohibit extra-judicial divorces, nor was it specifically concerned with the question of divorce. The specific object of the section was to delimit the respective jurisdictions in matrimonial causes of the High Court, on the one hand, and the Local Courts, on the other hand. The section, firstly, prohibited the Local Courts from entertaining causes arising from the Marriage Ordinance, 1902. This was clearly done ex abundanti cautela as jurisdiction over relevant marriages was already reserved to the High Court by the 1902 Ordinance itself. Secondly, it prohibited the High Court from entertaining on the first instance causes relating to customary-law marriages. It was from the latter that the High Court seemed to draw the conclusion that extra-judicial divorce was no longer legal. It is submitted, with respect, that this

conclusion was a non sequitur. The reservation of first-instance jurisdiction to the Local Courts amounted only to a restriction on the judicial powers of other courts. It is hard to see in what way it could be interpreted as indicating that extra-judicial divorce was no longer legally permissible.

The view that extra-judicial divorce is not permissible must have its basis in other considerations and not in the existing enactments delimiting the jurisdiction of African courts. General considerations of public policy seem to provide the main basis. This tends to be underlined in the more recent decisions of the National Traditional Appeal Court. This court has not been very consistent on the relevant issue. In some cases, it has implicitly recognised extra-judicial divorces.[18] However, in more direct references to the issue, the court has expressed the view that customary marriages could be dissolved only by the courts. Significantly, this view has been expressed without any reference to any statutory provision, like the Traditional Courts Act. In E. Nthenda v. E. Mabvira (1981),[19] the court simply observed to the effect that marriage under customary law created a status of such importance as should be terminated only by a court order. The rationale for this rule, according to the court, was the need to "ensure that all formalities as to dissolution are complied with and that all that was acquired during the matrimony is distributed smoothly and fairly".[20] This must be seen as an example of judicial efforts both to modernise customary marriage law and to enhance the status of customary marriage. Extra-judicial divorce tends to be associated with the idea that customary marriages constitute loose ties which are less solemn than statutory marriages.

The evolution of judicial divorce also characterises the ascendancy of individualism and the decline of kinship authority and influence. In order to obtain divorce or other matrimonial remedies, there is a tendency for individual spouses to dispense with the authority or cooperation of the kin. Strictly, or ideally, it should not be possible for a marriage to be dissolved unless the marriage guardians or family representatives have been consulted.[21] In practice, the courts have not always insisted on this requirement. Thus, a divorce may now be obtained by a spouse without any involvement on the part of his or her senior relatives. The rights, obligations, and decision-making powers pertaining to marriage have tended to be concentrated on the spouses themselves. As will become more clear in the course of this chapter, increasingly, divorce and accompanying remedies have come to depend on the interests, wishes and conduct of the spouses themselves. In other words, customary marriages have come to be treated more as contracts between the individual spouses than as social pacts between families.

The preference for judicial divorce is an aspect of the more general tendency, whereby kinship authority or control is giving way to formal legal regulation. Customary marriages can no longer realistically be conceived purely as social pacts between families. Within the complexity of modern society, customary marriages are acquiring a new dimension as aspects of public life and concern. The courts, rather than traditional familial structures, are proving to be the more effective machinery for social control.

c) Grounds for Divorce

In describing the principles governing divorce under customary law, the following remarks of Rubin and Cotran provide a useful starting point:

> It is not clear whether there are grounds for divorce in customary law. Many writers have inclined to this view, but there is good reason for doubting its validity - particularly if any analogy with the recognised grounds of divorce in English law is suggested. It is true that divorce may be refused because inadequate reasons are advanced by the parties, but there is no limitation on the number of reasons which are allowed; nor are they formalised into a set of watertight rules. Above all, the absence of specific grounds or reasons for divorce is not fatal to an attempt to end a marriage....[22]

Under customary law there are certainly no exclusive grounds upon which divorce may be granted.[23] It is perhaps correct to state that the ultimate power in the determination of whether or not there should be a divorce lies with the parties themselves and not the courts. To use the language of current English divorce law, a divorce will ultimately be granted if it appears that the marriage has broken down irretrievably.

Unlike the position under English law, however, the determination of whether a marriage has broken down irretrievably does not depend upon the fulfillment of certain prescribed conditions, but on whether the parties can be persuaded to continue to live together as husband and wife. Strictly speaking, customary law does not confer any power on the courts to deny divorce where at least one of the parties no longer wants to continue with the marriage. In E.P. Joshua v. E.B. Joshua (1981),[24] the National Traditional Appeal Court underlined this idea by stating that:

> At customary law a court cannot force a marriage between spouses. Before it dissolves a marriage, however, a traditional court is not astute [eager?] to bring the matrimony to an end. It does so only when there is no hope of reconciliation between the spouses and where the marriage has completely detoriorated (sic) the court will grant divorce to ease the tension between the spouses....25

The phrasing may betray some acquaintance with the law in Western common-law jurisdictions, but there can be little doubt that the principle is basically a customary-law one. In the instant case, both the trial court and the National Traditional Appeal Court itself had tried without success to dissuade the respondent "from his course of action". As the respondent no longer wanted his wife the courts had no choice but to dissolve the marriage. So too in Kakhobwe v. Kakhobwe (1981),[26] the National Traditional Appeal Court referred to how the presiding members of the court:

> ...had done all in their power to reconcile the spouses but respondent strongly objected to reuniting with his wife even as a second wife. The court need [can?] not force a marriage between two unwilling spouses.[27]

Court records are replete with examples of marriages which have been dissolved simply because one party no longer wants the other or because he or she wants to marry another person.

The principle just described is not necessarily contradicted by the not-so-infrequent instances when a court has refused to order a divorce and asked the parties to remain married.[28] Almost invariably, the cases where divorce is refused will be those where it appears to the court that there is an opportunity for reconciliation, or where it is very clear that the parties have not utilised the available processes of recon-

ciliation. Should it subsequently transpire that the parties cannot be reconciled, divorce will be granted.[29] In other words, a court's refusal to grant divorce is not absolute, but conditional upon a possible change of heart on the part of the party seeking the divorce.

In practice, however, people who seek divorce will usually endeavour to show that their actions are based on serious grounds. Divorce without good reasons is not favourably countenanced. Even under customary law, marriages are intended to be permanent. The absence of exclusive grounds of divorce is by no means a reflection of any liberal attitude towards divorce in traditional society. Marriage created strong and much-cherished social bonds, not only between the husband and the wife's relatives on the one hand and between the wife and the husband's relatives on the other, but also between the relatives of the husband and those of the wife. Divorce, which constituted a threat to these relationships, was frowned upon and tended to be allowed only where the continuation of a marriage constituted a greater threat to harmonious relationships. Even the death of one spouse was generally not regarded as sufficient reason for dissolving a marriage.[30]

Traditionally divorce is said to have been rare in most communities.[31] Nowadays, divorce is very common, especially in urban and semi-urban areas. The most frequent allegations in divorce suits include adultery, desertion, childlessness, neglect to maintain wife, and neglect to perform certain marital duties. During the colonial period, the failure of a husband to pay hut tax became a common complaint. Refusal to assist

members of a spouse's family, infection with veneral disease, quarrels with co-wives, the taking of another wife by the husband, failure to observe certain taboos, incurable or recurrent illness, dissipation of matrimonial property, frequent visits or frequent requests for support by relatives of the other spouse, false accusations of adultery, recurrent absence from the matrimonial home, imprisonment for serious crime - all these and many other allegations have served as grounds or reasons for divorce.

The definition of legal conditions or grounds upon which marriage could be dissolved, as the case is, for example, in the English legal system, is characteristic of societies which rely on bureaucratic machinery for the regulation of social relationships. The absence of exclusive definitions of grounds upon which marriage could be dissolved under customary law must be seen as a reflection of the lesser extent to which traditional African society relied on formal legal regulation. The stability of marriage and social relationships depended largely on the influence and authority of the kin. The absence of exclusive grounds for divorce was not a reflection of any laxed morality; it merely underlined the fact that less emphasis was placed on formal legal regulation.

At present, it may be argued that, in the final analysis, the role of the courts in divorce suits is merely one of rubber-stamping the expressed wishes of the parties. There is no true legal regulation of divorce. Of course, a party whose conduct is adjudged to have led to the breakdown of a marriage may suffer certain legal consequences. The party may be ordered

to pay compensation to the other party. Such orders are more common in matrilineal systems. The awards are usually smaller than any other type of award in matrimonial proceedings.[32] In some recent cases, "guilty" husbands have been ordered, in addition to compensation, to build houses for their divorced wives[33] or to pay maintenance. It must be pointed out, however, that the practice of awarding maintenance - another example of the influence of English law - is not a completely established one and is clearly less evident in rural areas. In patrilineal systems, the general rule is that the guilty party loses the malobolo.[34] Thus, where the wife is the guilty party, her guardian will be required to return the malobolo which the husband had paid for her. If the husband is the guilty party, the wife's people will be allowed to keep the malobolo. In some cases the malobolo may be apportioned between the parties. This will be the case, for example, if the court finds both parties equally to blame for the breakdown of the marriage. Which party is to blame for the breakdown of the marriage may also be a relevant factor in deciding the question of custody of children, which will be discussed presently.

Orders of this nature are basically of modern origin. Even the rules regarding the return of malobolo represent a reinterpretation of traditional principles.[35] The present practice of the courts would seem to be an attempt to impose some form of legal constraints on divorce. The absence of such legal constraints in traditional African societies was perhaps more than compensated for by the effectual operation of other mechanisms of social control. To the extent that traditional

systems of social control are no longer effective, it may indeed be socially desirable that there should be some legal constraints on divorce. Particularly in modern, urban areas, the practice whereby a court would grant divorce whenever it cannot persuade the spouses to live together has grave social implications, especially with regard to the status and dignity of women.[36] The institution of marriage ought to be something more than a form of purely private contract. Marriage creates a status that is uniquely basic to the stability of society in general. The dissolution of marriage is not a matter which should be decided entirely on the basis of the private calculations of the parties. Of course there is a point beyond which it would be socially unjust and undesirable that a marriage should continue against the wishes of a spouse or both spouses. Whether or not such a point has been reached, however, should, in any given case, partly be determined as a matter of law and general social policy, rather than as a simple matter of implementing the expressed wishes of the parties. Especially if children are involved, there ought to be some minimum legal requirements which must be fulfilled before divorce could be granted.

To cite the conclusions of the Law Commission in England, the objectives of a good divorce law should include the support of marriages which have a chance of survival.[37] The orders made by the courts against "guilty" parties in customary divorce cases hardly constitute an effective safeguard against unnecessary divorces. As long as the party who seeks divorce is willing to pay compensation or to forfeit malobolo or custody

of children (in other words, as long as a party is willing to pay the "price"), divorce will be granted, however trivial or unjustified his or her reasons are for seeking to break a marriage. Furthermore, the relevant orders are a rather inappropriate mechanism for regulating such a delicate matter as divorce. They are largely punitive or vindictive in character and pay scant attention to the future needs which the parties and their children are likely to face. The result is that marriages, again to paraphrase the conclusions of the Law Commission, tend to end with the minimum fairness and the maximum bitterness, distress and humiliation.[38]

Recrimination rather than reconciliation is the more common feature of divorce proceedings in the courts. In the early District Courts manned by European magistrates, reconciliation generally ceased to be a feature of divorce proceedings. In African courts, some attempts would be made to reconcile the parties before a pronouncement of divorce. Sometimes, however, these attempts are no more than incidental and perfunctory. Sometimes, it is even possible that the attempt to reconcile the parties is being used merely as a device to determine which party should be held responsible for the breakdown of marriage. Generally, the courts do not seem to feel bound to attempt a reconciliation before pronouncing divorce. Of course one explanation for this may be that when the parties resort to court proceedings, they are assumed to have exhausted all attempts at reconciliation. This may be the case in some, but unfortunately not in all, instances. More unfortunately, the principle of reconciliation has not always been followed; many marriages

have been dissolved without any or much evidence of attempted reconciliation.

Even African courts are tied down by inherent bureaucratic constraints in their conduct of divorce actions. There is none of the leisurely, all-encompassing exploration of issues characteristic of traditional African procedures. The courts have little time for prolonged and extensive inquests into foundering marriages. They tend only to focus on the immediate issues of the dispute. A lack of acquaintance with the parties and their surroundings necessarily introduces an element of detachment with the result that divorce may more readily be contemplated as a solution to a marital dispute than would be the case were the dispute to be handled only by people intimately connected with the parties. The parties themselves may not feel that the court is the proper place to voice their innermost concerns.

2. Custody of Children on Divorce

The principles of affiliation described in the preceding chapter have tended to be watered down by certain principles which the courts have sometimes applied to disputes about custody of children on divorce.

Firstly, it must be stated that the term "custody" in customary-law disputes is commonly used in the broad sense to connote the whole range of parental rights, powers and obligations. A party who has been awarded custody of children, assumes thereby the rights, powers and obligations of "guardianship" as well. Custody implies something close to absolute

"ownership" of children. Thus, the age of the children is of only limited relevance. For example, if there are grown-up, but unmarried, daughters, an order of "custody" is still necessary because it must be determined who would act as their "marriage guardian" or who would be entitled to malobolo paid in respect of their marriages. The awarding of custody to one spouse usually has the implication of excluding the other spouse and his or her kin from all legal rights, powers and obligations. The death of a spouse who has been awarded custody does not revive the rights or obligations of the other spouse.[39] Secondly, however, the whole practice of courts awarding custody is of recent origin and the rules applied by the courts are still very vague. There are as yet no elaborate principles regarding the legal implications of awarding custody to one spouse or the other. With the steady disintegration of the extended family system, the question regarding the rights, but especially the obligations, of divorced parents over children is certainly the most urgent and one which should receive priority in any future attempt at reform.

a) The Law in Patrilineal Systems

It would clearly seem that under traditional customary law in patrilineal systems, the only basis upon which children of a marriage could be taken from a husband and given to the wife was the husband's failure or refusal to pay malobolo. Otherwise, upon divorce, children would be left with, or at any rate would continue to be regarded as legally belonging to, the husband.[40] It does not appear to have mattered whether the husband was responsible for the breakup of the marriage. The

only exception was in relation to children of tender years. These were always allowed to go in with the mother. They would be returned to the father when old enough. When taking the children back, the father was obliged to bring a cow or other form of payment to cover for the wife's trouble in caring for the children.[41]

The courts, on the other hand, have introduced another principle in the law. A party whose conduct is adjudged to have led to the breakup of the marriage will normally be deprived of both malobolo and custody of children.[42] Thus, where the wife is responsible for the breakup of the marriage - for example if she commits adultery or deserts her husband - her guardian will be ordered to return malobolo and custody of children will be awarded to the husband. If on the other hand, it is the husband who is to blame, the wife will be awarded custody of children and no order against the wife for the return of malobolo will be made. The application of this principle is evident even in the older court records.[43]

However, if one compares old decisions of African courts and those of modern Traditional Courts, it will be found that this principle is applied more readily and more completely today than was previously the case. During colonial days, European magistrates were more willing to apply the principle than African courts. Thus, in Chipeta v. Jere (1939)[44]:

> The wife stated: "I want my husband to tell me why he has neglected me for a long time. I want him to divorce me now. I like him but he has neglected me for a long time."
> The husband replied: "The reason I have neglected her is that the child on her back is not mine."

Divorce was granted by the Native Authority court on the ground that the husband had neglected the wife. As already stated, however, the husband was still given the option to pay malobolo which he had not already paid in order to get the children of the marriage. The wife appealed to the District Commissioner, contending that because the husband had abandoned her, he should be adjudged to have abandoned the children as well. The wife did not deny that she had a child by another man. However, her adultery was attributed to the husband's long absence from Nyasaland and neglect. On these facts, the District Commissioner held that the respondent was entirely to blame. The wife was awarded custody of the children and the malobolo, which had apparently been paid by the time of the appeal.

The establishment of the principle that the guilty party should lose both children and malobolo received its initial impetus from European administrators when the latter began to preside over customary-law marriage disputes. The principle reflects a view of marriage that is at variance with the underlying implications of the traditional African concept of marriage as being primarily a pact between two social groups rather than between two individuals. One implication of the traditional way of looking at the marriage pact was that children were regarded as belonging primarily to the whole of either the man's or woman's family and only secondarily as belonging to an individual husband or wife. It becomes conceivable for the conduct of an individual husband or wife to drastically affect the rights of a whole kin group over such a fundamental matter as children only when marriage begins to be seen as being

primarily a contract between two people, and children to be regarded as primarily belonging either to the husband and wife. It is also possible, however, that the "guilty-party" principle appealed to African authorities independently of any influence of European administrators. Certainly, the principle has some inherent social advantages. The fear to lose children as well as malobolo can indeed act as a deterrent against ill-conceived divorces. It restores the balance of advantage between husband and wife. Without it, a wife may be compelled to endure mistreatment by the husband simply because she knows that divorce would also mean separation from her children. A callous husband, on the other hand, will have no incentive to desist from misconduct towards his wife if he knows that his only loss may be the malobolo paid for her. Loss of malobolo is in fact no loss at all if the husband is able to retain his children.

Apart from the advantages described above, the principle has little else to commend it. In fact, its very advantages may also be its disadvantages. Its obviously punitive undertones are objectionable. The object of reconciliation in any divorce case should not merely be to prevent a marriage from breaking up. Even where a divorce order has been made, the need remains to avoid further recrimination between the parties. The need is the greater where there are children to be considered. Rewarding one party and punishing another is clearly the wrong way to go about reducing the tension between divorced spouses. Even were some punitive measures are necessary (which is unlikely), children can hardly be the best weapon to effect such measures. Even worse, no clearly developed principles

regarding maintenance of children after divorce exist under customary law. For support from a parent against whom an order of custody has been made, children depend mainly on the parent's sense of moral duty and not on any legal obligation. Such sense of moral duty is hardly boosted by the application of the "guilty-party" principle. Moreover, the guilty parent may very well be the person better equipped to care for the children.

b) The Law in Matrilineal Systems

The "guilty-party" principle has sometimes also been used with respect to marriages under the matrilineal system. In Kamozi v. Kalauza (1917),[45] the plaintiff and his wife had been staying in the wife's village in accordance with the uxorilocal marriage system. After the death of the wife, the plaintiff sought to leave the village, and to take the children of the marriage with him. The Blantyre District Court stated that the following principle would apply:-

> If a man is turned out of a village through no fault of his own he may take his children. If he leaves of his own accord, owing to his wife's death or for any other reason the children remain with the mother or her relatives.[46]

In many of the cases, however, this principle has not been followed and the courts have adhered to the strict law of the matrilineal systems that children belong to the mother's side.[47] Whether or not the wife is at fault has been regarded as irrelevant as far as the question of custody is concerned.[48]

It is in the decisions of the National Traditional Appeal Court that the strict matrilineal principle has received most

emphasis, against what would seem to be obvious indications of the need for change.[49] The firm manner in which the court has tended to endorse the "guilty-party" principle in relation to lobola marriages contrasts rather sharply with the court's rejection of the principle in relation to chikamwini marriages. In Jeladi Kalonda v. Effe Masauko (1979),[50] for example, the court stated that irrespective of fault, children under the chikamwini system belong to the wife.[51] The difference in the approach of the National Traditional Appeal Court between chikamwini and lobola marriages has no obvious explanation.

One possible explanation is that the neutralisation of the traditional patrilineal principle is being seen by the court as an aspect of the improvement of the legal position of women. Since, with respect to children, the legal position of the wife under the matrilineal system is already an advantageous one, the court may not have seen any need to alter the law. It must be noted, however, that the question of custody in modern times is not a simple one of rights or powers over children, but also one of obligations. With the decline in the extended family system, asserting that, on divorce, children belong to the wife's side is sometimes simply putting the wife in a position where she has to shoulder the burden of bringing up the children on her own. The constant reminder by the National Traditional Appeal Court that the father has a "moral duty" to help in bringing up the children[52] does not provide any guarantee that the husband's help will be forthcoming. In fact, such reminders serve to underline the argument against the very strict application of the matrilineal principle.

The "guilty-party" principle is even less defensible. Apart from the fact that it does not represent strict traditional law, the principle, as already argued, is of little social utility, particularly as regards the welfare of the children themselves. The principle may also lead to unjust or inequitable results. It is not always easy to apportion guilt. Complaints which the parties are able to articulate in divorce proceedings are usually mere symptoms of deep-rooted causes. It is rarely the case that a marriage breaks down because of the fault of one party alone.[53] A party adjudged to be guilty may happen only to be the one who had placed the last straw.

It is perhaps on the basis of some of these considerations that, occasionally, the courts have refrained from awarding custody to one parent alone. Instead, either joint custody has been ordered or the children have been left free to choose between either parent.[54] A possible ingredient of orders of this type could be a principle which the High Court used to apply very regularly in custody disputes under customary law. When considering questions of custody, according to the High Court, the most important consideration was the moral and material welfare of the children. The welfare of children was paramount, irrespective of the customary-law rights of either spouse.[55] In the more recent decisions of the National Traditional Appeal Court, this principle has tended to be ignored. Thus, it is uncertain whether, and to what extent, the principle could be said to be part of modern customary law. Ibik's panels in the Restatement unanimously recommended that customary law should be altered so as to enable the court to pay due

regard to the best interests of children of the marriage. The implication of this, of course, is that the panels did not regard the principle as having been established under customary law. On the other hand, the recommendation is an indication that the principle is a somewhat familiar one in African communities. It is submitted that the further development of the principle would be a great improvement in customary law.

3. Matrimonial Property Rights

It is not possible here to do more than make a few brief and rather generalised remarks on the subject of matrimonial property rights. The discussion deals almost exclusively with the law relating to the division of property on divorce. Property claims of one spouse upon the death of another - largely the subject-matter of the Wills and Inheritance Act, 1967 - are altogether excluded from the present discussion, which is essentially about claims between husband and wife as opposed to claims between a spouse and third parties.

a) Personal Belongings

Items acquired by either spouse for purely personal use are not usually considered to constitute matrimonial property. Such items as clothing and ornaments are a clear example. Certain implements used by either spouse in pursuit of a special trade or hobby - weaving, carving, pot-making, hunting, trapping etc. - also tend to be treated as personal belongings. All such personal items are regarded as belonging to the individual spouse, who can dispose of them as he or she wishes. On divorce, each spouse is entitled to retain his or her personal belongings, which are not subject to any division.

Still, disputes do arise especially in relation to personal items which a husband may acquire for his wife in fulfillment of his marital duties, for example, the duty to provide clothing for the wife. A husband may retain some measure of control over such items even though they have already been transferred to the wife. A wife may not dispose of these things without the husband's authorisation. On divorce, particularly where the wife is the cause of it, attempts have been made by husbands to repossess the relevant items. Attempts have also been made to claim back other gifts given to the wife and her relatives. At least today, the law seems to be that such things cannot be taken away from the wife even if the divorce arises from her misconduct.[56] In Noel Gondwe v. Francisca naNyungwe (1980),[57] the National Traditional Appeal Court expressed the view that on divorce, a husband is not entitled to claim whatever he has spent on his wife. Any such claim, the court stated, would not only be against customary law, but would also be contrary to good conscience. The clear implication of this is that the wife would be entitled to retain personal belongings bought for her by the husband.[58]

b) Traditional Household Property

This will include such things as cooking utensils, tools for cultivating, chairs or stools, beds or mats, water vessels, baskets, mortars - in short, various normal household items employed for the common good of husband, wife and children. "Traditional household property" must be understood also to include industrially manufactured items which many normal households use in place of traditional equivalents. Paraffin lamps, metal pots and other utensils, blankets, mirrors, flour-sieves,

charcoal-irons and other such items of relatively small value must be included in this category. Expensive modern items such as cars, electric refrigerators and cookers constitute a different category of matrimonial property.

The general rule appears to be that "all traditional movable property, which a spouse acquires and brings to the matrimonial home constitutes matrimonial property (katundu wanyum ba)".[59] Such property is subject to the joint control of husband and wife, and may not be disposed of by either spouse without the consent of the other.[60] It is doubtful, however, if a unilateral disposal of such property by one spouse is legally actionable. If persistent, of course, such conduct may amount to dissipation of matrimonial property which constitutes a good ground for divorce.[61]

Traditionally different principles would appear to have been followed in the distribution of traditional household property upon divorce. One way was to divide the property between the spouses, with the spouse adjudged to have caused the divorce getting the smaller share.[62] In some places, apparently, if the wife was at fault, she would get nothing at all. If the husband was the one at fault, then the property would be divided equally between the spouses.[63] In some cases the spouses had equal shares of the property irrespective of where the guilt lay.[64] Under another rule the husband was entitled to everything irrespective of who was at fault.[65] In other places, each spouse would be entitled to take what he or she had brought or bought, with the wife getting a larger share of the property acquired jointly by the parties.[66] Yet another way of distri-

buting the property was to give to the wife those things associated with her domestic duties, for example, cooking utensils and to leave things like furniture with the husband.[67]

There are not many decided cases on the relevant matter. From the few cases decided by the High Court (before 1969) and the National Traditional Appeal Court, judicial opinion would clearly seem to lean in favour of the principle of equal distribution.[68] The details as to the application of this principle have never really been worked out. By equal division, the courts do not seem to imply that a monetary value should be be placed on each and every item and then divided accordingly. What equal division might imply with reference to property in a given household will be illustrated below when dealing with the distribution of modern household property.

c) Livestock

Traditionally, only such animals as fowls and pigeons would be owned on a strictly individual basis. Such animals would normally be placed in the joint care of the spouses and be regarded as matrimonial property. On divorce, they would be distributed in the same way as any traditional household property. However, if a spouse kept such items of livestock separately, for example, if they were entrusted to a third party, they may be regarded as belonging solely to that spouse and on divorce the spouse may be entitled to them as though they were his or her personal possessions.

Bigger livestock like goats, but especially cattle, tended to be subject to more complex patterns of ownership. Al-

though cattle could be owned as individual property, they were normally kept under the care of a broader social group. Thus, Coissoró notes with reference to the matrilineal Chewa that:

> All members of a mbumba put their individually owned beasts in the possession of the senior member....The senior member although technically has no ownership over the beasts entrusted to him, enjoys the privilege of using them for his own personal needs and for customary purposes, without having to ask for the authorization of their owners.[69]

He then goes on to explain that the true owners of such cattle may not dispose of them without giving notice to the senior member, but observes:

> This limitation on the disposal of cattle by their owner does not mean, however, that the cattle are ultimately the property of the mbumba even as a corporate entity with its own rights....[70]

Similarly, with reference to the patrilineal Ngoni, Coissoró notes:

> The rules regarding the disposal of cattle were based on the principle that no individual member of a house had any separate or separable interest in the house-herd, so that only with the consent of senior members of the house could any beast be disposed of by a member of the house.[71]

There was no distinction between inherited cattle and self-acquired cattle:

> ...so that, a beast purchased or received as a gift by a house-member could never become the individual property of the purchaser or the donee.[72]

Within such patterns of ownership, cattle could not strictly become matrimonial property and therefore subject to division between husband and wife upon divorce. Any cattle a spouse

could call his or her own would, at least nominally, be attached to a wider family group, and the family groups of husband and wife were mutually exclusive.

Cattle received as malobolo for married daughters was regarded as belonging to the father's side of the family and not the mother's. Among some people, like the Ngoni and the Lambya, each wife of a polygynous man, with her children, constituted a discrete unit in relation to the management of malobolo cattle. Cattle received for daughters' of one unit would normally only be used to pay malobolo for the sons of that unit. Cattle would readily be transferred across units if need arose, for example, if one wife had only male children. Such a transfer would create either a debt relationship between the two units or a special bond whereby children of the units involved would begin to relate as though they belonged to one woman.[73] As already noted in Z. Tembo v. M. and E. Jere,[74] if cattle from one unit were required for some purpose the husband was required to consult with the wife of that unit before acting. Still, the husband was the overall owner of all the cattle received for the daughters. The attachment of cattle to each unit and the need to consult with the wives did not mean that the latter were co-owners. The interest of the wife was, as it were, a vicarious one. Her right to protest against improper use would be exercised only to protect the interests of her children and not her own. Upon divorce, the wife could not claim any part of the cattle received on account of her daughters.

Traditional ideas of ownership are rapidly changing. There is a clear movement from collective to individual ownership of cattle. Thus, cattle may readily be viewed as constituting matrimonial property. Where such cattle have been acquired by the joint efforts of both spouses they may be shared by the spouses on the same principles as those governing traditional matrimonial property.[75] It is still doubtful, on the other hand, whether a court would at present readily order the division of cattle received as malobolo between husband and wife. Where the spouses have separately acquired cattle as individual property, each is likely to be allowed to retain them as such.[76]

d) Farming Land and the Matrimonial Home

Any land allocated to a person for use with his or her spouse constitutes matrimonial property. Generally, however, the powers of disposal and the claim to continued occupation or use after divorce may vest in one spouse alone.[77] In the case of spouses living virilocally, land will be allocated to the husband. During the continuance of the marriage such land will be subject to the beneficial enjoyment of both spouses. A wife may even enjoy exclusive beneficial use of certain pieces of land expressly re-allocated to her by the husband. Still, it is the husband who will have the overall control over the land and power of disposal. Upon divorce, the wife will have no claim to the land. In the case of spouses living uxorilocally, the wife's people will normally provide the husband with a piece of land where he could grow crops for his household. Such land constitutes matrimonial

property, but the husband cannot dispose of it without the consent of the wife's people who remain the rightful owners. The wife herself may not have the same power as that enjoyed by a husband in a lobola marriage. That power will normally vest in her legal guardian. The beneficial enjoyment on the part of the husband is dependent on the marriage. Upon divorce, the husband's right that his wife's people allow him to use the land lapses. It is possible on the other hand that a husband may acquire a piece of land independently of his marriage. This is usually the case with dimba-gardens (stream-side gardens). A husband would enjoy full rights to such land even though he resides uxorilocally. He will continue to have a claim even after divorce.[78]

The position regarding farming land also holds true in relation to the matrimonial house. During a marriage, the house constitutes matrimonial property and is subject to the joint control of both spouses. Where the parties reside virilocally, the house becomes the sole property of the husband upon divorce. Where they reside uxorilocally, the house is kept by the wife.

Where the parties reside uxorilocally, even upon divorce, the matrimonial home may not be regarded as belonging entirely to the wife. It has been a rule of most matrilineal communities that, on divorce, the husband is entitled to take away with him doors, windows, iron roof and other fittings of the matrimonial house. According to Ibik, this right to remove the fittings is only implicit where the husband had provided

them.[79] The wife is always entitled to retain the main structure of the house and any fixtures which cannot be removed without destroying the main structure.[80] In Dora Legison v. Lester Somera (1980),[81] the Chiradzulu District Appeal Traditional Court had ordered that the respondent, a divorced husband, could go and fetch the iron-roof sheets from the house he had built for his wife. On appeal to the National Traditional Appeal Court, however, it was held that the husband could not remove the iron sheets or any fittings from the house built for the wife. The National Traditional Appeal Court has also indicated that this will be the case even if the wife is responsible for the divorce. The court has explained its decisions simply by observing that the husband under matrilineal systems has an obligation to build a house for the wife in her village.

Indeed, where a house has not been built and the wife is not adjudged to be the wrong party, the court's view has been that the husband's obligation to build a house should not lapse with divorce.[82] On this point, the National Traditional Appeal Court is clearly stretching the traditional obligation of the husband under the matrilineal system. The court would appear to be using this obligation as a basis for a form of maintenance orders in favour of the wives. Whereas the High Court would order husbands to pay a sum of money in direct maintenance, the National Traditional Appeal Court would seem to prefer to achieve the same objective indirectly, by modifying a principle of traditional custom. It is interesting to note in this connection that the court has held that irrespective of

fault, the husband should not be allowed to remove fittings from the matrimonial house built in the wife's village. On the other hand, the question of fault is regarded as a relevant one in deciding whether or not to order the husband to build a house for the wife on divorce. There is a clear parallel here to the High Court's approach to the question of maintenance.

The rule that, on divorce, a husband could remove fittings from the matrimonial home perhaps represents one of the attempts to adapt the chikamwini residential principle to changing life-styles in African communities. Obviously, the original chikamwini principle had not contemplated the gradual change in African architecture, whereby houses with comparatively expensive fittings would be built. Traditional huts had few fittings and these were of negligible economic value. The huts were rarely built with windows; doors were normally fashioned from grass or reeds; and the same kind of material was used to make roofs. Thus, the rule regarding fittings could have had no economic rationale in purely traditional communities. The rule must have been invented to deal with a new situation in which houses began to acquire some economic value. The rule, however, underlines a point which has already been made, namely, that the house built by the husband in the wife's village was basically intended as a matrimonial home and not as an economic contribution to the wife's family. The rulings of the National Traditional Appeal Court against the husband taking away the fittings from the matrimonial house do not themselves represent any return to the basics of the chikamwini principle.

The compatibility of the chikamwini principle with modern economic life has been a subject of much controversy. On various occasions, there have been calls for the abolition or modification of the system. The main argument is that, under the chikamwini system, there is no incentive for the husband to improve the farmland allotted to him, or to build a decent homestead, in the wife's village, as these are things which he would be forced to leave behind him either on divorce or on the death of the wife.

The question of modifying the system was considered, for example, by the Ncheu District Council in the 1950's. The Council put forward the interesting proposal that the courts should be empowered to enforce a nuptial contract, which would be printed at the back of a marriage certificate, and which would be signed by the parties and their witnesses.[83] The contract would contain, inter alia, the following:

> (a) On the death of the wife or dissolution of marriage (the husband being the innocent party) the wife and her witnesses agree that the husband shall be allowed to remain at the village and to continue to cultivate the land allotted to him, despite the fact that no bride-price has been paid.[84]
>
> (b) The husband agrees to make improvements to the land and to build a well-constructed home for his wife.[85]
>
> (c) The husband has the power to bequest (sic) his property, including the building constructed by him and trees planted by him to one of his children.[86]

There is no evidence that the proposals were ever implemented. The view of the Chief Secretary was that the proposed law would be difficult to apply, although, at the same time, he welcomed what he described as:

> ...this indication of the Ncheu District Council's desire to get away from the stultifying effect of the uxorilocal custom and matrilineal descent.87

In its 1971 Annual Convention, the Malawi Congress Party included among its declarations the following:

> Having discussed fully marriage customs prevalent in Malawi in relation to the development of the country, delegates agreed that steps should be taken to change such aspects of our marriage customs which retard progress.88

A more direct reference to the chikamwini system had been made by the Party during the 1969 Annual Convention held in Blantyre, as follows:

> The Conference, having discussed fully aspects of Malawi marriage customs and their implications in the development of this country, recommended that:
> (i) The system of chikamwini should be discouraged.
> (ii) The people should be encouraged to allow husbands to take their wives to their (husbands') homes.89

Since the 1971 Convention, however, less attention has been paid to the specific question of marriage laws. The above declarations of dissatisfaction with the chikamwini system have not been followed by any concrete measures.

It must be noted that, from the viewpoint of the wife, the lobola system may present the same problems as the chikamwini system. The view implicit in the criticism against the latter system is that the virilocal residential system is more conducive to development than the uxorilocal system. It is submitted that this view may be correct largely only because of a major weakness in social attitudes. Both systems, to the extent that they inhibit individual initiative, are inherently

ill-suited to the modern capitalist economic environment. The real advantage of the virilocal system derives from the fact that society is currently still dominated by men. Men dominate the decision-making processes in the social and economic spheres. It is the man who is the head of the nuclear family. Economic development in modern society is, for good or for ill, closely linked to the strengthening of the nuclear family as an economic unit. In the chikamwini system, the nuclear family is more vulnerable to external influences because of the weaker position of its head, being a stranger in the wife's village. The stronger position of the husband in his own village under the virilocal system makes for a more independent nuclear family. Were the decision-making powers and the economic privileges to be equally distributed between men and women, husbands and wives, the difference between the lobola and chikamwini systems would have been minimal.

In modern days, the matrimonial home may be built in a place other than the village of either husband or wife. The law with respect to such cases is uncertain, if not non-existent. The same is true with farming land acquired commercially by either husband or wife or both. Fuller comments on the law with respect to such cases will be made below as part of the discussion on the law regarding the division of modern forms of property.

e) Foodstuffs

The rule that upon divorce foodstuffs should be divided equally between the spouses would seem to be universally recognised.[90] There is no rule, however, which would prevent a court

from ordering that a larger share of foodstuffs should go to the party who has been awarded custody of the children. Unharvested crops do not attach to the land; they are also subject to equal or equitable division between the spouses.

f) Modern Forms of Property

Traditional forms of property have generally never been a subject of much litigation between spouses. This is possibly partly due to the fact that the rules regarding the division of such property are sufficiently established to obviate serious differences between the parties. It may also be due to the fact that many traditional households possess very little. On divorce, there is usually very little to quarrel about. Litigation about the division of matrimonial property in general is also relatively infrequent compared, for example, to litigation about children. Yet this is bound to change as more people begin to acquire expensive household items and other forms of property. Already, customary-law courts are dealing with such things as maize mills, canteens, brick houses built in urban areas, sewing machines, stereo sets etc. In all likelihood, they will soon be, or already are, dealing with bank and other complex investment accounts,[91] property encumbered by mortgages, insurance policies etc. Whether, or to what extent, existing customary-law courts can be said to be equal to the task of dealing with such issues is a matter into which the present discussion is not intended to delve. What must be stressed here is that there are no clear customary-law principles dealing with such type of property.[92]

More specifically, there is no clear indication that the courts are prepared to stretch the rules governing the division of traditional matrimonial property and apply them to modern forms of property. With regard to purely household items, the courts have more often than not ordered that the property be divided equally between the spouses.[93] By "equal division" the courts tend to mean any or a combination of the following things: Equality may mean numerical equality, where this is possible. Thus, where there are two radios, each spouse may be allowed to take one without taking into consideration any disparity in their value. Equal division may simply mean matching one item with another. The wife may take the refrigerator for which the husband is allowed to retain the family stereo set. The third meaning is a refinement of the second one. Items of matrimonial property tend to be divided between those pertaining to the wife (womanly) and those pertaining to the husband (manly). Thus, property may be shared in such a way that the wife tends to take such things as a sewing machine or food mixer against, for example, living-room furniture awarded to the husband. On the whole, just "sharing" rather than "equal division" would seem to be the correct term.

The case of Zibia Kuluwani v. Michael Kuluwani (1981)[94] which went to the National Traditional Appeal Court provides a glimpse into the likely contents of a modern, affluent household, and into the way a court may order the division of modern matrimonial property. The court ordered that the property should be divided as follows:

The wife was to get - two single beds, one chest of drawers, one radio, three blankets, one sleeping bag, a sewing machine, two coffee tables, four stools, six pots, one set of plates, six tumblers, twelve spoons and forks, a food-mixer, a food-cutter, a dining set and one bed spread. The husband was to keep - a double bed, one chest of drawers, one mirror, three blankets, one sleeping bag, one bed spread, the sofa set, four stools, the stereo set, chair covers, cooler box, the remainder of the plates and tumblers, the baskets and the pressing iron.

Household goods as the ones listed above are treated as constituting matrimonial property. It does not seem to matter whether or not the wife has directly contributed to their acquisition. Anything expressly acquired for the personal use of a spouse remains his or her property. From one case at least, it would seem that anything that requires some form of registration may be regarded as belonging to the person in whose name the property is registered. Thus in Nsabwe Liundi v. Naliyeni Bandawe (1964)[95] the respondent had divorced the appellant because the latter had taken a second wife and chased the respondent from the matrimonial home. The appellant was a successful business man. The respondent had given him material assistance in the business which at first had consisted mainly of one maize mill. Later, a second maize mill was bought and this was licensed in the wife's name. The court of first instance in Kasupe (Machinga) awarded the maize mill to the wife. The award was upheld in subsequent appeals to the Kasupe Local Appeal Court and ultimately the High Court.

Very expensive property which a husband may acquire otherwise than in fulfillment of recognised marital duties, if not registered in the wife's name and if the wife has not directly contributed to the purchase money, seems to be treated as the sole property of the husband.[96]

In matrilineal systems, the fact that the husband has not fulfilled his obligation to build a house at the wife's home does not mean that any house bought or built elsewhere belongs to the wife. This point was stressed by the National Traditional Appeal Court in E.W.F. Nthenda v. Elefa Mabvira (1981).[97] Indeed the decision in this case would seem to put the husband in a particularly strong position because the house in question had been acquired jointly by the husband and wife. The husband was ordered to pay K200 for the wife to build another house at her home. He, however, retained the matrimonial home. On the other hand, in the High Court case of Liundi v. Bandawe[98] the court of first instance had ordered that the matrimonial home go to the wife. The order was, however, set aside by the Local Appeal Court. On (the husband's) appeal to the High Court, the three African assessors sitting with the Chief Justice recommended that the house should be returned to the wife. The Chief Justice was inclined to agree with this; unfortunately, the matter regarding the house had not been specifically raised by the wife during the High Court proceedings. Still, the judgement of the court of first instance and the views of the assessors in the High Court are important in that they point to the possibility of a matrimonial home of the type under discussion going to the wife rather than the husband.

4. The Legal Status of Widows and Widowers

A customary marriage is not automatically or immediately dissolved by death. A formal act of divorce is normally required if the surviving spouse wishes to bring the marital relationship to an end. In most cases, the severance of the marital bond occurs as part of purification rites which tend to come at the end of usually-long mourning periods.[99] Thus, among many people, the necessity for a formal act of divorce is magical or religious rather than legal in character. In some systems, however, the principle that marriage is not automatically dissolved by death has serious legal implications. Should the surviving spouse and the relatives of the deceased desire to continue with the relationship, there are ways of doing so provided for under customary law.

Among matrilineal people, it would seem that arrangements whereby a widow or widower may marry a relative of the deceased spouse are purely optional. Such arrangements will normally be made as a mark of esteem or an act of kindness on the part of the relatives of the deceased for the surviving spouse.[100] They are not made in pursuance of any legal obligation. In lobola systems, on the other hand, levirate and sororate arrangements may not only meet some social need, but will also serve to fulfill legally enforceable claims. The contrast between matrilineal and patrilineal systems is well underlined in court records relating to the respective systems. Whereas in patrilineal systems it is possible to find court decisions on the levirate and sororate institutions, there would seem to be hardly any such decisions in the other system. Naturally, therefore,

the following discussion is solely concerned with patrilineal systems. It concentrates on the law regarding the claims of widowers against relatives of deceased wives and the law relating to the legal status of widows.

a) Widower's Claims on his Deceased Wife's Relatives

The death of a wife used to entail liability on the part of her relatives to supply the husband with another wife. The choice of the "substitute wife" was usually restricted to sisters of the deceased or close paternal cousins or nieces. If the relatives of the deceased wife were unable or unwilling to supply another wife, they were required to return part or the whole of malobolo paid for the deceased.[101] Apart from demonstrating this principle, the case of Alifeyo Mhango v. Simeon Chisambi (1934)[102] is even more interesting because it involved a marriage that had been solemnised under the Native Marriage (Christian Rites) Registration Ordinance, 1923.[103] When the wife died, a shaving ceremony took place and at this ceremony the relatives of the deceased wife signalled their undertaking to supply another wife.[104] The defendant in this case was the brother of the deceased wife. After the shaving ceremony, the defendant was informed by a friend that in a church marriage the husband of a deceased wife could not claim another wife. The defendant followed this advice and refused to deliver another wife to his brother-in-law, the plaintiff. The latter sued for the return of malobolo. The defendant's plea that this was a Christian marriage and therefore excluded the application of the relevant practice of customary law was rejected both by the Native Authority and, on appeal, by the Mzimba District

Commissioner.[105] The defendant was ordered to return malobolo.

The widower's claim for a substitute wife must be distinguished from another aspect of the sororate institution whereby a husband was given a sister of his wife during the latter's lifetime (nthengwa yambiligha as it is called in Tumbuka). In the mbiligha case, there would in effect be two marriages. Some malobolo would usually be paid for the sister. Although this tended to be far less than the usual amount, the woman's parents could, if they were so inclined, claim the full malobolo. Divorce with one wife did not automatically mean divorce with her sister; although if it was the elder sister who had been divorced, the younger one might follow, out of loyalty. On the other hand, when a sister was given on the death of the first wife, no new marriage was created and the husband was not obliged to pay further malobolo.[106]

The case of a sororate marriage arising from the failure of the first wife to bear children was somewhat ambivalent. The position of the husband in such a case tended to be closer to that of a widower. He would normally not be asked to pay further malobolo. The children born of the second sister would normally be considered to belong to the childless wife. Thus, for example, among the Ngoni, if the first sister was also the senior wife, the children of the second sister would rank first on succession even though between the marriage of the first sister and that of the second there were other wives with children. More importantly, when the prior wife could not bear children, as when she had died, the husband could ask for another wife as of right.

Of course it was not in every case that a widower would be allowed to claim for a second wife or the return of malobolo. If on her death, the wife was already old, or past childbearing, or had left a sufficient number of children who no longer required close maternal care, there was usually no liability on the part of her relatives to supply a new wife or return malobolo.[107] In effect, much depended on how long the marriage had lasted before the death of the wife. With the diminishing popularity of the custom, even among the Native Authorities,[108] it soon became accepted that if a marriage had lasted for more than one year no claim by the widower against the relatives of his deceased wife should lie.[109] According to a District Commissioner in Karonga, the ancient custom had, under modern conditions, "proved a heavy burden on the old people".[110] Furthermore, the widower would forfeit any claim if he had ill-treated the deceased during her lifetime; so too if her untimely death could in some way be attributed to his negligence or misconduct. In one case held in Mzimba in 1913, the wife had been devoured by a lion. The accident was somehow attributed to the husband's failure to provide effective protection for his wife. Although the wife had borne only one child (who had eventually died) the return of malobolo was rejected.[111] The widower would be even less likely to succeed if he had neglected to pay malobolo for his deceased wife.

b) The Legal Status of Widows

The general principle is clear enough. Where malobolo have been paid, the death of the husband does not free the wife from the marriage. She is not free to marry any person outside

the circle of her late husband's relatives. If she does so, her action and that of her intended partner would constitute, to use the words of the National Traditional Appeal Court in Mtambalika Moyo v. Hilda Chipeta (1974), "a breach of an old and respectable custom".[112] Mere sexual intercourse with an "unreleased" widow also constitutes adultery and the man responsible may be liable to pay compensation to the relatives of the deceased.[113] A widow may not leave her late husband's village to live with her own parents. If she does so, even if she does not marry again, her parents will be called upon to return the malobolo paid for her.[114]

Under strict traditional custom, the primary obligation of a woman whose husband has died is to go through the procedure of "widow inheritance", ukungenisa or ukungena in chiNgoni, or nthengwa yauchokolo, in chiTumbuka. She must continue with her marriage obligations, including bearing children, with a relative - preferably a uterine brother - of the deceased. No further malobolo are demanded and the children born with the new man tend generally to be regarded as the lawful issue of the deceased. It is as though, with the death of the husband, nothing has changed. Sometimes, particularly when the widow is past childbearing, the "inheritance" is merely nominal and the widow does not actually cohabit with the new husband.

A widow could remain in her deceased husband's village without being "inherited" by any of his relatives. This is normally the case where she has grown-up sons who could take care of her. In such a case, as the saying goes, her own children inherit her. Even if there is someone who wants to

inherit her, a widow may elect to remain "single". As long as she remains in the village of her late husband, her in-laws may not have the power to compel her to be inherited. Thus, in one case, a widow who did not want to be inherited successfully applied for a court order warning a persistent brother-in-law against molestation.[115] A problem may arise today in relation to a widow who resides neither in her late husband's village nor in her parents' village, but in a neutral place of work. For obvious reasons customary law is silent on the matter. It seems likely, however, that she may not necessarily be held to have deserted her husband's people as long as she still visits them and still uses the husband's village as the primary place of abode during holidays.

A widow who wants to be released from her marriage must seek a formal divorce. Her parents will be required to return malobolo, or where a prospective husband has already been identified, the latter may be ordered to pay malobolo directly to the widow's relatives-in-law.[116] With the introduction of colonial rule, women started to resort to the courts in order to obtain freedom. Such "applications for freedom" were very common in the early District Courts where European magistrates presided. This is understandable. A widow who sought her freedom would normally be operating not only against the wishes of her in-laws, but also against the interests of her parents. She would therefore require the independent authority of the courts to put pressure on her parents to return malobolo, and on her in-laws to release her.

European magistrates, perhaps naturally, tended to be sympathetic to the needs of widows. Thus, although they did not ignore customary law, they would usually do their best to alleviate any hardship entailed by the application of customary law. For example, on granting freedom to a widow, they would order only a small portion of malobolo to be paid.[117] In many cases, however, the obligation to return malobolo would be suspended until the widow actually re-marries.[118] This way, she would be able to go and live with her parents without the latter immediately being called upon to return malobolo. In one case, a widow ran away with a very poor man. The man was sued by relatives of the widow's late husband. In desperation, he offered to work for the plaintiffs. The court adjourned the case until the relatives of the widow were called. A compromise was reached whereby the widow's parents would pay half the amount due to the plaintiffs. The latter agreed not to ask for the other half until the defendant could pay. According to the court, the defendant's offer to work for the plaintiff's would have been "too much like slavery" and would have put the widow herself in a rather humiliating position.[119]

The institution of "widow inheritance", especially in modern times, is a double-edged sword. The widow has a right too that a relative of her deceased husband should inherit her. She has a claim on her husband's relatives for support and protection. Should the relatives fail to find someone who could inherit her, this would be construed as an intention to divorce the widow. She may thus be allowed to leave without the obligation to return malobolo and in some cases, she may even be

allowed to take the children. This may also apply to a case where the widow is not allowed to "marry" a relative of her own choice. This may be a greater problem today than in the olden days because there may not be many men who would be willing to inherit widows. Financial burdens may be one obstacle. A person who inherits a widow must in most cases also be prepared to become a polygynist. This may present special problems in Christian communities. It is not only failure to provide a man that will excuse a widow from the obligation to remain with her husband's relatives. Any other conduct which may constitute a ground for divorce will do. Even quarrels between brothers over one woman may be construed as a ground for divorce.[120]

NOTES

Chapter Four

1. Op. cit., Vol.3, pp. 23.

2. See K. v. B., Chiradzulu Dist. Ct. civ. app. (NA) case no. 11 of 1935 where a husband had been chased out simply because he did not get on well with the guardian of the wife. The latter wanted another man to marry the woman. The wife, fortunately, ran after her husband and the suit had been brought by the guardian to recover the compensation he had paid to the husband for wrongful divorce.

3. See e.g. Penson Tembo v. Loveness Kumwenda, NTAC civ. app. case no. 27 of 1982 - where the guardians were ordered to keep away from the parties as their role was proving to be a destructive one.

4. Bt. Dist. Ct. civ. case no. 35 of 1909, and 81 of 1910, MNA BA1/2/1.

5. Civ. case no. 9 of 1912, MNA BR1/1/1.

6. High Court Civ. App. (Local Court) Case No. 10 of 1965, MNA 6.5.6F/16118.

7. The court expressed a similar view with respect to divorce by the Islamic Talaq - see Lambart v. Ismail Mussa Omar 1964-66 ALR (Mal.), 511.

8. See Levi Mhone v. Ednara Balozi, Mzimba Dist. Ct. civ. app. (NA) case no. 9 of 1942, MNA BR4/1/1 - where the forcible removal of malobolo cattle was held to constitute divorce. Significantly, it was the wife and not the husband (who had removed the cattle) that relied on the removal of the cattle as amounting to a divorce. See also Paulos Nyirenda v. Etas Phiri, Mzimba Dist. Ct. civ. app. (NA) case no. 30 of 1911, MNA BR4/1/1.

9. See discussion on adultery above. Also see Chap. 2 on marital status as a bar to marriage.

10. See discussion on children above.

11. See Coissoró, op. cit., p. 122.

12. Section 4(1) of 1961 Rumphi District By-Laws.

13. See observation to the same effect by Cram, J., in Khondiwa v. Mtambalika, Civ. App. (Local Court) Case No. 17 of 1965, MNA 6.5.6F/16118, with reference to the Blantyre District By-Laws.

14. Greyson v. Regina, supra, where it was held that the division of property between the parties could be accepted as marking the end of a marriage. In the instant case, matrimonial property had not been distributed and so it was held that there was still a subsisting marriage between the defendant and his wife. The defendant had been charged with the murder of his wife. He had called the wife after learning that she had been married before and that she had continued to associate with her former husband. It was held that the defendant could raise the defence of provocation.

15. See note 13 above.

16. High Court Civ. App. (Local Court) No. 14 of 1965.

17. Section 11(b).

18. See e.g. David Mfune v. Lyson Balogi, supra, Chap. 2, text to note 54. The return of malobolo to the husband was held to have terminated the marriage.

19. NTAC civ. app. case no. 41 of 1980.

20. Transcript of judgement. See also Joseph Bonongwe v. V. Kanyoli, NTAC civ. app. case no. 87 of 1981. Where it was held that a divorce was not effective until an appeal to a higher court had been heard and determined.

21. See Bt. Local (Urban) Court civ. case no. 560 of 1955, MNA 2.25.11R/10554. See also Tyness nyaNg'ambi v. Blackwell Mkandawire, NTAC civ. app. case no. 68 of 1981 - where the NTAC stated that it had no jurisdiction to dissolve a customary marriage in the absence of the nkhoswes.

22. Readings in African Law, Vol. II (London : Frank Cass and Co. Ltd., 1970), p. 209.

23. See Ibik, op. cit., Vol.3, pp. 23.

24. NTAC civ. app. case no. 99 of 1981.

25. Transcript of judgement.

26. NTAC civ. app. case no. 102 of 1981.

27. Transcript of judgement.

28. See e.g. Tyness nyaNg'ambi v. Blackwell Mkandawire (above, note 21); George Bandawe Singini v. Aliness Ngwira, NTAC civ. app. case no. 3 of 1983; Catherine Shaba v. Lewis Mpaso, NTAC civ. app. case no. 15 of 1982. See also Bt. Dist. civ. case no. 200 of 1920, MNA BA1/1/5.

29. See e.g. in Vick Machere v. William Chiumia, NTAC civ. app. (from Mzimba) case no. 78 of 1981.

30. See below.

31. See T.D. Thomson, op. cit., p. 5.

32. In the older cases, these ranged between 10/- to £3. These days, awards K20 to K80 are common.

33. See discussion on matrimonial home, above, Chap. 3.

34. See Msukwa v. Msowoya, NTAC civ. app. case no. 40 of 1979; S. Mkandawire v. E. Mkandawire, NTAC civ. app. case no. 143 of 1978; Mhango v. Chipeta, NTAC civ. app. case no. 167 of 1974. Also, Grant Chisi v. Newton Mwanza, Mzimba Dist. Ct. civ. app. (NA) case no. 41 of 1939, MNA NNM1/17/4. Leah Chipeta v. Yakobe Jere, Mzimba Dist. Ct. civ. app. (NA) case no. 19 of 1939; Emmi M'nthali v. Patrice Sowoya, Mzimba Dist. civ. app. (NA) case no. 17 of 1945, MNA BR4/1/2. Chizere Gondwe v. Peter Mkandawire, Mzimba Dist. civ. app. (NA) case no. 4 of 1939, MNA BR4/1/1.

35. See below, discussion relating to custody of children.

36. See e.g. the Kakhobwe case in which the court pleaded with the respondent to stay with the appellant "even as a second wife"!

37. Law Commission, Reform of the Grounds of Divorce - The Field of Choice, Cmnd. 3123 (London : HMSO, 1966), para. 120.

38. Ibid.

39. The distinction which Bolt, J., drew between "custody" and "guardianship" in Kumcaca v. Nkhota (1966-68 ALR, 509), does not appear to be of any particular relevance under customary law.

40. See Ibik, op. cit., Vol.3, pp. 62. Ethnological accounts do not even hint at the prospect of a divorced woman obtaining custody of children.

41. This was a legal obligation and not a mere social courtesy. See Mailesi Pangaunye v. Evelesi Bonongwe, NTAC civ. app. case no. 15 of 1980; James Malemia v. Elina nyaManda, Ncheu Dist. Ct. civ. app. (NA) no. (?) of 1938, MNA BC3/1/1, Mzimba Dist. Ct. civ. case no. 103 of 1913, MNA BR1/1/2.

42. See Vick Machere v. Wilson Chiumia, NTAC civ. app. no. 78 of 1981; Bottoman Shaba v. Tiball nyaVula, NTAC civ. app. case no. 35 of 1980; Amos Jere v. T. Ngoma, NTAC civ. app. case no. 108 of 1974; W. Mwaibambi v. E. Shonga, NTAC civ. app. case no. 104 of 1979; Mtambalika Moyo v. Hilda Chipeta, NTAC civ. app. case no. 107 of 1974; Amos Mwanyongo v. Kelsen Gondwe, NTAC civ. app. case no. 15 of 1973. See also Enala Kalua v. Efraim Zimba, Euthin Local Ct. civ. case no. 17 of 1966, MNA Fol.6/6; Rebecca Zimba v. Samson Kumwenda, Mzimba Dist. civ. app. (NA) case no. 100A of 1939, MNA BR4/1/2; K. v. K., Mzimba Dist. Ct. civ. case no. 1 of 1914, MNA BR1/1/2. And see Mkamanga v. Phiri by the High Court, 1966-68 ALR, 106.

43. Apart from K. v. K. (above) see also A. v. M., Mzimba Dist. Ct. civ. case no. 142 of 1911, MNA BR1/1/1. D. v. K., Mzimba Dist. Ct. civ. case no. 83 of 1912, MNA BR1/1/1.

44. See note 61, Chap. 3 above.

45. Bt. Dist. Ct. civ. app. case no. 31 of 1917, MNA BA1/2/2.

46. Ibid. See also Bt. Dist. Ct. civ. app. case no. 55 of 1905, no. 5 of 1911, MNA BA1/2/1; and Bt. Dist. Ct. civ. app. (NA) no. 33 of 1934, MNA BA4/1/1.

47. See Columbus v. Maduwani, Zomba Dist. civ. app. (NA) case no. 4 of 1935, MNA BV3/5/1. According to the presiding DC, it was "quite impossible according to Yao custom for the man to take the children".

48. See Fort Manning Dist. civ. app. (NA) case no. 5 of 1938, MNA BJ1/2/1.

49. See Chap. 3, on affiliation.

50. NTAC civ. app. (Mulanje) case no. 53 of 1979.

51. See also S.T. Wandawanda v. Mary Bowa, NTAC civ. app. no. (?) of 1979 - where it had been agreed that the children should remain with the father to complete their education. The court ordered that the children should be returned to the mother as soon as they completed their education.

52. See discussion on rights and duties in Chap. 3.

53. See Phoya v. Phoya, NTAC civ. app. case no. 38 of 1979 - where it was stated by the NTAC that a court hearing a divorce case should do its best to find the guilty party.

54. See e.g. in Msumba v. Nyirenda, Nkhata-Bay Local App. Ct. civ. case no. 21 of 1964, MNA C/10/3; W. Mzumala v. W. Gondwe, NTAC civ. app. (Mzimba) no. 110 of 1979 - where the NTAC ordered that there should be "joint custody".
It is not clear as to what exactly is meant by orders of this type: Would there be an obligation on both parents to look after all the children? Or would each parent only be responsible for those children who have decided to stay with him or her? What about children who are still young and incapable of deciding which parent they want to stay with? Who will have the power to make decisions as to such matters as education and marriage? Who would be entitled to malobolo paid in respect of marriages of the daughters? Indeed, it would seem that orders of this nature may only be appropriate where the children involved are already grown-up and taking care of themselves.

55. See Kamcaca v. Nkhota, Ibid; Kafele v. Komwa [1968-70] 5 ALR (Mal.), 149. Mkamanga v. Phiri [1966-68] 4 ALR (Mal.),

105. In the last case, the High Court also applied the guilty party principle, although the judgement left no doubt that the welfare of children was paramount.

56. See Ibik, op. cit., Vol.3, pp. 25.

57. NTAC civ. app. case no. 1 of 1980.

58. See also Mwanza v. Bota, NTAC civ. app. case no. 156 of 1978.

59. See Ibik, op. cit., Vol.3, pp. 25.

60. Ibid.

61. Ibid. See e.g. Ngoni law at p. 59.

62. See Ibik, op. cit., Vol.3, pp. 25, 63 and 200 with respect to Yao, Ngoni and Chewa law respectively.

63. See Ibik, op. cit., p. 84, with respect to Tumbuka law respectively.

64. See Ibik, op. cit., pp. 42 and 63 with respect to Lomwe and Ngoni law respectively.

65. Ibik, op. cit., Vol.3, pp. 122 and 163 as to Ngonde and Lambya law respectively.

66. Ibik, op. cit., Vol.3, pp. 79 as to Sena law.

67. Ibik, op. cit., Vol.3, p. 102 as to Tonga law.

68. See e.g. Zibia Kuluwani v. Michael Kuluwani, NTAC civ. app. case no. 24 of 1981. See below for further citations.

69. Op. cit., p. 130.

70. Op. cit., p. 131. Thus, after the death of the senior member, the owner is automatically given possession and the new senior member does not have control over the cattle until and unless the owners place it under his control.

71. Op. cit., p. 216.

72. Ibid.

73. For a description of a similar custom among the Nyakyusa see Monica Wilson, "Nyakyusa kinship", in African Systems of Kinship, A.R. Radcliffe-Brown and Daryll Forde (eds.), p. 111 esp. at pp. 117-18.

74. Chap. 3, on matrimonial home.

75. See Ibik, op. cit., Vol.3, e.g. p. 62 with respect to Ngoni law.

76. See Ibik, ibid.

77. Ibik, op. cit., Vol.3, pp. 26.

78. See Coissoró, op. cit., p. 226.

79. Ibik, op. cit., p. 26 on Yao law.

80. Mwazaonga v. Zitha, Civ. App. (Local Court) Case No. 9 of 1966, MNA 6.5.6F/16118.

81. NTAC civ. app. case no. 77 of 1980. See also J. Kalonda v. E. Masauko, NTAC civ. app. case no. 53 of 1979.

82. Z. Kuluwani v. Kuluwani, NTAC civ. app. case no. 24 of 1981; Lindia Mkanthana v. B. Mkanthana, NTAC civ. app. no. 93 of 1980; Alexander Kachingwe v. Teleza Kachingwe, NTAC civ. app. no. 89 of 1981; E.P. Joshua v. E. Joshua, NTAC civ. app. case no. 99 of 1981 and E. Nthenda v. E. Mabvira, NTAC civ. app. case no. 41 of 1981.

83. DC Ncheu to PC Lilongwe, 19th March, 1956, MNA 2.13. 5R/5132.

84. There was perhaps a misunderstanding here of the implications of bride price.

85. This was a reference to the alleged practice, whereby even wealthy husbands would deliberately build small and cheap huts in their wives' villages.

86. This particular proposal was, of course, to be incorporated in the Wills and Inheritance Act, 1967 (see above). For source reference of proposals, see note 83 above.

87. Chief Sec. to PC Lilongwe, 17th May, 1956, MNA 2.13. 5R/5132.

88. No. 5 of 1971 held in Lilongwe, Dept. of Information, Blantyre.

89. No. 7 of 1969, Dept. of Information, Blantyre.

90. See Ibik, op. cit., Vol.3, pp. 42. See also Maima v. Lajabu, Chiradzulu Dist. Ct. civ. app. (NA) case no. 4 of 1939, MNA BD1/1/1. Also, Mwazaonga v. Zitha (note 80, above).

91. This is well reflected in the Wills and Inheritance Act, 1967, which, for example, has introduced the concept of "Institutional Money", which broadly means any money due to the deceased from a financial institution, such as a bank, building society, post office account or a provident fund.

92. This was also the observation of the National Traditional Appeal Court, in E. Nthenda v. E. Mabvira (see note 82 above).

93. See Kuluwani v. Kuluwani (note 82 above); Kakhobwe v. Kakhobwe (note 26 above) and Mwanza v. Bota (note 58 above).

94. Ibid.

95. High Court Civ. App. (Local Court) Case No. 13 of 1964. Southworth, C.J., presiding. MNA 6.5.6F/16118.

96. Ibik's panels in the Restatement, Vol.3, were generally against such things as cars, maize mills etc. going to the wife. The perception seems to be that the things which go to the wife would ultimately land into the hands of her relatives or her subsequent husband, who tend to be regarded as undeserving.

97. Note 82 above.

98. See note 95 above.

99. See Coissoró, op. cit., pp. 124, 125 and 210 on Yao, Chewa and Ngoni customs respectively. See also Ibik, op. cit., Vol.3, pp. 24.

100. See Mair, Survey, pp. 98-99. Ibik, op. cit., Vol. 3, pp. 12.

101. See Mzimba Dist. Ct. civ. app. case no. 1 of 1912, MNA BR1/1/1. Also no. 40 of 1912, ibid, and David v. nya-Gondwe, Mzimba Dist. Ct. civ. app. case no. 5 of 1914, MNA BR1/1/2.

102. Mzimba Dist. Ct. civ. app. (NA) case no. 3 of 1934, MNA BR4/1/1.

103. This is the subject of Chap. 6 below.

104. By offering to shave the head of the widower at the shaving ceremony, the deceased wife's people had apparently undertaken to offer another wife.

105. As to the effect of the relevant ordinance, see remarks in note 103 above.

106. See E. Mwanza v. S. Bota, (note 58 above) - where, at one stage, it had been argued that the marriage at issue was not a valid one, but merely a sororate marriage. The court observed that a sororate marriage was valid under customary law and that the malobolo paid for the first marriage validated the second one.

107. See Mzimba Dist. Ct. civ. app. case no. 5 of 1912, MNA BR1/1/1.

108. Thus, NA Kyungu (Karonga) and his council attempted to limit such claims to where the marriage had lasted only for

a short (not defined in the proposed rule) time. See encl. DC Karonga to PC (NP), 22nd June, 1935, MNA NN1/21/15.

109. See e.g. in Lamek Utabe v. Mzuao (Muziwawo?), Mzimba Dist. Ct. civ. app. case no. 27 of 1921, MNA BR1/1/1. One year was held to be a reasonable period beyond which the claim for a second wife should not lie.

110. See note 108 above.

111. Civ. app. case no. 55 of 1913, MNA BR1/1/1.

112. NTAC civ. app. case no. 107 of 1974. See also Mzimba Dist. Ct. civ. app. cases nos. 80 of 1912, and no. 108 of 1911, MNA BR1/1/1.

113. M. v. G., Mzimba Dist. Ct. civ. app. case no. 42 of 1912, MNA BR1/1/1.

114. See George Shaba v. Fillimon Ngulube (see Chap. 3, note 54 above).

115. F. v. C., Mzimba Dist. Ct. civ. app. case no. 35 of 1911, MNA BR1/1/1.

116. T. v. C., Mzimba Dist. Ct. civ. app. cases nos. 108 of 1911, 159 of 1911 and 80 of 1912, MNA BR1/1/1; Estere Jere v. Mlonyeni Jere, Mzimba Dist. Ct. civ. app. case no. 10 of 1923, MNA BR1/1/2. Cf. M. Mhango v. M. Mkuna, Mzimba Dist. Ct. civ. app. case no. 9 of 1923 where the husband had not paid malobolo. It was held that the widow was free. MNA BR1/1/2.

117. See Fanny Moyo v. Chikengwenero, Mzimba Dist. Ct. civ. app. case no. 50 of 1921, MNA BR1/1/4.

118. E.G. in J. Chirwa v. Chumba Nkhurande, Mzimba Dist. Ct. civ. app. case no. 21 of 1922, MNA BR1/1/4; E. v. M., Mzimba Dist. Ct. civ. app. case no. 20 of 1921. MNA BR1/1/4.

119. Sahani Ngulube v. Zedi Chisi, Mzimba Dist. Ct. civ. app. case no. 35 of 1922. MNA BR1/1/4.

120. See David Nyirenda v. Zakheta Katota, Mzimba Dist. Ct. civ. app. (NA) case no. 10 of 1942, MNA BR4/1/1. In this case, the husband was actually not dead, but had gone to Southern Rhodesia and in his absence, the younger brother "inherited" the wife. When the husband later returned, the two brothers began to quarrel over the wife. She was fed up with their quarrels and decided to divorce them. NA M'Mbelwa held that the two brothers had, by their conduct, divorced the woman. His decision was upheld on appeal to the DC.

P A R T II

THE INTRODUCTION OF COLONIAL MARRIAGE LAWS

CHAPTER FIVE

THE APPLICATION OF MARRIAGE LEGISLATION TO AFRICANS - The Marriage Ordinance, 1902

1. Introduction

The marriage legislation applicable to Africans in Malawi was introduced between 1902 and 1923, by the colonial administration. Mainly, it comprises the Marriage Act which was enacted in 1902 as the British Central Africa Marriage Ordinance,[1] and the African Marriage (Christian Rites) Registration Act which was enacted as the Native Marriage (Christian Rites) Registration Ordinance in 1923[2] - replacing the Christian Native Marriage Ordinance of 1912.[3] The two chapters in this part of the study examine the tangled history of the enactment of the above statutes. The issues relating to the history of the Marriage Ordinance, 1902, are discussed in this chapter. The history of the Native Marriage (Christian Rites) Registration Ordinance, 1923, is detailed in the next chapter. The latter also includes an account of the Christian Native Marriage Ordinance, 1912.

The body of law inaugurated by the enactment of the Marriage Ordinance, 1902, derived ultimately from the English law of marriage. This was a law which had its roots in English, Western-European, cultural and religious traditions. The relevant principles were, in many respects, radically different from those governing marriage under African customary law. Divorce, in the cases of marriages contracted under the Ordinance, was also to be governed by similar principles, and these were

embodied in the Divorce Ordinance which was enacted in 1905.[4] In addition, the English law governing the distribution of personal estates on intestacy was to govern succession to the property of Africans married under the Ordinance and to the property of their children (irrespective of the marriage law applicable to the latter).

In the present discussion of the history of marriage legislation, the main task will be to highlight the issues of policy regarding the availability of the provisions of the Marriage Ordinance to members of the African population and the implications on the status of the indigenous marriage laws within the colonial legal system. The ultimate questions addressed are whether, in what way, and to what extent, the enactment of the Marriage Ordinance could be interpreted as constituting a measure towards the replacement of indigenous marriage systems. This essentially involves an attempt to identify the policy considerations which had necessitated the evolution of the present dual system of marriage law for Africans. The relevant questions are examined from the standpoint of the officials actually involved in the transactions relating to the introduction of the relevant legislation. This chapter also lays down the foundation for the discussions in the following chapters which consist of a close examination of the interaction of colonial legislation, indigenous African custom and Christian missionary ideologies in the development of marriage law. The main question in this chapter on this particular theme relates to colonial official attitudes towards the continued availability of customary marriage law to those Africans who had adopted Christianity as their religion.

2. The Origin and Provisions of the Marriage Ordinance, 1902

The initial impetus for the introduction of European types of marriage legislation in British African territories has often been attributed to the wishes:

> ...of the missionary bodies who felt that they were unable to keep their converts true to their voluntary professed religion without the aid of legal sanction and penalties.[5]

This view, as some of the more recent studies have shown, is not quite accurate.[6] Indeed, as Morris has noted,[7] some missionaries were even hostile to the introduction of the Ordinances as they constituted state interference with the religious sacrament of marriage. With some missions, as will become apparent in the next chapter, the struggle between church and state for control over the regulation of marriage which had taken place in England was being repeated in the African protectorates.

The immediate problem leading to the introduction of marriage legislation had little to do with marriages of Africans, Christian or otherwise. The enactment of the relevant statutes had been prompted by the problems of non-African immigrants who wished to contract marriage locally.

Prior to the introduction of local marriage legislation in many parts of British colonial Africa, marriages of non-African immigrants had been governed by the Foreign Marriage Act, 1892.[8] This Act empowered consular officers to solemnise marriages at their official residences between parties one or both of whom were British subjects.[9] The restriction to

marriages to which at least one of the parties was a British subject, and the fact that the parties to an intended marriage had to travel a long distance to one of the few locations of consular residences, had been sources of much hardship. In October, 1902, for example, with the intention of obviating some of the defects of the Foreign Marriage Act, the administration in British Central Africa Protectorate presented a draft marriage ordinance to the Foreign Office for approval. The main object of the draft was to "simplify the procedure" for contracting marriage and to give power to the Commissioner to appoint ordinary (that is, non-consular) magistrates as Marriage Officers.[10] Under the Foreign Marriage Act, in this territory, marriage could be solemnised only at two places: Zomba and Blantyre. These two places had catered not only for British Central Africa, but for the entire British sphere north of the Zambezi.[11] Representations similar to those made by the British Central Africa administration had been made by the administration in the East Africa Protectorate.[12]

In response, the Foreign Office sent draft marriage Ordinances to several African territories, including British Central Africa, with instructions that the drafts be enacted as Marriage Ordinances.[13] It would seem that the overriding consideration at the Foreign Office was the introduction of uniform marriage ordinances in the protectorates. The relevant draft ordinances had been closely patterned on the Southern Nigeria Marriage Proclamation of 1900,[14] following a recommendation by the Colonial Office:

> ...that the Southern Nigeria Proclamations are the latest precedent ... and the most suitable for use in a British Protectorate.[15]

In turn, the Nigerian Proclamation had been modelled on the Gold Coast Marriage Ordinance, 1884.[16]

It was clear from the provisions of the draft Marriage Ordinance sent by the Foreign Office to the Commissioner, British Central Africa, that considerations other than the mere need to alleviate the difficulties of a minority immigrant population had been taken into account.[17] The proposed law would be available not only to expatriates, but also to members of the indigenous population. The draft Ordinance provided for the demarcation of the territory into marriage districts, the appointment of Registrars of Marriages and the licensing of places of public worship as places for the celebration of monogamous marriages. Marriage could be celebrated either before a civil Registrar of Marriages or before an authorised Minister of religion in a licensed place of public worship. In either case, certain preliminaries at the office of the Registrar of Marriages would have to be completed by the parties, unless the marriage was under a special licence issued by the Commissioner.

The fact that even Africans could avail themselves of the provisions of the Ordinance was implicit in many of the clauses which had been framed specifically with reference to Africans. For example: Section 35 of the Ordinance provided that:

> ...any person who is married under this Ordinance ... shall be incapable, during the continuance of such marriage, of contracting a valid marriage under any native law or custom.

Section 39 (later Section 40):

> Where any person who is subject to native law or custom contracts a marriage in accordance with the provisions of this or any other law relating to marriage ... and such person dies intestate....
> And any person who is the issue of any such marriage as aforesaid dies intestate....
> The personal property of such intestate and also any real property of which the said intestate might have disposed by Will, shall be distributed in accordance with the provisions of the law of England relating to the distribution of the personal estate of intestates, any native law or custom to the contrary notwithstanding.

Section 51 made it an offence, carrying a maximum penalty of five years, for any person to contract marriage under the Marriage Ordinance being at the material time married in accordance with the native law or custom to any person other than the person with whom such marriage is contracted.[18] All these provisions envisaged the possible application of the Ordinance to Africans.

Besides the references to customary law, there was another, less obvious, indication that the Ordinance was of general application. The opening words of Section 7:

> Whenever after the commencement of this Ordinance, <u>any</u> persons desire to marry....

were sufficiently indicative of, not only the generality, but arguably also the inherently exclusive character of the Marriage Ordinance. But for Section 35, under which the continued validity of customary marriages was expressly excepted, Section 7 of the Ordinance would clearly have thrown some doubt on the continued validity of customary marriages contracted after the commencement of the Marriage Ordinance.[19]

It is very doubtful, however, whether the Foreign Office had any clearly-formulated policy with regard to the application of the Marriage Ordinance to marriages of Africans. In the preparation of the original drafts, neither the local administrations nor the missionary establishments had been consulted. As Morris has observed, little thought was given, for example, to the question of:

> Whether an enactment which might be suitable for the coastal areas of West Africa, with a considerable westernised population, would also be suitable for the rest of Africa where conditions were very different.20

There is no intention here to follow the developments in all the territories affected by the standard draft Marriage Ordinance sent by the Foreign Office. Subsequent developments in British Central Africa were, however, closely linked, at least for a while, with developments in Uganda. A brief account of the reaction in Uganda to the Foreign Office draft is therefore in order.

3. The Reaction in Uganda

In British Central Africa, the draft Marriage Ordinance prepared by the Foreign Office was enacted immediately after it had been received. However, soon afterwards, the Commissioner, Alfred Sharpe, received information from the Foreign Office to the effect that in Uganda, the equivalent Marriage Ordinance had been objected to as "unworkable". The Commissioner was instructed not to bring the British Central Africa Marriage Ordinance into force until it had been determined whether any objections would be raised in British Central Africa to the Ordinance.

If so, the Commissioner was instructed to forward details of such objections, together with any proposed remedies, to the Foreign Office for further consideration.[21]

In Uganda, the missionaries were displeased with several aspects of the draft Ordinance. The Anglican Bishop, Alfred Tucker, in particular was highly critical of the draft Ordinance. The requirements that certain preliminaries should first be completed at the office of the Registrar of Marriages before marriage could be solemnised was one of the aspects criticised. Bishop Tucker contended that the long journeys involved in travelling to offices of the Registrars of Marriages would prove "irksome" and "unworkable" for Africans:

> ...men will be required to travel hundreds of miles to face hunger and weariness and it may be sickness and death before they can get married.[22]

The fee charged under the Ordinance was also criticised by Bishop Tucker as being too high. The Bishop warned that the fee could be interpreted by Africans as an additional form of interior taxation (which had been prohibited by the terms of the Baganda Agreement, 1900). There was also opposition to a clause applying the English law of succession to Africans married under the Ordinance.

Bishop Tucker also sternly disapproved of the clause in the Ordinance which authorised the marriage of a man to the sister or niece of his deceased wife.[23] The marriage of a man to a sister or niece of his wife (not necessarily deceased) had been a familiar feature of many systems of African customary law.

However, the inclusion of this clause in the Marriage Ordinance had not, as might be assumed, been intended as a recognition of this feature of customary law. The inclusion of the clause had come as a result of developments in England which led to the enactment of the Deceased Wife's Sister's Marriage Act, 1907. Morris explains as follows:

> In 1902 when the Secretary of State sent his draft Marriage Ordinance, marriage with a deceased wife's sister was still unlawful in England, but since a change in this respect was then contemplated, the draft Ordinance anticipated the change and stated specifically that the rules regarding kindred and affinity were to be those under English law except that a man could marry his deceased wife's sister or niece.[24]

Bishop Tucker claimed that among the Baganda, the practice legalised by the Ordinance had completely disappeared as a result of Christian teaching and therefore that the clause legalising such practice constituted a step backwards. Other missionaries also expressed opposition to the provisions of the Ordinance.[25]

The objections raised by the missions in Uganda were directed both at the bureaucractic incumbrances which the Ordinance imposed and at the whole idea of applying English legal principles of marriage law to Africans. In the final analysis, the argument of the missions in Uganda was that the application of the Ordinance would constitute an obstacle to the promotion of the Christian ideals of marriage among Africans. This is indeed how the Commissioner of Uganda summed up the matter in a despatch to the Foreign Office. He noted that the effect of the Marriage Ordinance would be:

> ...to discourage Christian marriage, and to produce disastrous results to the work the missionaries have so far successfully taken up in elevating the moral tone of the people.26

It was the desire of the missions that Christian marriage should be free from complicated procedures and expense. In the words of the Commissioner:

> They [the missionaries] fear, and I think with some reason, that if the Baganda find it otherwise, and that Christian marriage entails on them trouble and expense for which they do not bargain they are very likely to think that the game is not worth the candle and to prefer to continue in their old social and conjugal customs.27

In Bishop Tucker's words:

> Every hindrance placed in the way of [Christian] marriage is an incentive to immorality.28

It is useful to emphasise that these arguments were not essentially to the effect that indigenous customary marriage practices were preferable, in the context of the social conditions of Africa, to the alien form of marriage introduced through the Ordinance. On the contrary, it was implicit in the arguments that the disappearance of indigenous practices would be a desirable thing. While the Ordinance was seen only as an obstacle to Christianity, customary marriage practices were viewed as the very negation of Christianity.

As a result of the reaction in Uganda, a feeling of regret for having introduced the Marriage Ordinances without consultation with relevant officials in the protectorates pervaded the Foreign Office. One of the officials observed how unwise it was:

> ...to prepare these elaborate legislative measures - so excellent on paper - without reference to the local circumstances ... and needs.[29]

He added:

> It is the more regrettable because if it is a failure in Uganda it probably will be in the other protectorates.[30]

Soon afterwards, the Foreign Office approved a supplementary Ordinance, the Native Marriage Ordinance, 1903. By virtue of this Ordinance, African Christians would be able to contract statutory marriage in church without going through the complicated procedure at the office of the civil Registrar of Marriages.[31] The fee for registration of marriage was fixed at one Rupee. The clause substituting the English law of succession was repealed. The reference to the marriage of a man to a sister or niece of his deceased wife was omitted.

In contrast, the initial reaction in British Central Africa was that there were no objections to the Ordinance, that the Ordinance was suited to the requirements of the territory.[32] Thus, on 1st February, 1903, the British Central Africa Marriage Ordinance was duly brought into force. This was not, however, the end of the matter. From this time until 1948, the legislative problems initiated by the enactment of the Marriage Ordinance were to become a perpetual item on the agenda of the colonial administration.

Despite the assurances from British Central Africa that the Marriage Ordinance constituted a satisfactory measure, dissatisfaction with the Ordinance mounted at the Foreign Office.

Details of the Uganda objections and a copy of the Uganda Native Marriage Ordinance were transmitted to the Commissioner of British Central Africa. Once again the Commissioner was asked to ascertain the opinions of the missions, "especially the Scottish Established Church, the Free Church of Scotland and the Universities Mission to Central Africa".[33] Further instructions from the Foreign Office enjoined the Commissioner to:

> ...furnish report at earliest convenience and telegraph whether any objections have been raised especially as to the deceased wife's sister clause.[34]

By the beginning of 1904, the Foreign Office was contemplating a review "of the entire development of marriage law in the territories".[35]

The official view in British Central Africa did not change. Advising the Acting Commissioner on the Uganda Native Marriage Ordinance, Joseph Nunan, the Chief Legal Officer, expressed himself as being "strongly adverse" to it; stating that it contained "nothing of utility which is not already conveyed" by the 1902 Ordinance.[36] Nunan even did not see any need to consult the missions as requested by the Foreign Office. Nevertheless, at least the heads of the three missions specifically referred to by the Foreign Office were consulted. An account of their views will be given later in the chapter. Firstly, it is essential to examine the official view in British Central Africa with regard to the application of the Marriage Ordinance to members of the African population.

4. The Marriage Ordinance and African Marriages : Storey v. The Registrar of Marriages of the Shire District

Storey v. The Registrar of Marriages (1903),[37] was the first decision of the High Court[38] of the British Central Africa Protectorate relating to the provisions of the Marriage Ordinance. In the course of the judgement, Joseph Nunan, the presiding judge, dealt with certain issues which were to predominate in the official exchanges on questions relating to the application of the Marriage Ordinance to Africans.

The petitioner in the case was Albert James Storey, an English man who had come to British Central Africa in 1898 as a missionary in the employment of the Zambezi Industrial Mission.[39] He later left the Mission, and at the time of the petition, he was working as a clerk in Blantyre. While still at the Mission, he had made acquaintance with an Ngoni woman, Alice Ndumei. The woman had also been in the employment of the Mission. She had also been attending classes as a catechumen, awaiting baptism. After leaving the Mission, Storey made three attempts to persuade Alice Ndumei to join him as a concubine. On the advice of another European, the man in charge of the Mission, Ndumei turned down the first and second invitations. On the third attempt she consented and joined Storey. This was with the express approval of her father, although no kind of marriage ceremony took place. After a year (during which a child was born, of the union) Storey decided to formalise his relationship with Ndumei under the provisions of the newly enacted Marriage Ordinance, 1902.

Lewis Traherne Moggridge, the Registrar of Marriages of the Shire Marriage District, refused to perform the marriage or to issue a certificate in the Form C under Section 11 of the Ordinance. The reason given for the refusal was, in the words of the judgement:

> ...that the woman [was] not capable of fully understanding the nature of the contract, and that she should not be exposed to the legal penalties which she may incur by taking a native husband under the simple system of native custom at any time hereafter during the life of the European husband.[40]

Storey commenced proceeding before the High Court against the Registrar of Marriages. The summons called upon the Registrar to:

> ...show cause why a certificate in Form C should not be duly issued by him to the petitioner and marriage duly celebrated between the petitioner and Alice Ndumei by him as Registrar of Marriages or by some other proper authority on the fulfillment of the conditions prescribed by the British Central Africa Marriage Ordinance, 1902.[41]

In default of such cause being shown, Storey petitioned the High Court for a mandamus, commanding the Registrar of Marriages to issue the said certificate in the Form "C" of the First Schedule to the Marriage Ordinance.[42]

Nunan dismissed Storey's petition, stating that he was not sufficiently convinced by any evidence which had been brought before the court or by the demeanor or words of the woman herself that the discretion of the Marriage Registrar should be overridden.

In the proceedings, Nunan had the assistance of four assessors - Dr H. Hetherwick, Mr W.W. Miller, Mr R.S. Hynde and

W.R. Martin - to whom he put a series of questions as to the capacity of the parties to the proposed marriage, including the following:

> Question 5 : Does the woman appear to understand the nature of the marriage contract as the voluntary union of one man to one woman for life to the exclusion of all others?
>
> Question 6 : Does the woman appear to understand the penalties to which both parties are liable for breach of the Ordinance?
>
> Question 7 : Is there a reasonable prospect that the woman will, if married, be able to remain faithful to her marriage vow so far as to avoid incurring the said penalties?
>
> Question 8 : Is there any reason of public policy or otherwise known to you why such marriage should not be celebrated?

One can sympathise with Nunan insofar as he might have been using the case at hand as a basis for a fresh definition of policy with regard to the application of the Marriage Ordinance to Africans. In his preliminary remarks, Nunan expressed the view that apart from Europeans for whom the Ordinance had primarily been intended, the Ordinance had further been intended

> ...to provide intelligent and educated natives of the Protectorate with facilities for entering into a contract of marriage in the English sense....[43]

Soon after the Storey judgement, Nunan wrote to the Acting Commissioner that:

> ...owing to the primitive character of the native population I think that the celebration of marriage under the Ordinance should be conducted cautiously and treated as an experiment.[44]

Nunan and other officials in British Central Africa, including the Commissioner, maintained as a matter, not only of interpretation but also, of policy that the extension of the application of the Marriage Ordinance to Africans should be restricted; that only "intelligent or educated" Africans should be capable of contracting statutory marriage.

It had clearly been one of the main considerations in framing the law contained in the Marriage Ordinance that, owing to the supposedly primitive social conditions of the majority of Africans, it would be impractical to impose a wholesale substitution of English marriage for customary marriage.[45] Yet, there does not appear to have been any intention on the part of the architects[46] of the Marriage Ordinance to bar any category of Africans from contracting marriage under the Ordinance. Indeed, the whole tenor of the Ordinance was not restrictive. On the contrary, it was obvious from some of its provisions that its architects had intended the Ordinance to be applied as extensively as possible. Thus, even marriages of the very class of Africans whom Nunan purported to exclude from the application of the Ordinance were specifically anticipated under its provisions. The clauses of the Ordinance under which one of the parties to an intended marriage was required to sign the notice of marriage in the presence of the Registrar of Marriages,[47] significantly, made special provision for persons who were "unable to write" or were "insufficiently acquainted with the English language or both".[48] Instead of "signing", such persons were allowed to use "a mark or a cross in the presence of some literate persons". Clearly, there was no class of

people to whom this proviso was more relevant than the "uneducated" Africans.

It is submitted that in placing the questions listed above before the assessors, Nunan was sidetracking the key issue. The question most pertinent to the decision must have been whether a Registrar of Marriages could (under the provisions of the Ordinance as it stood) legally refuse to issue a certificate in the prescribed form where the parties had fulfilled all the necessary conditions laid down by the Ordinance.[49] By dismissing Storey's petition, Nunan of course assumed that a Registrar had discretion in such matters. Yet, the relevant Section 11 of the Ordinance peremptorily stated that:

> The Registrar, at any time after the expiration of twenty-one days and before the expiration of three months from the date of the notice, upon payment of the prescribed fee, shall thereupon issue his certificate in the Form (C) in the first schedule hereto.

The Section did not seem to leave any room for discretion on the part of the Registrar of Marriages to withhold the certificate for reasons other than those which were specifically stated in the Ordinance or which would render a proposed marriage void or illegal.

Indeed, despite Nunan's decision in the Storey case, a measure of disagreement arose among the officials concerned with the application of the Marriage Ordinance over the question whether a Registrar had any discretion on the relevant matter. For example, in 1917 a Catholic Father at Nguludi Mission, Fr. M. Cadoret, raised the issue of whether he could celebrate marriage under the 1902 Ordinance between a Christian and a non-

Christian African.[50] The Registrar of Marriages for the district expressed doubts about the admissibility of the proposed marriage. Incidentally, the Registrar in question was again L.T. Moggridge, who advised Fr. Cadoret in terms reminiscent of the decision in the Storey case:

> In the meanwhile I am myself exceedingly unwilling in such cases to bind a heathen native by a contract, involving a penalty of five years imprisonment for its breach, which contract is quite foreign to native custom and modes of thought. I think that there are very few cases in which a heathen native could readily grasp the meaning and liabilities of a Christian marriage; the natural inconstancy of the native ... is what I want to guard against ... I refuse to agree on his or her behalf to agree to an act imposing disproportionate penalties on such inconstancy.[51]

Earlier, however, Fr. Cadoret had been advised by the Registrar-General, W.H. McCullough, that such a marriage (involving a non-Christian African) was possible and even desirable. In a letter to Moggridge, the Registrar-General disagreed with the former's advice to Fr. Cadoret. The Registrar-General had no doubt that "heathens" could marry under the Marriage Ordinance:

> ...which in fact would appear to actually contemplate and provide for the cases of natives contracting marriage.[52]

He went on to state that:

> If two non-Christian natives contracting marriage comply with the provisions of the Ordinance, then I am unable to see any valid reason why they should be refused. In a case where the parties are unusually ignorant you might perhaps decline although I am unable to say exactly on what grounds. You might of course always urge heathens to eschew the Ordinance and all its ways. You can warn them impressively of the dreadful consequences of contravention, but if non-Christians notwithstanding insist on the marriage and comply with the law then I don't think they can be denied.[53]

McCullough's words were echoed in 1929 by the Acting Attorney-General of Nyasaland in his advice to the Registrar of Marriages for Karonga District. In a letter dated 29th October, 1929, the Registrar for Karonga inquired of the Registrar-General whether he could legally refuse to commence the preliminaries demanded by the 1902 Marriage Ordinance and instruct the African applicant to celebrate his marriage under the Native Marriage (Christian Rites) Registration Ordinance, 1923. His reason for refusing:

> I feel that the native concerned is simply actuated by a desire to mock European methods and I feel that if it is decided that native Christian marriage can be celebrated under the 1902 Ordinance, the Registrar of this District will find himself inundated with applications causing a considerable waste of time which could be put to better advantage.[54]

The Registrar-General referred the matter to the Acting Attorney-General. The advice of the latter was that provided the African in question was prepared to swear the affidavit under Section 11 of the Ordinance, there was no rule of law precluding him from the provisions of the Ordinance. The Registrar at Karonga was told that he could advise, discourage and warn the African as to the consequences, for example, with regard to succession and bigamy, but he could not refuse to celebrate a marriage.[55]

In the Storey case, the ground for refusing to issue the certificate was not even proved in fact. There was nothing to support the finding that the woman was incapable of understanding the nature of marriage under the Ordinance. The woman could not, obviously, have been expected to understand the detailed

legal implications of marriage under English law. Even in England that could not have been a practical requirement. It should be enough if the parties had a general idea of the moral and social obligations of marriage. It was the duty of the Registrar of Marriagesto explain to the parties the legal conditions and consequences of marriage under the Ordinance.[56] As far as the question of monogamy was concerned, even among Africans, a woman was allowed only one husband, so that the proposed monogamous marriage would not have placed the woman in any position of real conflict. The evidence clearly pointed to the fact that Ndumei was not a woman of easy virtue.

The four assessors had unanimously answered questions 5 and 6 above in the affirmative, thereby virtually contradicting Moggridge's assessment. It was also Nunan's finding that the woman had answered all the questions as to her intention satisfactorily. A former mission teacher of Ndumei had also deposed in her favour and in favour of the intended marriage. The assessors had generally answered question 7 above in the affirmative.[57]

The burden of proof in this case should have been on the Registrar to show the existence of circumstances justifying his refusal to discharge a statutory duty. The Marriage Ordinance had placed a duty on him to issue a certificate and he had refused to discharge that duty. Yet, Nunan seemed to hold that the burden of proof was on the petitioner and his intended wife.

Apart from constituting evidence of official unwillingness to apply the Marriage Ordinance to Africans, the Storey case

also serves to capture the atmosphere of racial prejudice and social bigotry which characterised some of the marriage-law policy decisions. In the judgement, Nunan all but ignored the legal issue raised by the petition and concentrated instead on what he described as the "special circumstances" of the case. These included the consideration that:

> The woman appears to be a native of very ordinary type. That type is very inferior indeed. It is known to be exceedingly stupid and its moral tone is what one may expect from the notorious sequence of the unyago ceremony of puberty; from the polygamous institutions since the days of Canaan and from the statistics of adultery and divorce cases tried daily at every boma and before every headman of any importance in the country.[58]

Clearly, question 8 above had been intended to draw the views of the assessors on the inter-racial character of the marriage. While deprecating marriage between "white and black", the view of three of the assessors was that a formalised relationship was preferable to an illicit one. It was noted that there were many white men in the territory who were cohabiting with black women and this was more deplorable than a formalised inter-racial marriage. One assessor observed:

> I think it would be a pity to compel Mr Storey to live in a state of concubinage when he is prepared to incur a lawful marriage.[59]

Nunan, however, agreed with the fourth assessor, Mr Martin, who condemned the proposed marriage in the strongest terms. Martin declared:

> Whatever the black of this country may be a hundred years hence, he is not at present fit to associate with the white man. His level is that of the beast, or very little above it. The time is not ripe for such marriages. Till

> it becomes ripe, all such marriages should be strictly prohibited.[60]

He further noted that if the proposed marriage were to take place, there would be no law to prevent a white woman marrying a black man. This, he warned, would threaten the safety of European women in the territory.[61]

Nunan himself added that such a marriage as the one proposed by Storey would erode the:

> ...prestige of the whiteman in a territory where he is outnumbered by four thousand to one by an exceedingly primitive, if docile and industrious race.[62]

The striking thing in these remarks is not really the attitude towards mixed marriages, but the explanations offered. Rather candidly, the relevant officials did not refer to any higher social ideals which could be threatened by such marriages than the fear, in effect, that the European settler community would be stripped of the shroud of racial superiority. Although the evidence to this effect is not very strong, it is not an altogether far-fetched point that among some of the officials in British Central Africa, the extension of the application of the Marriage Ordinance to Africans might have been seen as an unwarranted recognition of social parity between the European and indigenous races. Basically, however, it was the idea that Africans were deficient in their moral and social life that constituted the basis of some of the thinking on the question of marriage legislation.

5. The Marriages of African Christians and the Marriage Ordinance

a) The Interpretation of the Ordinance

Nunan's statement in Storey's case, that the Marriage Ordinance had, apart from Europeans, been intended for "intelligent and educated" Africans seems to have been deliberately intended to discount any notion that conversion to Christianity on the part of Africans automatically necessitated or justified the celebration of marriage under the Ordinance. The Ordinance itself did not expressly make it compulsory for African Christians to contract marriage under its provisions.[63] Theoretically, Christians were still free to contract marriage under their respective personal customary laws.

Before the introduction of local marriage legislation in 1902, it had become an established practice of Christian churches to solemnise marriages of their African converts in accordance with Christian rites. All Christian churches saw it as a duty of their members to receive a church blessing on their marriage. For some, the episcopal churches, marriage was in fact conceived primarily as a religious sacrament and only secondarily, if at all, as a civil contract. The Marriage Ordinance allowed those wishing to contract marriage under its provisions the choice between a civil marriage ceremony and a Christian religious ceremony. In this respect, the enactment of the Marriage Ordinance did not create much of a problem. However, the Ordinance also appeared to throw some doubt on the legality of the unofficial Christian marriages.

Section 22 of the Ordinance, in particular, stated that:

> A Minister shall not celebrate any marriage if he knows of any just impediment to such marriage, nor until the parties deliver to him the Registrar's certificate or the Commissioner's licence.

The implication of this seemed to be that Ministers of religion could no longer bless marriages outside the provisions of the Marriage Ordinance. In other words, any Christian marriage had to be a marriage under the imported English law. African Christians who did not want to bind themselves by a contract of marriage under the Ordinance, according to this reading of Section 22, also could not have their marriages blessed by a religious ceremony. To the extent that it was essential for African Christians to have their marriages so blessed, the ultimate implication of Section 22 was that many Africans would be bound to contract marriage under the Marriage Ordinance.

The foregoing interpretation of the Ordinance conflicted with Nunan's idea that the application of the Ordinance to Africans had to be embarked on cautiously and as an experiment. Not surprisingly, Nunan dismissed the idea that the intention of the Marriage Ordinance had been:

> ...to prohibit the practice which has gone for many years amongst Christian missionaries of celebrating a purely religious form of marriage in the case of native converts.[64]

Indeed, Section 22 of the Ordinance could be interpreted differently. The Section could have been read as referring only to cases where there was in fact an intention on the part of the officiating Minister and the parties to solemnise a marriage

which was binding under the provisions of the Ordinance. Where there was no such intention then no law would be broken. This was the view held by Nunan. He argued that the clause in question only referred to Ministers performing marriages under the Marriage Ordinance in a licensed place of worship. He explained:

> A Christian or purely religious ceremony of marriage of natives in this country is still possible without the sanction of five years imprisonment in the case of a lapse into polygamy and without any interference with native law and custom as to the distribution of property.65

According to Nunan, such purely religious ceremonies had been expressly exempted from the operation of the Ordinance in Section 35 which preserved customary-law marriages. The implication was that purely Christian marriage ceremonies constituted customary-law marriages. Normally, marriages celebrated in accordance with Christian ceremonies were accompanied by valid customary-law marriage contracts. Thus, it was possible to argue, in support of Nunan's view, that the mere fact that Africans had gone through a Christian marriage ceremony did not invalidate the customary-law marriage, which had an entirely independent existence. Nunan's interpretation of Section 22 must be seen as an aspect of his doubts about the advisability of any haste in introducing the English system of marriage law to Africans.

Both the Foreign Office and the Colonial Office, which latter office took over the administration of the Protectorate in 1904, rejected Nunan's interpretation of Section 22 of the Ordinance. They rejected the view that the missionaries were

still free to celebrate Christian marriages between Africans outside the framework of the Marriage Ordinance. A Foreign Office despatch to the Acting Commissioner, Major F.B. Pearce, described Nunan's reading of the Ordinance as wrong:

> It will be remembered that when the Ordinance was first enacted in Uganda there was a great outcry ... that it would render marriage of native Christians impossible because they could not spend three weeks or a month travelling from remote parts to a registrar to make the necessary declarations.... The suggested remedy was shortly to make every clergyman a registrar under the Ordinance. It certainly never occurred, so far as I know, to the Commissioner or any of his advisers that the difficulty was non-existent because the Native Christian marriages were not within the purview of the Ordinance at all.[66]

At the Colonial Office the view of the Foreign Office was confirmed. A Colonial Office despatch to the Commissioner, Alfred Sharpe, emphasised that:

> There is in fact no class of marriage to which it is more natural to apply the law of 1902 than the marriages of Christian natives by Ministers of religion.
>
> Particularly as regards the effect of such marriages on the devolution of property. I am advised that it is desirable that where natives are married with civilized ceremonies whether religious or purely civil, any property to which the parties to the marriage may be legally entitled should devolve after death according to English law as provided by Section 39 of the Ordinance.[67]

In rejecting Nunan's interpretation, the Colonial Office (and Foreign Office) did not draw any distinction between purely Christian marriage ceremonies and ceremonies which would be preceded by valid customary-law contracts. Either way, the Colonial Office rejected the view that marriages between Africans were excepted from the penal provisions of the Marriage Ordinance by virtue of Section 35.[68]

It might seem absurd that, while not abolishing customary marriages altogether, the architects of the Marriage Ordinance could have intended to prevent the missionaries from simply appending a Christian blessing to an existing customary marriage. Yet, it is likely that this had been the actual intention of the architects of the Ordinance. The whole scheme of the Marriage Ordinance was based on the assumption that the European ideals of social relations would eventually displace the indigenous social institutions. The provisions of the Ordinance reflected the view that was underlined by the well-known Nigerian case of Cole v. Cole (1898).[69] In this case, it was held that English law was to apply in the distribution of the estate of a man who had married in accordance with Christian marriage rites, although not under statutory marriage law. The principle of the case was that a Christian marriage clothed the parties and their offspring with a status unknown to African customary law, and that it would be against justice to apply such customary law to the parties or their offspring. It was stated that in such cases, a court was not bound to observe customary law.

In an illuminating examination of the history of the parent Gold Coast Marriage Ordinance of 1884, Professor Zabel stresses the point that most of the officials involved in the making of that Ordinance

> ...were permeated by the facile assumption that English law and western ways were superior and could only improve the lot of those who adopted them, whatever their indigenous traditions might be.[70]

The pervasive ethnocentricism of the time led to the belief that, since the traditional African institution of marriage did not conform to the European conception of marriage,[71] customary marriages were a reflection of an inferior and barbaric culture. Consequently, it tended to be assumed that "civilised" Africans - in particular those who had embraced the Christian religion and solemnised their marriages in accordance with Christian rites - would necessarily require a "true" or more satisfactory system of marriage, namely that of English law. This was an aspect of the tendency to view "civilisation" or "progress" among Africans exclusively in terms of the adoption of Western European habits and norms. The adoption of Christianity was construed as a manifestation of civilisation and, consequently, as a renouncement of traditional African practices on the part of the individual concerned. Thus, indeed, the extension of the application of the Marriage Ordinance to the African population was primarily targeted at the "educated" or "Christian" Africans - the so-called civilised Africans.[72]

That the architects of the Marriage Ordinance had assumed that marriages between African Christians would inevitably fall under the regime of English law is further suggested by Sections 36 and 37 of the Ordinance. Section 36 provided for the "validation" of marriages celebrated by Christian churches prior to the enactment of the Marriage Ordinance. Marriages so celebrated would take effect as though they had been celebrated in accordance with the procedure laid down in the Ordinance. Section 37 contained instructions to religious bodies in possession of records of marriages celebrated by them, to forward details of

such records to the Registrar-General. These provisions were not, as one might expect, confined to marriages where the necessary formalities for a valid customary marriage had been neglected. A number of exceptions to the operation of these clauses were provided for, but significantly, these did not include cases where the Christian marriage ceremony had been accompanied by a customary-law marriage contract. The effect of these clauses was not merely the validation of otherwise legally non-existent unions, but also the transformation of what were essentially customary-law marriages into monogamous statutory marriages.

African Christians who had solemnised their marriages in accordance with Christian rites were given no opportunity to opt out of the imported English law. The language of Section 37 relating to the transmission of records to the Registrar-General was not permissive but peremptory. Consistent with the view that the extension of the application of the Ordinance to Africans should not be hurried, Alfred Sharpe attempted to foster the view that the clauses under consideration had been intended for, and should be confined to, marriages of Europeans.[73] The Foreign office rejected this view.[74]

Even where a Minister of religion had not transmitted the relevant documents to the Registrar-General, it would appear that a pre-1902 Christian marriage would still be regarded as though it had been celebrated in accordance with the provisions of the Marriage Ordinance. In other words, the operation of Section 36 was not conditional upon the fulfillment of the obligation of the Minister of religion to transmit documents to the

Registrar-General. This was, at least, the implication of the High Court decision in Machinjili and others v. Kapusa and others (1945).[75] The case had originated from the court of Native Authority Machinjili, which had ordered in effect that the estate of the late Andrew Machinjili should be divided according to Yao custom. Yao was the personal law of the deceased. The appellants were the deceased's sons. Under the matrilineal Yao system, they did not have any strong claim to the estate of their father. Nevertheless, they contended that the property of their late father should be divided amongst themselves. The case, it may be noted in passing, is an example of the kind of problems which prompted the enactment of the Wills and Inheritance Act, 1967.[76]

The judgement of Native Authority Machinjili was confirmed on appeal by the District Commissioner, Blantyre, and the Provincial Commissioner, Southern Province. The sons successfully appealed to the High Court. It was contended on the part of the appellants that in 1895, the late Andrew Machinjili had gone through a ceremony of marriage with the appellants' mother in accordance with the rites of the Church of Scotland at Blantyre. There was no evidence that the officiating Minister had forwarded any documents relating to the marriage to the Registrar-General. However, oral evidence was received which showed that a Christian marriage ceremony had indeed taken place. It was argued that the marriage between the deceased and the mother of the appellants had been brought under the provisions of the Marriage Ordinance (by virtue of Section 36).[77] It was contended therefore that the English law of

succession was the law applicable to Machinjili's estate, by virtue of Section 40 (originally Section 39) of the Marriage Ordinance. Mathew, Agt.C.J. agreed. He observed:

> It is not for me to comment on the wisdom of these provisions but merely to apply the law. The personal property of the late Andrew Machinjili must be distributed in accordance with the provisions of the law of England relating to the distribution of the personal estate of intestates. The appeal is allowed.[78]

It may be observed by way of comment that the above decision of Mathew, Agt.C.J., though technically correct, was somewhat anachronistic in the context of the developments since 1923, when the Native Marriage (Christian Rites) Registration Ordinance, 1923, was enacted. By virtue of this Ordinance, it had become legally possible to celebrate marriage by Christian rites outside the framework of the 1902 Marriage Ordinance. Strictly, however, the enactment of the 1923 Ordinance did not have the effect of altering the legal character of marriages which had already been validated under the 1902 Ordinance.

b) The Attempts to Amend the Marriage Ordinance

Perhaps realising that his views on the question of African marriages did not accord with the general tenor of the provisions of the Marriage Ordinance, after the Storey case, Nunan submitted a draft Marriage Ordinance, the declared purpose of which was to "remove doubts" about relevant aspects of the Ordinance. Nunan's draft British Central Africa Marriage Ordinance, 1903, provided, inter alia, the following:

> Nothing in this Ordinance contained and nothing in the British Central Africa Marriage Ordinance, 1902, contained shall prevent any Minister of religion from

> contracting in such form and in such place as he shall deem fit a religious ceremony of marriage in the case of any native.[79]

The purpose of this clause was to confirm Nunan's dictum in the Storey case, that the Marriage Ordinance, 1902, had not prohibited the practice of Christian missions of celebrating "unofficial" religious marriages between Africans. Nunan did not envisage the application of the provisions of the Marriage Ordinance to these marriages. In law the relevant marriages would be regarded as customary ones.

At the Foreign Office, the import of Nunan's draft was not fully grasped. The reasons for Nunan's draft were confused with the views of Bishop Tucker in Uganda. In apparent sympathy with the draft prepared by Nunan, but in words reminiscent of Tucker's objections, the relevant despatch from the Foreign Office stated that it was a little difficult:

> ...to see why marriage in the protectorates should be made so much more difficult than it is in England, and in the case of the natives the very accurate registration ... provided for does not seem very necessary. On the other hand, I think there ought to be some registration of such marriages ... and if the principle of Nunan's proposal is approved, I think some clauses ought to be added providing for registration in a prescribed form by the officiating Minister and the forwarding of particulars to the Registrar-General.[80]

Further, in the same despatch, it was stated that the Uganda remedy was "perhaps a better method of meeting the difficulty about Native Christian Marriage; viz: multiplying the registrars by appointing Ministers of religion".[81] Nunan's draft was not concerned with the procedure for registration under the Marriage Ordinance, but with the more serious question of whether

Christian marriage ceremonies should always necessarily expose the Africans involved to the legal consequences of the imported English law.

However, whether or not the Foreign Office had properly construed Nunan's proposal became immaterial as the whole matter of marriage legislation for the Protectorate was soon transferred to the Colonial Office. In its communications with the Colonial Office on the matter, the Foreign Office presented Nunan's draft and the Uganda Native Marriage Ordinance, 1903, as alternative remedies for British Central Africa.[82]

The transfer from the Foreign Office to the Colonial Office was to prove a significant development. The text of the standard Marriage Ordinance was largely a creation of Colonial Office officials. Perhaps because of this, the Colonial Office, in contrast to the Foreign Office, tended to be less sympathetic to proposals to depart from the standard text. Legal advisers like Hugh Betram Cox[83] viewed the standard Marriage Ordinance as constituting a delicately balanced, even all-ideal, formula which was not lightly to be tampered with. Thus, the suggestion of the Foreign Office that the Uganda law might be enacted in British Central Africa was not acted upon.[84] In any case, officials in British Central Africa had not asked for the kind of law enacted in Uganda.

As to Nunan's proposed amendment, the Colonial Office held as a matter of policy that marriages celebrated in accordance with Christian rites should be governed by English law. It was stressed that it should be one of the chief aims of the Marriage

Ordinance, 1902, to cater for that class of Africans whom the missionaries had "drawn ... out of their native habits and customs and married them according to a new regime".[85] The proposed draft from British Central Africa clearly went against this policy.

On 19th October, 1904, Nunan submitted a second draft which merely reiterated Section 3 of the first draft. When this draft was also rejected, the Commissioner, Alfred Sharpe, wrote to the Colonial Office, explaining Nunan's proposals in detail. He stated that apart from marriage under the 1902 Ordinance, which was available to both Europeans and Africans, there was only one other type of marriage available to Africans. This was

> ...marriage in accordance with native law and custom. This marriage the missionaries like to amplify or adorn (where they can obtain the consent of the natives) by some form of Christian religious ceremony. They have no wish to induce natives (except under very unusual circumstances) to marry in accordance with the 1902 Ordinance as they scarcely think they are fit for this.
>
> Mr Nunan was of the opinion that in view of Section 22 of the Marriage Ordinance, missionaries might hesitate to perform a religious ceremony in the case of natives being joined according to native law and custom; lest they themselves should incur the pains and penalties laid down in that Section; and Mr Nunan's draft was drawn with the object of making clear that a missionary or other clergyman might if he liked, carry out *[a]* form of religious ceremony... without requiring to see that the provisions of the Ordinance were carried out. Such marriage would not be marriage under the Ordinance of course; the performing of a religious ceremony being merely an amplification of the native law and custom.[86]

At the Colonial Office, some officials began to sympathise with the proposal from British Central Africa. For example, it was suggested by Gilbert Grindle,[87] either that Nunan's draft should be enacted or, that the missionaries should tacitly be allowed to continue with their pre-1902 practice without inter-

ference.[88] This view did not prevail.

Alfred Sharpe made yet another attempt to persuade the Colonial Office to accept Nunan's proposal. In a letter dated 21st April, 1905,[89] he cited at length a statement made by Dr Alexander Hetherwick, Head of the Church of Scotland Mission. Confusingly, the views expressed by Hetherwick did not seem to support Nunan's proposal. According to Hetherwick's statement, it was very necessary to apply the law of 1902 to marriages between two African Christians. In his view, the application of the Ordinance in such circumstances would strengthen the marriage bond in the African mind:

> The obligations of the Ordinance are not more than those that every Christian marriage imposes. With increased facilities for the operation of the Ordinance, I can see no difficulty in the adoption of the Ordinance in such cases as those I have mentioned.[90]

Hetherwick's apparent agreement with Nunan would seem to have been confined to marriage between a "heathen" and a "Christian" or between two "heathens". With reference to such marriages, the view of Hetherwick was that it would be "manifestly unjust" to bind Africans (to such marriages):

> ...by a bond which he or she cannot understand. For this class ... all the missionaries consider some form of modified religious rite essential, but simply as an adjunct to what is really a native marriage. The pains and penalties of the Marriage Ordinance could not be applied.[91]

Significantly, Hetherwick expressed the hope that:

> In time, with the advance of religion and education this class [would] disappear entirely - an end greatly to be desired.92

The response of the Colonial Office was the same. Cox, especially, was flabbergasted by the proposals from British Central Africa, in particular by the alleged attitude of the Christian missionaries. He observed:

> It seems that the missionaries have been accustomed to marry with Christian forms of service half-backed converts or even heathens well-knowing that they don't understand the ceremony. They superadd a religious rite to native custom. Such a marriage cannot be marriage by native custom and I gather from A. Sharpe that if adultery is subsequently committed the missionaries would regard the marriage as annulled.... How any Christian can countenance such a prostitution of one of the most solemn rites of his church I cannot conceive, but so far has modern Christianity departed from St Peter and St Paul [that] zealous men it seems countenance it.[93]

Cox added a typical invective of his:

> These unions are to me detestable and it should be the duty of any Christian to educate the convert to the higher views of marriage and not descend to the level of the native.[94]

In a sense, Cox was advocating the use of secular law as a means of educating Africans to the supposedly higher views of marriage. Later, it will be interesting to compare Cox's view with the equally forceful views of Martin Parr, a fierce critic of the Marriage Ordinances.[95]

The advice of Cox was that the proposals from British Central Africa should be rejected. The Assistant Colonial Secretary, Lyttleton, concurred. Sharpe was told that:

> ...the Marriage Ordinance contemplates only two forms of legal marriages, namely, that complying strictly with the provisions of the Ordinance and that celebrated in accordance with native law and custom. Therefore if natives go through a religious marriage ceremony, but intentionally neglect to carry out the provisions of the Marriage

Ordinance, such marriages are liable to the penalty prescribed under Section 4796 of the Ordinance.[97]

In November, 1905, Nunan prepared yet another draft entitled "The Native Marriage Ordinance, 1905".[98] The draft marked a half-hearted change of mind by Nunan. It was patterned on the Uganda Native Marriage Ordinance, 1903, the same Ordinance which had earlier been rejected by both the officials in British Central Africa and by the Colonial Office. The proposed Ordinance would apply only to marriage between Africans both of whom were Christians. The provisions of the 1902 Ordinance would still apply, except that the simple church ceremony would suffice and the formalities preliminary to marriage prescribed under the 1902 Ordinance could be dispensed with; the marriages would be celebrated in licensed places and by licensed Ministers of religion; the Commissioner would, however, have power to license a Minister of religion to celebrate marriage in any place, licensed or not; the fee for registration would be reduced from three shillings (under the 1902 Ordinance) to one shilling. Unlike the Uganda Ordinance, however, Nunan's new draft did not exclude the application of the English law of succession. Nunan simply stated that it had been considered "highly desirable" that the section applying the English law should be retained.

In a covering letter to the Acting Commissioner, Nunan explained that, personally, he was unwilling to re-open the issue, but that he had been forced by "earnest representations by the Bishop of Likoma [UMCA] and Dr Hetherwick to approach the Colonial Office as to the enactment of the Uganda law in British

Central Africa".[99] In fact, Dr Hetherwick himself had written to the Acting Commissioner on 31st October, 1905.[100] Once again, the Colonial Office rejected the proposal to introduce the Uganda law in British Central Africa. The main argument against the draft was that it was "highly indefinite": it dispensed with the notice of marriage to the Registrar of Marriages; it did not provide for the publication of notice of an intended marriage; there were thus (according to the CO) no adequate means of ensuring that the necessary consents had been obtained or that there were no legal impediments to an intended marriage - for example, that neither party was already married to a third person under native law and custom. It was observed that:

> ...the civil law of marriage should insist on certainty with regard to the preliminaries and fact of marriage in as much as on this law depends civil status, legitimacy, and devolution of property.101

The draft Native Marriage Ordinance was also seen as entrusting to the missionaries too much of the powers which properly belonged to the civil authorities. The proposal to give clergymen powers to give consent in civil marriages involving minors, to be Registrars of Marriages, and to decide the procedure for marriage, was described as "highly dangerous". The Colonial Office would be willing to consider any draft designed to alleviate the problem of high fees and long distances. It was emphasised, however, that any such draft should not affect the legal position as regards intestate succession, penalties for bigamy and related offences, and other aspects of the 1902 Marriage Ordinance.

Perhaps in an attempt to meet some of the objections raised by the Colonial Office, the Attorney-General of British Central Africa, A.K. Young, prepared another draft "Native Marriage Ordinance".[102] This draft retained the preliminaries prescribed under the 1902 Ordinance. Although the aim of the draft was to simplify the procedure for contracting marriage, if enacted, the proposed law would have had the effect of complicating matters even further. The preliminaries to marriage would be split into two. Those preliminaries relating to the notice of marriage under Sections 7, 8, 9 and 10 would be performed at the office of the Civil Registrar of Marriages. For this purpose, the draft provided that all District Residents (or officers) and Assistant District Residents would be Registrars of Marriages in their respective administrative districts and sub-districts. On the other hand, the preliminaries relating to affidavits as to capacity and explanations as to the legal consequences of the contract of marriage would be handled by Ministers of religion.[103] For this purpose, another draft entitled "The Marriage Ministers Registration Ordinance, 1906", was prepared.[104] This provided for the registration of Ministers of religion as Ministers who could solemnise marriage under the proposed Native Marriage Ordinance. The Ordinance would require heads of missions to apply to the Registrar-General for the registration of their respective Ministers. Unregistered Ministers would be incapable of performing marriage. Marriage Ministers would keep marriage registers. Particulars would be transmitted to the Registrar-General on a quarterly basis.[105] The Native Marriage Ordinance would impose a fee of one shilling for registration.

Even Young himself was not enthusiastic about the drafts. He was of the same opinion as Nunan, namely, that the problems of distances and fees with which the drafts were mainly concerned were sufficiently provided for under the 1902 Ordinance. This view was supported at the Colonial Office. In rejecting Young's drafts, the Colonial Office stated that it was:

> ...averse to further legislation at present on the subject of marriage in the British Central Africa Protectorate, if it can be avoided.[106]

Alfred Sharpe was informed that he could utilise the powers under the 1902 Marriage Ordinance to issue standing instructions for the remission of fees in special cases and appointment of additional Registrars of Marriage to lessen the problems of fees and distances respectively. Otherwise, it was observed at the Colonial Office that, for British Central Africa, there was "nothing practically left now to legislate for".[107] Sharpe followed the advice given by the Colonial Office. On June 28th, 1907, standing instructions were issued to the effect that marriage districts would henceforth correspond to the administrative districts and sub-districts in the territory. Every District Resident and Assistant District Resident would be a Registrar of Marriages under the Marriage Ordinance. Marriage Registers from this period up to at least 1912, show that in the majority of marriages involving Africans, the fee was not being charged;[108] although no standing order to that effect seems to have been made. The provisions of the British Central Africa Marriage Ordinance were left intact. This state of affairs was to last until 1912.

6. Missionary Response to the Enactment of The British Central Africa Marriage Ordinance

During the period between the enactment of the Marriage Ordinance and the time of Young's draft in 1906/1907, missionary participation in the transactions relating to marriage legislation had been minimal. In British Central Africa, there had been nothing of the spontaneous and purposeful response as had been demonstrated by Bishop Tucker in Uganda. It was only after about a year of the enactment of the Marriage Ordinance that three heads of missions officially submitted some views on the Ordinance. This came as a result of the insistence by the Foreign Office, which had been doubtful about the apparent official satisfaction with the Marriage Ordinance in British Central Africa, in view of the strong criticism against a similar Ordinance in Uganda. The three heads of missions in question were: Dr Alexander Hetherwick of the Established Church of Scotland;[109] Bishop Gerald Trower of the Universities Mission to Central Africa;[110] and Dr Robert Laws of the Free Church of Scotland.[111] In addition to the Marriage Ordinance, the three heads had also been called upon to comment on Tucker's objections and the Uganda Native Marriage Ordinance, 1903. The three men expressed themselves as being in favour of the Marriage Ordinance.

Dr Laws told the Commissioner that the Marriage Ordinance would serve to "emphasise the obligation of the marriage bond". Dr Hetherwick stated that the Ordinance would be "a strong aid to the advancement of the marriage state". Bishop Trower expressed similar sentiments. At the same time, however, it was

clear that the three missionaries wanted some of the elements of the Uganda Native Marriage Ordinance to be implemented in British Central Africa. All the three agreed with Bishop Tucker that the fees prescribed under the Marriage Ordinance, 1902, were too high and that the distances to Registrars' offices would be too onerous for Africans. With regard to these matters, missionaries who had been in contact with Nunan had been assured that the Commissioner had power under the Marriage Ordinance to reduce or altogether remit the fees; and that the problem of distances could be overcome by the establishment of more marriage districts. That the Ordinance provided for such powers was all true. Yet, Nunan was not entirely candid with the missionaries with regard to the actual intentions of the government; because at that time it was being recommended by Nunan that marriage districts should not be unduly multiplied as only few Africans would need to use the provisions of the Marriage Ordinance.[112] By the same token, Nunan was of the view that there was no need to reduce the fees. Following this advice, Alfred Sharpe informed the Colonial Office that:

> The fees provided are not really high and any civilized Christian natives who desire to take advantage of the Ordinance are well able to do so without amendment of its clauses regarding fees.113

For the missionaries, the issue could hardly have been merely whether or not African Christians could afford the fees charged. Even more important must have been the question of whether or not the Marriage Ordinance entailed additional material burdens on the parties to Christian marriage. If it did, it was likely to contribute to the discouragement of Christian

marriage among Africans. It is clearly in this way that missionaries like Bishop Tucker in Uganda had viewed the matter. The attitude of the civil officials in British Central Africa on the subject must undoubtedly have been influenced by the view that the Marriage Ordinance did not prohibit "unofficial" celebration of Christian marriages by the missionaries.[114] Thus, where it was thought that the burdens of the Marriage Ordinance would be too onerous for Africans, the provisions of the Ordinance would be ignored and a simple Christian marriage ceremony would be performed. Indeed, in practice, many missionaries continued to celebrate Christian marriages outside the provisions of the Marriage Ordinance, despite the emphatic view of the Colonial Office that the practice was illegal.

With varying emphasis, all the three heads of missions advised against the retention of the clause permitting the marriage of a man to the niece or sister of his deceased wife. However, Alfred Sharpe refused to recommend any amendment. He stated that he could not see any "genuine desire or depth of feeling" among the missions for the repeal of the relevant section of the Ordinance. None of the three missionaries made any reference to the clause dealing with intestate succession.

The missionaries would seem to have been under the impression that changes similar to the Uganda law would be introduced as a matter of course. This perhaps explains the lack of feeling in their representations noted by the Commissioner in relation to the deceased sister clause. Unfortunately, as already noted, the officials in British Central Africa were not enthusiastic about the Ugandan amendment. The Colonial Office was also

against it. In his subsequent communications to the Government, Dr Hetherwick became more specific in his demands for the introduction of the Uganda formula. However, Dr Hetherwick was not really in favour of Nunan's formula of a simple religious marriage ceremony which did not entail the obligations of English law. In a letter to the Acting Commissioner he reiterated that the Marriage Ordinance, 1902, was "suited to the case of Native Christian Marriages in this country",[115] and went on to explain as follows:

> My objection to the Ordinance as it stands was not... due to the failure of the native Christian to understand the nature of the lifelong bond, but to the distance of many districts in the Protectorate from the Registrars' offices, and the amount of fees which I have been told by some of the missionaries to the remoter districts would press heavily on the contracting parties. The modified Uganda Ordinance of 1903 appoints the officiating Minister as Registrar and fixed the fee at the rate of a Rupee. Corresponding change in the Ordinance here would remove the difficulties I have mentioned and make the Ordinance a measure of great value to the work of the missions in the Protectorate. What has been done for Uganda should be possible for B.C.A.[116]

Despite the measures taken by the Commissioner in 1907 to reduce the difficulties of distances and fees, Hetherwick was to continue to press for the introduction of an ordinance on the lines of the Uganda Native Marriage Ordinance. Later, in 1912, Hetherwick was instrumental to the passing of the Nyasaland Christian Native Marriage Ordinance,[117] which had the same object as that of the Uganda Ordinance.

7. Summary of Basic Policy-Issues

In the foregoing pages, the history of the enactment of the Marriage Ordinance, 1902, has been reviewed. The exercise does

not constitute any attempt to examine the detailed provisions of the Ordinance. The main purpose of the discussions has been to highlight the policy-issues raised in relation to the enactment of the Ordinance, especially as regards the application of the Ordinance to Africans and with respect to the continued availability of customary marriage to African Christians.

Summing up the official arguments for and against the inclusion of certain key provisions in the parent Gold Coast and Lagos Ordinance, Zabel notes how:

> Two streams of thought emerge; one the desire to uplift the native to the unquestioned superiority of Christian ways, and the other, the fear of tampering with quite incomprehensible existing social structure. One witnesses in these documents noblesse oblige, the mood of colonialism, being tempered by the harsh lessons of experience in Africa.118

The British Central Africa Marriage Ordinance bore the contours of these streams of thought. On its face, the Ordinance seemed to be strikingly self-contradictory as to its basic object.

On the one hand, in expressly recognising the continued validity of marriages contracted under customary law, the Ordinance seemed to underline a desire to avoid tampering with indigenous marriage systems. On the other hand, Africans married under the Ordinance would virtually be cut-off from the realm of customary law as regards marriage obligations, divorce and even succession. Severe penalties were prescribed, not only against the reversion to polygyny, but also against any attempt to go through a customary marriage, even with the existing spouse. Thus, whereas a customary marriage could be converted

into a statutory one, the reverse was made a criminal offence punishable by imprisonment for a maximum period of five years. These latter aspects of the Ordinance tended to suggest an intention to suppress customary law.

Like similar statutes in other parts of British colonial Africa,[119] the British Central Africa Marriage Ordinance was not, however, imposed upon the territory as part of any formulated policy to replace indigenous systems of marriage law. The Ordinance was also not enacted in response to any request by Christian missions who might have sought the aid of secular sanction in their endeavours to suppress polygyny. Yet, the actual provisions of the Ordinance tended to suggest that these had been its objectives.

Implicit in the provisions of the Marriage Ordinance, and in the related official exchanges, was the assumption that, eventually, customary marriage would disappear under the weight of European influences. At least during the early period of colonial rule, there was seldom any dispute among European officials that traditional African institutions of marriage were inherently inferior and incompatible with civilised social relations. Not only the recognition of customary marriage in the Marriage Ordinance, but even less so, the reluctance of British Central African colonial officials to expose their African subjects to the demands of Western-European social and moral standards did not result from any desire to promote indigenous African social institutions or from any notion that customary marriage was preferable to the alien form of marriage. The

differences of opinion between Whitehall officials and the officials in British Central Africa was not about whether or not the Western ideals of marriage would be good for Africans. It was a common assumption that the Ordinance marriage was intrinsically superior and that its adoption by Africans would only be to the latter's good. The point of difference was whether Africans could be expected to understand and conform to the ideals embodied in the Ordinance.

The main justification for the continued availability of customary marriage was rooted in the supposed backwardness of the indigenous African population and not in some recognition of any intrinsic merit of customary systems. At least initially, there had been no conscious policy to develop African marriage law from the existing African social institutions. The long-term development of African marriage law, it was assumed, would be a matter not of reforming the indigenous institutions but of Africans adopting the European system. The preservation of customary marriage systems was necessitated mainly by practical, as opposed to any ideological, considerations. As a corollary, the dualistic system of African marriage law could not have been intended as a permanent feature of the law of the Protectorate, but as a stop-gap measure, necessitated by the recognition of the fact that the immediate replacement of indigenous systems was not likely to have satisfactory results.[120]

The European policy-makers assumed that a "civilised" African population would reject customary law and aspire to the Western moral standards. It was mainly because of this that

the British Government decided to extend the application of European systems of marriage law to Africans. As the adoption of Christianity on the part of Africans tended to be seen as the quintessence of the transformation from the supposedly original savagery of Africans to civilisation, African Christians provided the most urgent reason for extending the European forms of marriage law to Africans.[121] It was also for this reason that the question arose whether African Christians could be allowed to contract marriage under customary law.

NOTES

Chapter Five

1. No. 3 of 1902 (renamed in 1964).

2. No. 7 of 1923 (renamed in 1964).

3. No. 15 of 1912 (repealed by 4 of 1923).

4. No. 5 of 1905 - renamed the Divorce Act (cap. 25:04) in 1964.

5. Martin Parr, "Marriage Ordinances for Africans", Vol.17 Journal of the International African Institute (1947), p. 1 at p. 2. See also, Simon Roberts, "Malawi Law of Succession : Another Attempt at Reform" [1968] J.A.L., 81.

6. See e.g. H.F. Morris, "The Development of Statutory Marriage Law in Twentieth Century British Colonial Africa" [1979] J.A.L., 38. For a detailed description of the introduction of statutory marriage law in Malawi, see also B.P. Wanda, Colonialism, Nationalism and Tradition : The Evolution and Development of the Legal System of Malawi, Ph.D. Thesis, London, 1979 (Vol.6).

7. Ibid.

8. 17 STATS. 16.

9. See Bromley's Family Law, 4th ed., p. 20, for details.

10. Draft Ordinance by Joseph Nunan, Chief Legal Officer, encl. in Alfred Sharpe, Commissioner, to FO, 25th October, 1902, PRO FO 2/608.

11. That is, including what was later to become Northern Rhodesia. See Nunan, ibid.

12. Comm. for East Africa Protectorate to FO 20th Dec., 1899, PRO FO 2/674. Also earlier despatch dated 16th Aug., 1898, PRO FO 2/674.

13. FO to comms. for the Uganda, East Africa, North Eastern Rhodesia and British Central Africa, and Somaliland, Protectorates, 17th Sept., 1902, PRO FO 2/674. Nunan's draft was simply ignored in favour of the standard draft.

14. No. 20 of 1900 (a copy of the Southern Nigeria Marriage Proclamation no. 22 of 1901 had also been sent from the CO to the FO). See Moris, op. cit. for the history of the Proclamation. See also Shirley Zabel, "Legislative History of the Gold Coast and Lagos Marriage Ordinance : III" [1979] J.A.L., 10.

15. CO to FO, 12th Feb., 1902, PRO FO 2/674.

16. See note 14 above.

17. See Arthur Phillips, Survey, p. 241. Among such considerations, Arthur Phillips mentions particularly "(a) the need for a lex loci in respect of marriage and (b) the desire to make available a legal form of (Christian marriage) for those Africans who, on grounds of religion or civilization might require it". Thus a memo at the Foreign Office (Gray's memo of 10th Oct., 1901, PRO FO 2/674) noted that:

> "The British Government [was] under some obligation to provide general marriage law in the Protectorates concerned. Having assumed jurisdiction over all persons therein we should not confine the privilege of marriage to British subjects. Also even if foreign governments could provide for their subjects, what of native Christians who are not technically British subjects?".

It may be remarked in passing that the assumption that "civilized" or "Christian" Africans would require the new form of marriage was largely a manifestation of the negative attitude, familiar in those days, towards indigenous African marriage. Customary-law marriage was thought to be incompatible with "civilization" or "Christianity". Discussions by Shirley Zabel, op. cit. and Morris, op. cit. do underline this point.

18. See also Section 52.

19. This would, indeed, seem to be borne out by the official transactions relating to the enactment of the Asiatic (Marriage, Divorce and Succession) Ordinance, no. 13 of 1929 (now, the Asiatic... Act, Cap. 25:03). See MNA S1/1549/27. The official view was that marriages contracted by Asians in accordance with Asiatic religions, before the passing of the Act, could be regarded as invalid in view of the relevant provision of the Marriage Ordinance. See below, Chap. 6 for further details on the Asiatics Act.

20. Op. cit., p. 38.

21. Telegram from FO to Sharpe, 21st Dec., 1902. A letter to the same effect followed a few days later, PRO FO 2/674. Details of the Uganda objections were to be received at a much later date.

22. Tucker to the comm. for Uganda, Hayes Sadler, 19th and 24th Dec., 1902, PRO FO 2/906. Tucker had no objections to the Ordinance insofar as it applied to non-Africans. See Morris, op. cit. and Wanda, op. cit.

23. Section 33 of the original BCA Marriage Ordinance.

24. H.F. Morris, "Marriage Law in Uganda : Sixty Years of Attempted Reform", in Family Law in Asia and Africa, J.N.D. Anderson (ed.) (London : George Allen & Unwin Ltd., 1968), 34 at pp. 35-36.

25. E.g. the White Fathers and the Mill Hill Mission, encl. in Comm., Uganda, to FO, 11th June, 1903 , PRO FO 2/906.

26. Uganda Comm. to FO, 11th June, 1903 , PRO FO 2/906.

27. Ibid.

28. Tucker to Uganda Comm., 19th Dec., 1902. See note 22 above.

29. FO official minutes on despatch from Uganda, of 19th Dec., 1902, note 26 above.

30. Ibid.

31. The delegation of the matters of celebration of marriage entirely to missionary authorities in cases of Christian Africans was a significant step by the FO, away from a well-established policy of the CO in favour of the preservation of the role of the civil authorities over marriage preliminaries. [See Zabel, op. cit., pp. 11-12]. The CO would later resist the introduction of the "Uganda amendment" to British Central Africa, partly on the basis of the need to preserve the civil character of marriage.

32. Comm., A. Sharpe, to FO, 29th Dec., 1902 , PRO FO 2/906.

33. FO to Comm. BCA, 21st Sept., 1903 , PRO FO 2/906.

34. Telegram of 11th Dec., 1903 , PRO FO 2/906.

35. Memo of Lord Percy, Jan. 15th, 1904 , PRO FO 2/906. This of course, did not materialise with respect to BCA as the administration of the Protectorate was soon transferred to the Colonial Office.

36. Nunan to Agt. Comm. Major F.B. Pearce, 7th Nov., 1903, encl. in despatch of A. Sharpe to FO, 18th Jan., 1904 , PRO CO 525/5.

37. Case no. 27 of 1903/4 (unreported) MNA J4/3/1.

38. Jurisdiction with regard to disputes about marriages contracted under the Marriage Ordinance, 1902, was reserved to the High Court. (In some later versions, Section 56.)

39. Storey was the founder of the famous A.J. Storey's Co. in Nyasaland.

40. Judgement transcript.

41. Summons dated 28th Sept., 1903, MNA J4/3/1.

42. Ibid.

43. Judgement transcript.

44. Nunan to Pearce, 7th Nov., 1903 , PRO CO 525/5.

45. See Zabel, op. cit., esp. p. 16.

46. In effect, the reference here is to the architects of the parent Gold Coast Marriage Ordinance, 1884.

47. Section 7.

48. Section 8.

49. Section 11 listed the following conditions:

(a) That one of the parties has been resident within the district in which the marriage is intended to be celebrated at least fifteen days preceding the granting of the certificate.

(b) That each of the parties to the intended marriage (not being a widower or widow) is 21 years old, or that if he or she is under that age, the consent (of the father or other guardian) has been obtained.

(c) That there is not any impediment of kindred or affinity, or any other lawful hindrance to the marriage.

(d) That neither of the parties to the intended marriage is married by native law or custom to any person other than the person with whom such marriage is purported to be contracted.

Section 11(d) above, may suggest that the conditions listed above were not exhaustive; because it is clear that a Registrar would be entitled to refuse to celebrate a marriage or issue a certificate where one of the parties to a proposed marriage was already validly married to a third person under some law other than customary law. However, marriage to a third party under some law other than customary law is sufficiently covered under Section 11(c): ..."or any other lawful hindrance to the marriage". Even the hindrance covered under Section 11(d) is also already covered under Section 11(c). Its separate treatment under Section 11(d) was very likely a result of the uncertainty as to whether or not a customary marriage was a "marriage" in the strict legal sense. See Hyde v. Hyde and Woodmanse (1866) L.R. IP and D, 130, per Lord Penzance, at p. 133.

50. Fr. Cadoret to L.T. Moggridge (Bt. Resident), 26th Aug., 1917, MNA S1/1622/19.

51. L.T. Moggridge to Fr. Cadoret, 5th Sept., 1917, MNA S1/1622/19.

52. McCullough to Moggridge, 8th Sept., 1917, MNA S1/1622/19.

53. Ibid.

54. DC Karonga to the Registrar-General, 19th Oct., 1929, MNA L3/30/1.

55. Agt. Attorney-General to the DC Karonga, 14th Nov., 1929, MNA L3/30/1.

56. Section 11.

57. Nunan's notes on the Storey case, MNA J5/2/1.

58. Judgement transcript.

59. Mr Miller, Nunan's note, note 57 above. This, in fact, is what eventually happened. See also Mwase's comments on the issue, op. cit., p. 95.

60. Nunan's notes, above. A de facto colour bar existed in the territory throughout the colonial period. See Mwase's Strike a Blow and Die, for some of the elements of this colour bar, esp. pp. 81-87.

61. That this view was supported even at a higher level was illustrated by the case of Harry Kabango, a Nyasaland African who in 1919/20 tried to marry a Scottish girl and bring her to Nyasaland. With the help of the Colonial Office, the marriage was prevented. See MNA 52/54/19 for relevant documents.

62. Judgement. After the Storey case, Nunan proposed a draft amendment to the Marriage Ordinance which inter alia purported to prevent the celebration of marriage between "European" and "native" except with the consent of the Commissioner.

63. Compare with the interpretation of the Uganda Marriage legislation by the High Court of Uganda in Bishan Singh v. R.: Cr. App. no. 13 of 1923. The case is discussed by Morris in Read and Morris, op. cit., pp. 228-30.

64. Judgement in the Storey case. This was also the view of Alfred Sharpe, the Commissioner. See Sharpe to CO, 28th Oct., 1904, PRO CO 525/3.

65. Judgement in the Storey case.

66. FO to Pearce, 22nd Dec., 1903, PRO FO 2/949.

67. CO to Sharpe, 5th Aug., 1904, PRO CO 525/1.

68. This will become apparent below.

69. (1898) 1 N.L.R. 15 at p. 22.

70. Op. cit., p. 26.

71. See dictum of Lord Penzance in Hyde v. Hyde, note 49 above. See A.N. Allott, "Marriage and Internal Conflict of Law in Ghana" [1958] J.A.L., 164 at 172 and Phillips, Survey, introductory essay. Also per Hamilton C.J. in R. v. Amkeyo [1917] E.A. L.R., 14.

72. See Phillips, Survey, see note 17 above.

73. Sharpe to FO, 29th Dec., 1902 , PRO FO 2/674.

74. FO minutes on Sharpe's letter, above.

75. 5 N. L.R. [1940-45], p. 74.

76. See discussion on duty of fathers under customary law in Chap. 3 above.

77. At the time of the case, the relevant clause became Section 37.

78. Ibid., p. 76.

79. Section 3 of draft, encl. in Pearce to FO, 16th Oct., 1903, PRO FO 2/749. Compare with Native Marriage (Christian Rites) Reg. Ordinance, 1923, Chap. 6 below.

80. FO to Pearce, 22nd Dec., 1903, PRO FO 2/749.

81. Ibid.

82. FO to CO, 19th Jan. and 10th March, 1904, PRO FO 2/906.

83. Under Secretary of State at the CO.

84. CO to Sharpe, 5th Aug., 1904 , PRO CO 525/1.

85. CO minutes on Nunan's draft.

86. Sharpe to CO, 2nd April, 1905 , PRO CO 525/7.

87. Clerk at the Colonial Office.

88. Minutes on Sharpe's letter, above.

89. PRO CO 525/7.

90. Encl. in Sharpe to CO, note 89 above. It will be seen, shortly, that Dr Hetherwick wanted a law similar to the Uganda Native Marriage Ordinance enacted in BCA hence the reference to "increased facilities".

91. Ibid. By "heathen" Hetherwick was perhaps referring to unbaptised Africans who would nevertheless be attending Christian classes, for example, catechumens. Otherwise it would be difficult to see why a Christian missionary would wish

to add a Christian ceremony to a marriage between complete "outsiders". In any case, such outsiders would not even present themselves to a Christian clergyman.

92. Ibid. For the views of other missionaries, see below.

93. Minutes on Sharpe's letter of 26th April, 1905, above.

94. Ibid.

95. "Ordinances for Africans", see note 5 above. See following chapter.

96. Section 47 provided for a maximum penalty of 5 years imprisonment for anyone who performed or witnessed a marriage ceremony: "knowing that he is not duly qualified so to do, or that any of the matters required by law for the validity of such marriage has not happened so that the marriage is void or unlawful on any ground". The Section appeared to supplement Section 22.

97. CO to Sharpe, 7th Sept., 1905 , PRO CO 525/7.

98. Nunan to Agt. Comm., H.R. Wallis, 1st Nov., 1905. The draft was forwarded to the CO on 2nd Nov., 1905 , PRO CO 525/9.

99. Ibid.

100. PRO CO 525/9.

101. CO to Comm. of BCA, 2nd Aug., 1905 , PRO CO 525/9.

102. Young to Sharpe, 26th Oct., 1906, forwarded to the CO by A. Sharpe on 11th Jan., 1907 , PRO CO 525/17.

103. A. Sharpe argued, and perhaps correctly so, that the missionaries would be better equipped in determining the qualifications of the parties to contract marriage - e.g. Whether one party was already married to a third party under customary law.

104. See note 102 above.

105. Alfred Sharpe had reservations about the Minister's capability to keep marriage records. He did not, however, alter Young's draft.

106. CO to Sharpe, 19th April, 1907 , PRO CO 525/17.

107. Cox's minutes on Sharpe's despatch, note 102 above.

108. This was evident by the absence of fee stamps from the registers. See e.g. Bt. Marriage District registers, MNA NSB4/2/1.

109. Hetherwick to Sharpe, 16th Dec., 1903 , PRO CO 525/5.

110. Trower to Sharpe, 8th Jan., 1904 , PRO CO 525/5.

111. Laws to Sharpe, 29th Jan., 1904 , PRO CO 525/1.

112. Nunan to Pearce, 7th Nov., 1903 , PRO CO 525/5.

113. Sharpe to CO, 21st April, 1905 , PRO CO 525/7.

114. Even after this view had been rejected by the CO, Nunan continued to insist that the missions could still bless customary marriages without bringing into operation the provisions of the Marriage Ordinance. Nunan to Agt. Comm., Wallis, 1st Nov., 1905, note 98 above.

115. Hetherwick to Wallis, 31st Oct., 1905 , PRO CO 525/9.

116. Ibid.

117. See below, Chap. 6.

118. Op. cit., p. 23.

119. See Morris, "The Development of Statutory Marriage Law", p. 38.

120. See Phillips, Survey, p. 190. Phillips also contrasts the British approach with that of Belgian and Portuguese colonial authorities. The latter were usually expressly charged with the duty of working towards the abolition of such African traditional practices as polygyny. For the British, Phillips has noted:

> "The normal attitude seems to have been that official pressure in such matters is not likely to have satisfactory results, and that genuine reforms can only be expected from the growth, under the stimulus of missionary and educational influences, of an enlightened public opinion among the people themselves", ibid.

121. It can be noted that in some territories, most notably Tanganyika, non-Christian Africans could not contract monogamous statutory marriage under the relevant Marriage Ordinance (no. 12 of 1921). Northern Rhodesia, Zambia, was unique in that all Africans were excluded from the relevant Marriage Ordinance (no. 1 of 1918). See below.

CHAPTER SIX

AFRICAN CHRISTIANS AND THE MARRIAGE LAWS

Following further representations from certain missionaries, especially Dr Hetherwick of the Blantyre Mission, the Christian Native Marriage Ordinance was enacted in 1912. This Ordinance was patterned on the once-rejected model of the Uganda Native Marriage Ordinance of 1903. Its key feature was the introduction of an alternative and supposedly simpler mechanism for contracting monogamous statutory marriage. However, by 1923, the 1912 law had become very unpopular among practically all the missions, including those who had been involved in its enactment. The Native Marriage (Christian Rites) Registration Ordinance, 1923, was enacted to meet missionary objections to this law. This chapter reviews the issues leading to, and arising from, the enactment of the 1923 Ordinance. The exercise will involve, firstly, a discussion of the difficulties encountered by the missions as a result of the enactment of the 1912 Ordinance. This will be followed by an examination of proposals made at a conference held in Blantyre in 1920 and the eventual enactment of the 1923 Ordinance. While removing some of the problems arising from the combined operation of the 1902 and 1912 Ordinances, the 1923 Ordinance posed fresh problems for the missions. It is also the task of this chapter to introduce certain proposals made by the missions to have the 1923 Ordinance repealed. Some of the key issues raised in the relevant proposals are discussed more fully in two of the remaining chapters.

1. The Missionaries and the Enactment of the Christian Native Marriage Ordinance, 1912

The missions played a somewhat ambiguous role in the enactment of the Christian Native Marriage Ordinance, 1912. The Ordinance was meant to facilitate missionary compliance with the requirements of statutory law in celebrating marriages involving African parties.[1] The practice of the missions between 1902 and 1912 had been characterised by widespread disregard for the provisions of the Marriage Ordinance, 1902. Three factors had contributed to this state of affairs.

Firstly, the majority of the missionaries had not been aware of the official view that all Christian religious marriage ceremonies were unlawful unless the same had been conducted in accordance with the provisions of the Marriage Ordinance, 1902.[2] The head of the Universities Mission, Bishop Cathrew Fisher, pointed out in 1913 that members of his mission had:

> ...been accustomed for many years to "marry" our native communicants with the usual church service, and sometimes our catechumens with a modified form of it. We had no idea that we were legal registrars (as all clergy are in England ex-officio), or that the law took any cognisance of our marriage services. Natives, whether Christian or heathen, as we thought, were equal before the law and their marriages stood or fell according to the evidence that the native customs of marriage had been satisfied.[3]

Secondly, in many cases, the missionaries had not been prepared to burden their African converts with the legal consequences of marriage under the Marriage Ordinance. Indeed, this attitude on the part of most missionaries was also a main factor contributing to the failure of the Christian Native Marriage Ordinance, 1912. The relevant arguments are discussed in detail below.

Thirdly, the preliminaries to marriage under the 1902 Ordinance had proved to be too complicated for Africans. The Government on its part attributed the widespread missionary disregard for the provisions of the Marriage Ordinance, 1902, almost exclusively to this third factor. Hence, it would seem to have been assumed that by enacting the Christian Native Marriage Ordinance, 1912 - with its supposedly simplified preliminaries - there would no longer be any reason for the missionaries to ignore the requirements of statutory law.[4] Writing in 1913, one official of the administration adequately summarised the official thinking behind the enactment of the 1912 Ordinance. After citing the pre-1912 irregularities in missionary practice, he observed:

> ....But this Government recognising the absence of any illegal purpose on the part of the missionary societies - and being anxious to afford better facilities for the marriage of Christian natives - preferred to overlook the technical contraventions in question and passed the Ordinance of 1912 with the sole view of removing as far as lay in its power, the difficulties attaching to the lawful celebration of such marriages under the Ordinance of 1902.[5]

It is also clear, however, that the 1912 Ordinance was enacted as a response to the demands of certain missionaries, who, since the rejection of Young's draft in 1907,[6] had continued to press the Government for a specialised ordinance to deal with marriages of African Christians.[7] In 1910, for instance, the Nyasaland General Missionary Conference had passed a resolution which, inter alia, expressed the Conference's:

> ...dissatisfaction with the present condition of the law in the Protectorate as regards native marriages, insofar as no provision is made for native marriages by Christian rites and in accordance with Christian law.[8]

The resolution went on:

> ....The rapid growth of the native Christian community, and of the position which they are assuming in the social life of the native population, make it essential that the law as regards the status of such marriage should be clearly defined.[9]

By this resolution, Dr Hetherwick was to explain later, the missionaries had intended to ask for relief from the penalties under the Marriage Ordinance, 1902, so that they could celebrate marriage between Africans according to the rites of their respective churches.[10] It was never expressly stated by the missionaries concerned whether marriages celebrated in accordance with the method proposed would be governed by the principles of the 1902 Ordinance, or by customary law, or indeed exclusively by the religious laws of the respective missions. Whatever the exact view of the missions on this point, it was in apparent response to their representations that the Colonial Office finally relented and recommended the model of the Uganda Native Marriage Ordinance, 1903, as a solution to the problems in Nyasaland.

The Colonial Office stood firm to its earlier position, that marriages solemnised in accordance with Christian rites should be governed by the principles of the 1902 Marriage Ordinance and not by any other law. In fact, the Colonial Office was not even enthusiastic about the Uganda model, which it recommended merely as the better of two evils; the other alternative being to allow the missionaries to conduct informal Christian marriage ceremonies.[11] The recommendation of the Colonial Office was followed; a bill entitled the Christian Native

Marriage Bill was prepared by the Acting Attorney-General, Joseph Sheridan. In October, 1912, a meeting to which the various missionary bodies were invited, and which was chaired by Sheridan, was arranged in Blantyre.

The aim of the meeting was to allow the Government to explain more clearly to the missionaries the legal implications of the Marriage Ordinance, 1902, and the purpose and nature of the proposed Christian Native Marriage Bill. The meeting also provided the missions with an opportunity to comment on the proposed Bill before its formal enactment. Unfortunately, only a few missionaries attended the meeting. These included Dr Hetherwick of the Church of Scotland Mission, Dr Laws of the Free Church of Scotland Mission and Mr Hofmeyer of the Dutch Reformed Church. Representatives of the Zambezi Industrial Mission and the South Africa General Mission also managed to meet the Acting Attorney-General at a later date. None of these missionaries registered any objection to the new Bill. On the contrary, they welcomed the new measure, allegedly under the impression that it represented:

> ...a recognition by the Government of the work done by the missions and as a forward step in the [legislation] of the Protectorate securing the position of natives married according to the Christian rites. For the first time in the history of the Protectorate Native Christianity found a place in the statute book.[12]

This view, espoused by the non-episcopal missions, contrasted with the reaction of the Anglican Universities Mission to Central Africa. It was indeed unfortunate that the Anglicans had not sent any representative to the Blantyre meeting of 1912,

as their views were later to form the core of the argument for the repeal of the 1912 Ordinance. Dr Hetherwick of the Blantyre Mission had been entrusted by the Governor with the task of inviting his fellow missionaries to the meeting. The Bishop of the UMCA was somewhat irritated by the fact that he had to learn from Hetherwick and not directly from the Governor about the meeting. After citing delays in communication between the island of Likoma, his headquarters, and the mainland, as one reason for his failure to attend the meeting, he also stated that he did not view the information from Hetherwick as a formal invitation to the meeting.[13]

A copy of the proposed Bill had, however, been sent to the Bishop by the Acting Governor on September 13, 1912.[14] In a reply of 7th October, 1912, and for reasons which were to become apparent in his later communications to the Government, the Bishop strongly objected to the enactment of the proposed Bill. He urged the Government at least to postpone the introduction of the new law and to introduce it only:

> ...after a far fuller discussion of it has been possible among those it chiefly concerned.[15]

The Bishop became the chief critic of the Christian Native Marriage Ordinance throughout its controversial tenure.[16] Ultimately, it was the Bishop's view which would prevail. In 1912, however, his protests were strangely ignored, and the Christian Native Marriage Ordinance was duly enacted and brought into operation in November of that year.

2. The Provisions of the Christian Native Marriage Ordinance, 1912

The Christian Native Marriage Ordinance, 1912, was a comparatively short instrument, comprising a dozen clauses and a brief Schedule. Its provisions can be conveniently summarised.

Section 1 merely furnished the short title.

Section 2 defined the term "Minister" used in the Ordinance. The definition had been inserted on the request made by Dr Hetherwick during the October meeting with the Acting Attorney-General. The Section defined "Minister" as any person licensed by the Governor for celebrating marriages under the [1912] Ordinance. This was designed to enable the Governor to appoint "any person" as a marriage Minister. This was unlike the case under the 1902 Ordinance where only a "recognised Minister of religion" could be appointed.[17]

Section 3 was the operative clause. It stated:

> Notwithstanding anything contained in "The British Central Africa Marriage Ordinance, 1902", marriages may be celebrated under this Ordinance between natives both of whom profess the Christian religion.

This clause is considered fully below.

Section 4 was also a key clause. It provided that:

> Except as otherwise provided in this Ordinance the provisions of "The British Central Africa Marriage Ordinance, 1902", shall apply to marriages celebrated under this Ordinance.

Thus, the principle of monogamy, the rules governing intestate succession and prohibited degrees of affinity and consanguinity[18] - to mention the significant examples - consequent upon marriage

under the 1902 Ordinance, applied equally to marriages contracted under the 1912 Ordinance.

Section 5 prohibited the celebration of marriage (under the 1912 Ordinance) by any person other than a Minister as defined in Section 2 above or in any building except those licensed by the Governor for the purpose.

Section 6 provided that, for the purpose of the registration of marriage under the [1912] Ordinance, every Minister as defined above should be deemed to be a Registrar of marriages under the 1902 Ordinance. The significance of this was that a notice of marriage under the 1912 Ordinance could be given to a Minister, instead of a civil Registrar of Marriage. In other words, the parties to an intended marriage under the 1912 Ordinance would not be required at any stage to go to a civil Registrar.

Sections 7 to 12 provided the essence of the Christian Native Marriage Ordinance. Together with the accompanying Schedule, these clauses defined the alternative procedures for transacting the preliminaries to marriage. The relevant provisions, which cannot conveniently be summarised here, are discussed below.

In May, 1913, two amendments were made, one to the Christian Native Marriage Ordinance, 1912, the other to the Divorce Ordinance, 1905. The object of these amendments was to extend jurisdiction over marriages contracted under the 1912 Ordinance to certain subordinate courts. Jurisdiction over marriages contracted under the provisions of the 1902 Ordinance was reserved to the High Court. The relevant amendments are also considered fully below.

a) The Application of the Christian Native Marriage Ordinance, 1912

It is clear from Section 3 above that the Christian Native Marriage Ordinance, 1912, was not available to everyone, but was restricted to "marriages ... between natives both of whom profess the Christian religion". At the time of the enactment of this Ordinance, there was no statutory definition of the term "native". Under the Interpretation and General Clauses Ordinance, first enacted in 1929,[19] the term "native" was defined as:

> ...any native of Africa not of European or Asiatic extraction, but includes an Arab and a Somali and also any Baluchi born in Africa.[20]

According to this definition, people of purely European or Asiatic extraction would clearly be excluded from the application of the Ordinance.

The most likely difficulty would be the involvement of people born of mixed (African and European or African and Asian) parents. The tendency was to regard such people as being non-natives. This was the case, for example, under the Northern Rhodesia Marriage Ordinance, 1918, which, until 1963, was not available to "natives". The term "native" was defined as:

> ...a person being a member of an aboriginal race or tribe of Africa but shall not include a person partly of European descent.[21]

In 1940, the Attorney-General of Nyasaland advised against the celebration of a marriage between people of mixed parents under

the Native Marriage (Christian Rites) Registration Ordinance, 1923, which replaced the 1912 Ordinance. The view of the Attorney-General was that such people did not qualify as natives.[22] On the other hand, it did not seem that one had to be an indigene of Nyasaland to qualify as a native. During the short history of the 1912 Ordinance, the restriction of the application of the Ordinance to "natives" does not appear to have given rise to any practical problems.

The phrase "profess the Christian religion" posed a more urgent practical problem for the missions. The phrase was liable to, and did on different occasions receive, different interpretations. Officials of the Universities Mission, already unhappy with the entire Ordinance, did not hesitate to capitalise on the difficulties created by the phrase. They saw these difficulties as additional proof of the need to repeal the 1912 law.

In general, the missionaries tended to restrict the use of the word "Christian" to describing a member of a Christian church who had actually gone through the ceremony of baptism. Members under instruction with a view to baptism, for example, catechumens, were not technically considered to be Christians.[23] In their marriage practices, however, the missionaries did not always insist on someone being a Christian in this narrow sense in order to be eligible for a Christian marriage ceremony. Special provision was often made for marriage between a baptised member and unbaptised one, or even between two unbaptised members. The critical question was whether such unbaptised members could still be married under the provisions of the 1912 Ordinance.

The question was brought to the fore in 1914 when the office of the Registrar-General issued a document entitled, "Instructions to Licensed Ministers", intended as a guide to the working of the Christian Native Marriage Ordinance, 1912.[24] The "Instructions" enjoined the officiating Minister to certify that both parties to an intended marriage were "Christians". Before these "Instructions", the missionaries - at any rate those of the UMCA - had assumed that the phrase "profess the Christian religion" had been deliberately used in the Ordinance in order to accommodate non-baptised members of a church. The wording of the "Instructions" therefore presented the question of whether the missionary assumption about non-baptised members had been correct or whether the "Instructions" represented a reversal of policy on the part of the Government.[25] Opinions of Government officials did not prove very helpful on the matter. At one point the missionaries were advised that:

> If ... in answer to the question, "Do you profess the Christian religion?" both parties reply in the affirmative, the marriage may take place.[26]

This view was highly unsatisfactory. It seemed to throw the whole responsibility of determining eligibility for marriage under the Ordinance on the contracting parties themselves. Indeed, could any African who had had no contact with a Christian church before qualify for marriage under the Ordinance by merely uttering a verbal profession of the Christian religion?

Equally unsatisfactory was another somewhat cryptic statement relayed to the UMCA Bishop by A.D. Turnbull, Acting Chief Secretary, in 1915. In reply to the Bishop's requests for

clarification on the apparent conflict between the wording of Section 3 of the Ordinance and the "Instructions" issued by the Registrar-General's Office,[27] the Acting Chief Secretary wrote:

> I am directed to state that the certifying Minister will be quite in order if he certifies that the parties profess the Christian religion.[28]

This offered no clue as to what the officiating Minister should look for in order to certify that the parties professed the Christian religion. Thus, for quite some time, the position of the Government on the matter remained vague. On their part, the missionaries still felt that they could solemnise marriages of unbaptised converts under the 1912 Ordinance. Such marriages continued to be celebrated until 1919.

Between 1917 and 1919, the High Court of Nyasaland delivered two judgements touching on the meaning of Section 3 of the 1912 Ordinance. In the cases of Peter Amisi v. Zingaremba (1917)[29] and Harrison Mchenga v. Manesi (1919)[30] marriages celebrated under the 1912 Ordinance were declared null and void by the High Court on the ground that the parties thereto did not meet the conditions of Section 3. In the first of the above cases, neither of the parties had been baptised. On this basis alone, the court was prepared to declare the marriage void. The view of the court was that noone other than a baptised Christian could legally be married under the 1912 Ordinance. In fact, however, the woman stated in evidence, accepted by the court, that she had never ever subscribed to the Christian faith. During the proceedings, she even refused to

be sworn by the Bible. Thus the court's view that none other than a baptised member of a Christian church could contract marriage under the 1912 Ordinance may strictly be viewed as a mere obiter dictum, rather than an authoritative ratio decidendi.

In the second case, the man was a baptised Christian, but the woman had only been under instruction at a mission for a few weeks prior to the marriage. In the court's view this was not enough to satisfy the requirements of Section 3. Again, the authority of this decision on the point under consideration seems to be weakened by the fact that the woman was someone who could not really be characterised as an established member of a Christian church. Nevertheless, the court's view that only a baptised member of a Christian church could marry under the 1912 Ordinance was endorsed by both the Attorney-General and the Registrar-General of Marriages, and became the official policy in 1919. The Registrar-General enthusiastically noted as follows:

> The 1912 Ordinance is not a general Native Marriage Ordinance but a Christian Native Marriage Ordinance. It seems impossible that any person should be considered a Christian until he or she has been baptized.[31]

In general, the missionaries of course shared the view that only a baptised member of a church could be considered a "Christian" in the strict sense of the word. It was, however, an entirely different matter to argue that to "profess the Christian religion" in the words of Section 3 meant that one had to be actually baptised.

From 1919, the missionaries could not marry their catechumens or other unbaptised converts under the 1912 Ordinance.[32] Where the missionaries wished to solemnise marriage involving unbaptised members of their churches, they were instructed to do so in accordance with the provisions of the Marriage Ordinance, 1902, which was still open to anyone irrespective of race or religion.

The Government policy to restrict marriage under the 1912 Ordinance to baptised Africans had the advantage of introducing an objective criterion for determining eligibility for marriage under the Ordinance. Yet, it also introduced a rigidity or inflexibility that was unsuited to the requirements of the missionaries. To the extent that the 1912 Ordinance really provided for a simplified procedure for contracting monogamous statutory marriage, and to the extent that there was a need on the part of the missions to solemnise marriages of non-baptised converts, the restriction on the application of the 1912 Ordinance would in effect revive the pre-1912 situation. In order to contract Christian marriages, non-baptised converts had to make the necessary journeys to civil Registrars of Marriages to complete the preliminaries under the 1902 Ordinance.[33] The irony of this was that, whereas the more seasoned, baptised, convert could take advantage of the simpler procedure under the 1912 Ordinance, the novice, unbaptised convert, had to marry the harder way. Furthermore, although the missions normally married their non-baptised converts with a somewhat modified religious ceremony, it was plainly absurd to subject members of one and the same church to so radically different procedures as existed under the 1902 and the 1912 Ordinances.

By 1919, many missionaries, as well as government officials, had become convinced that the 1912 Ordinance had to be repealed. As long as it remained on the statute books, however, the missions sought changes in government policy so that they could marry some of their unbaptised converts under the Ordinance. An amendment to this effect was proposed by the Bishop of the Universities Mission in March 1919.[34] No action was taken on the proposal. While clearly willing to consider the amendment, the Government preferred to defer the matter and deal with it as part and parcel of a more comprehensive examination of the question of marriage legislation in Nyasaland.[35]

b) The Preliminaries to Marriage Under the 1912 Ordinance

As already noted, the primary objective of the Christian Native Marriage Ordinance, 1912, was to simplify the procedure for contracting monogamous statutory marriage in the case of African Christian converts. In this regard the Ordinance was only partially successful. Whereas the task of the contracting parties was indeed rendered less onerous, the procedure under the 1912 Ordinance introduced new complications for the officiating Ministers. The source of the problems partly lay in the unwillingness on the part of the civil administration to entrust the entire process of marriage formalities to the missionaries. The provision which was inserted in the Ordinance in order to ensure the participation of the civil authorities in the preliminaries to marriage was the main source of problems.[36]

Like marriage under the principal, 1902, Ordinance, preliminaries under the 1912 Ordinance commenced with the Notice of marriage by one of the parties to a Registrar of Marriages.[37]

For the purposes of the 1912 Ordinance, however, "Registrar of Marriages" meant a licensed church official and not a civil Registrar. Upon receipt of the Notice, the officiating Minister had to make the necessary entries and cause the Notice of the marriage to be affixed on the outer door of a licensed building where the marriage was to take place.[38] Marriage could be celebrated after 21 days and before the expiry of 3 months from the date of the Notice.[39] However, where one of the parties to the marriage was "ordinarily resident in a place other than the place in which the marriage is intended to be celebrated", the Minister had to cause a copy of the Notice to be exposed in a conspicuous place in the village of such party where it had to remain for a period of 21 days before marriage could be celebrated. The officiating Minister could, where necessary, delegate the task of fixing the Notice in the village to another "Registrar";[40] in which case, marriage could not be celebrated until the officiating Minister had received a certificate under the hand of the other Registrar that no caveat had been entered against the issue of a certificate of marriage.

Even where both parties to marriage were ordinarily resident in the area where the marriage was to take place a further requirement was imposed by Section 8 of the Ordinance:

> 8. (1) Whenever any persons desiring to marry under this Ordinance shall have given notice of such intention to a Minister ... the said Minister before issuing his certificate shall forward to the District Resident of the District in which the marriage is intended to take place the documents referred to in the Schedule to this Ordinance.
>
> (2) Upon receipt of such documents the District Resident may make such inquiries as he shall deem necessary and shall before the expiry of 21 days ... inform the Minister

> who forwarded the said documents whether or not a caveat has been entered against the issue of the certificate.
>
> (3) Thereafter the District Resident shall file the documents as aforesaid in the archives of his office for purposes of record.[41]

The purpose of this provision was to provide for an independent investigation by a civil official into the circumstances of a marriage contracted under the Ordinance. It must be pointed out that the duties of the District Resident under this Section would be carried out in the Resident's capacity as an administrative officer rather than as a Registrar of Marriages (by virtue of the Order issued in 1907).[42] Further, whereas Assistant District Residents were Registrars of Marriages within their Sub-Districts,[43] they were not similarly empowered to discharge the functions of a District Resident under Section 8.[44]

For the many missionary posts located in remote areas, far from the bomas, the requirements of Section 8 of the 1912 Ordinance were wellnigh impossible to execute, because of poor communication facilities. Correspondence relating to the working of the 1912 Ordinance is replete with complaints from missionaries as well as civil administrators about the intolerable delays created by this clause. One District Resident, citing instances of marriage documents from officiating Ministers which never reached him "within several months", aptly described the whole of the procedure as "a ridiculous farce".[45] His point was endorsed by W.H. McCullough, Registrar-General in 1917, who also characterised the procedure as "absurd".[46] Perhaps no mission was more inconvenienced by this clause than the Universities Mission at the lake islands of Likoma and Chisumulo.

Documents from this station had to be sent all the way to the mainland boma of Nkhota-Kota. It was clear from Section 8 that even after the expiry of 21 days from the day of the Notice of marriage, and even if no caveat against the marriage had been entered within those 21 days, a Minister could not celebrate a marriage under the Ordinance until he had further heard from the District Resident that no caveat had been entered. Communication between the islands and Nkhota-Kota was by means of a boat, the visits of which were as infrequent as they were unpredictable. The resulting delays became unacceptable. The Bishop of the mission concluded as follows:

> It is clear therefore that under present conditions it is impossible to conform exactly with the directions of the Ordinance and a real hardship is placed upon natives of Likoma who cannot the least tell when their marriage can take place. The social arrangements in connection with native weddings (trivial as they may seem) are really valued and much preparation is customary. Further, a very strong temptation is placed upon such natives to begin to live together before marriage when indefinite delays of this kind take place and no date can be given even approximately.[47]

The foregoing quotation is from the Bishop's letter addressed to the Chief Secretary, dated 14th February, 1917. In the same letter, the Bishop enquired of the Chief Secretary whether a solution to the problem could be found. The Government's answer was to constitute Likoma and Chisumulo islands into a separate Marriage District (under the Marriage Ordinance, 1902) with the missionary in charge as the Registrar of Marriages.[48] This was done under the mistaken belief that, as a Registrar of Marriage (under the 1902 Ordinance), the missionary in charge would not be required to forward marriage documents to a District Resident when celebrating marriage under the 1912

Ordinance. As already noted, the functions of the District Resident under Section 8 of the 1912 Ordinance were associated with his general duties as an administrative officer, and not as Registrar of Marriages under the 1902 Ordinance. Constituting the Priest-in-Charge at Likoma into a Registrar of Marriages did not, therefore, obviate the need to forward documents to the Resident at Nkhota-Kota when conducting marriage preliminaries under the 1912 Ordinance.[49]

Nevertheless, the arrangement offered the missionaries a way out of their troubles under the 1912 Ordinance, albeit in an entirely unexpected way. What in fact had been achieved was that the missionaries there could solemnise marriage under the principal 1902 Marriage Ordinance without the parties to such marriage being required to travel farther than their own mission station to effect the necessary preliminaries. The arrangement had a further advantage: it did away with the tormenting distinction between professors and non-professors of the Christian religion; for under the 1902 Ordinance, it did not matter whether or not one was a Christian. For Likoma and Chisumulo, of course, this meant the end of the road for the Christian Native Marriage Ordinance, 1912.[50] Not that it mattered as far as the missionaries were concerned; presumably, they even welcomed it. It can be noted that Christians elsewhere in the territory could, if they so wished, still contract marriage under the 1902 Ordinance. It was, however, only at Likoma and Chisumulo that the parties could do so exclusively with their own Minister of religion. Other Christians, including those of the Universities Mission located on the mainland, had to deal with civil Registrars of Marriages at the <u>bomas</u> - with all the attendant

problems which had in the first place led to the introduction of the 1912 law. It might also be necessary to point out that the arrangement just discussed did not end the Bishop's campaign against the 1912 Ordinance.[51]

As far as issuing a caveat against the issue of a certificate was concerned, there was less formality under the 1912 Ordinance than under the 1902 law. Section 9 of the 1912 Ordinance replaced Section 14 of the 1902 Ordinance. Under the latter, a person entering a caveat did so by writing the word "Forbidden" opposite the entry of the Notice in the Marriage Notice Book, and appending thereto his name and place of abode, and the grounds upon or by reason of which he claimed to forbid the issue of the certificate. Under Section 9 of the 1912 Ordinance, all that was required on the part of the person objecting was a verbal communication to the Registrar. By virtue of Section 10 of the 1912 Ordinance, a caveat entered against the issue of a certificate could be removed by the High Court without much formality. This Section was amended in 1913,[52] and the power to remove a caveat (under the 1912 Ordinance) was extended to a magistrate holding a District Native Court.[53] Under Section 15 of the 1902 Ordinance, on the other hand, a caveat could only be removed by the High Court after a summary hearing.

Where parental consent was required (that is, in cases of marriage involving parties who were under the age of 21 years), and there was no parent or guardian available, Section 11 of the 1912 Ordinance allowed the Governor, the Judge of the High Court, A District Resident or a "Minister" to give such consent without any formality.

The fees on registration and for a certified copy of entry was fixed at one Shilling, respectively. This rate applied to all marriages to which both parties were "natives" whether contracted under the 1912 or the 1902 Ordinance.[54]

c) Declarations as to Divorce and Penalties for Violation of the Principle of Monogamy

In the course of celebrating marriage under the Christian Native Marriage Ordinance, 1912, the officiating Minister was required to sign a declaration to the effect, inter alia, that he had satisfied himself that the parties to the intended marriage:

> ...realise and understand the penalties to which they are liable for any breach of the provisions of [The British Central Africa Marriage Ordinance, 1902], and further that they realise the nature and duration of the bond of matrimony, and the grounds upon which they will be able to obtain divorce.[55]

The Minister was under a duty to explain to the parties the above penalties and obligations. The parties themselves were also required to sign declarations to the effect that they understood these penalties and obligations.

It was for good reason that the legislators had been anxious that those who contracted marriage under the Ordinances did so with open eyes as to the consequent obligations. Not only were the penalties for violating these obligations severe, but, even more importantly, conduct amounting to violation of the law under the Ordinances was perfectly legal under indigenous customary law. The chances of some Africans contracting statutory marriage under some misapprehension as to their rights

and duties were therefore ever present. However, the missionaries saw the matter differently. Missionaries of the episcopal churches, in particular, were greatly disconcerted by the references to grounds upon which divorce could be obtained in the declarations. As divorce was absolutely repugnant to their doctrine,[56] these missionaries found the declarations highly offensive. Many Catholic missions refused to apply for licences under the 1912 Ordinance.[57] They preferred sending their converts to civil Registrars under the 1902 Ordinance to having anything to do with the 1912 law.[58] The Bishop of the Universities Mission summed up his feelings on the matter in the following words:

> So far as main questions of principle are concerned it is, I think, clear that the state has a right and a duty to deal with questions of marriage and to insist on whatever forms of registration seem best. We are only entitled (and then it is not a case of being entitled but of being bound) to refuse to comply with such regulations if such compliance involves a disobedience either by omission or commission to the law of God.[59]

Later, in a letter to the Chief Secretary, the Bishop wondered why one should:

> ...choose the moment when a man and a woman are about to be married to suggest to them how they may at some further time get divorced.[60]

Declarations with regard to penalties for violating the principle of monogamy were no less objectionable to many missionaries. The bases of missionary objections to these declarations tended to be contradictory, often reflecting the differences in perspective between the episcopal and non-episcopal missionaries. The former did not want to have anything to do with the

threatened penalties. Much as they were committed to the principle of monogamy, it was not in their interest that threats of harsh penalties should be utilised to promote this principle. The Anglicans, in particular, felt that these penalties were entirely the business of the Government and that they would themselves be content to enforce the principle of monogamy ecclesiastically through suspensions and excommunications.[61]

On the other hand, the line taken by some non-episcopal missionaries was somewhat different. For example, it was argued by Donald Fraser of the Free Church of Scotland that, while the missionaries were being compelled to declare the penalties to Africans, Government officers took a cavalier attitude towards their enforcement. He observed:

> As marriage-officers we are compelled to read the penalties to which any one breaching the law is liable. Yet there are a number of cases of open defiance of this law and [there is] no case of prosecution in this place. Several capitaos[62] are notoriously defiant, and are not prosecuted, nor removed from positions of trust. Thus the marriage law is brought into contempt.[63]

He went on:

> Our feeling is that if one or two successful prosecutions took place, and thus the earnestness of the law were made evident, the whole people would come to recognize the nenessity of obeying the law. In this tribe (Mombera's Ngoni) a public declaration by the Magistrate[64] that ukulobola cannot be received, and must be returned in the case of an invalid [bigamous] marriage, and that children of the invalid marriage have no right of succession, should be quite enough to restrain parents from allowing their children to be given in marriage in an illegal way.[65]

Fraser, however, noted that actual punishment should not be necessary. Indeed, no missionary ever expressed any enthusiasm

for severe penalties against those Africans who violated the principle of monogamy. In his "Notes", written at a later date, Fraser was in fact to observe how strange it was:

> ...that penalties so severe may be threatened to natives who breach the marriage contract especially when we bear in mind the present state of native civilization.[66]

The dilemma for the missionaries could clearly be seen in Fraser's views. The lack of positive action to restrain violations of the Ordinances could only bring the law into contempt. Harsh penalties, on the other hand, were seen as unjust in view of what they saw as a lower level of civilisation among Africans. Moreover, the missionaries feared that such penalties might even have the adverse effect of encouraging concubinage among Christian Africans.[67] The issues about divorce and monogamy are discussed more fully in later chapters.[68]

d) The Problem of Jurisdiction

Apart from the power to remove caveats, which was extended to magistrates holding District Native Courts, jurisdiction over matters arising from marriage contracted under the Christian Native Marriage Ordinance, 1912, was reserved to the High Court. Thus, marriages contracted under this Ordinance could be dissolved only by a decree of the High Court. This presented the obvious problem of access in terms of distances for many people. The complexity and high costs of the forms and procedures of the High Court would constitute a further obstacle to divorce for many of the Africans.

The problem of distances was highlighted by Fraser, who, like many other non-episcopal missionaries, tended to take what

may be described as a more practical (that is, less doctrinaire) stance on the question of divorce than their counterparts in the Anglican and Catholic missions. In his "Notes on the Christian Native Marriage Ordinance", Fraser stated as follows:

> While we do not desire to give any facilities for divorce, and in most cases deprecate it, we feel that any form of relief is very hard to obtain, and that however high we may put our ideal of marriage, Government is not justified in making the difficulties of relief so great to natives in their present state of civilization. [For example], should parties residing in any part of the Livingstonia Mission sphere seek divorce, they are required to travel several hundred miles to and from Blantyre to state their case. They may obtain a decree nisi, but six months after the same journey, involving several months travel for the women, has to be taken again for the full decree (decree absolute).[69]

Although the men were not free from these problems, it was the women who often suffered most. As Fraser pointed out:

> ...a woman, whose husband has deserted her and has been away for years in the mines of the South [South Africa] or of Belgian Congo and has sent her no maintenance, cannot obtain divorce under the law of England, nor obtain any relief unless she undertakes this very long journey.[70]

A concrete example of such hardship appeared in the monthly report for the Nkhota-Kota District for August 1919. The example also highlighted the other aspects of the problem. The relevant part of the report read:

> The Marriage Ordinances are causing a good deal of trouble as few of the natives who have allowed themselves to be persuaded to be married under them realised in the least what they were really binding themselves to, and the practical inability of obtaining divorce
> ...an unfortunate woman whose husband has deserted her and gone to Salisbury [Southern Rhodesia/Zimbabwe] has been asked to pay £6 in fee before proceedings can be taken in the High Court.[71] This is of course impossible. She is

> destitute but cannot marry again without liability to prosecution. In this District there are at present half a dozen similar cases as even where the husband is in the Protectorate recourse to Blantyre is impossible to the ordinary native woman. As a result both parties form illegitimate connexions and the marriage law is brought into contempt.[72]

Fortunately for the woman in this case, her costs were met from a special fund established by the Government. As Jackson, the Acting Judge of the High Court who dealt with the matter, noted, however, the case was only a single instance of a "general" crisis.[73]

It was not that no attempt had been made to improve the situation. The principal Divorce Ordinance, 1905, had been amended in 1913 by the Divorce Amendment Ordinance,[74] to enable the Governor to authorise (by Notice in the Gazette) any magistrate holding a District Native Court to exercise jurisdiction under the Divorce Ordinance with respect to marriages celebrated under the Christian Native Marriage Ordinance, 1912.[75] The amendment had been initiated by Dr Hetherwick. Although far from completely resolving the problems in obtaining divorce, the conferment of jurisdiction upon magistrates would obviously have constituted an improvement. Occasionally, some magistrates actually assumed jurisdiction and granted divorces with respect to marriages celebrated under the 1912 Ordinance.[76] This assumption of jurisdiction was, however, based on an erroneous belief that the 1913 amendment had automatically extended divorce jurisdiction to magistrate courts. This was not the case. A magistrate could only exercise jurisdiction after authorisation by the Governor's Notice in the Gazette. As things turned out,

the Governor never made any authorisation throughout the life of the 1912 Ordinance.

Those magistrates who bothered to ask in fact discovered that the Government was unwilling to make any such authorisations. In 1916, for example, the Resident for Zomba District requested such authorisation, stating that a man married under the 1912 Ordinance had come to him wishing to divorce his wife:

> The grounds for divorce appear ample, but under the Divorce Amendment Ordinance, 1913, I only have jurisdiction in such cases if authorized by Notice in the Gazette....[77]

The request was turned down and the Resident was told to refer the case at hand to the High Court.[78] No reason was given, but the Chief Secretary's minutes of 15th August, 1916, provide a glimpse into the reasoning behind the Government's reluctance to utilise the 1913 amendment. The reasoning reflects the apparent high regard in which marriage under the Ordinance was held, and echoed the sentiment expressed in the Nigerian case of Cole v. Cole (1898). It was minuted that:

> Educated Christian natives who marry under the Ordinance [1912] ipso facto lose their rights and position as members of a native community and acquire rights and duties of a totally different nature.[79]

It was thus observed that divorce for such "Christian natives" should not be taken lightly; that the jurisdiction of magistrates would be unprecedented and diminish the gravity of marriage under the 1912 Ordinance.[80] Divorces granted by magistrates with respect to marriages contracted under the 1912 Ordinance were therefore technically void for want of jurisdiction.

The question of divorce under the 1913 amendment is further discussed in a later chapter.

e) The Question of Christian Marriage Outside the Framework of Statutory Law

During the period of the operation of the 1912 Ordinance, the Nyasaland administration adopted the view of the Colonial Office, namely, that the celebration of informal religious marriages outside the provisions of the existing Ordinances was unlawful. The contrary view expressed by Nunan had clearly been abandoned. The officials, though unwilling to implement the relevant penal provisions against any missionary, made it clear that they regarded the informal Christian marriage ceremonies as being unlawful.

The Bishop of the Universities Mission made several attempts to persuade the Government to change its attitude so that the missionaries could be allowed to continue with the practice of adding a Christian blessing to a customary-law marriage - without subjecting the parties thereto to the principles of the Marriage Ordinance.[81] The Bishop's pleas were rejected. Indeed, the Government's response was striking in the way it echoed Cox's remarks on the issue. The Bishop's requests were characterised as an attempt on the part of the missionaries:

> ...to give benediction and sanction to what must be solely regarded as pagan and polygamous contracts. The Acting Governor cannot but feel that such a procedure is open to grave objections; for apart from the fact that the so-called "marriage" of natives by the reading of the ordinary service of the Church of England over them in an unlicensed church, and without having first complied with the

> requirements of the law, renders the Minister liable to prosecution,82 it may be assumed that the contracting parties themselves have been deluded (unintentionally of course) into believing that they had by reason of the church ceremony above referred to, contracted a legal Christian marriage which would be recognised by the Boma.83

It was further stated that:

> ...marriage celebrated "according to native law and custom" is a pagan contract which, though it admits of a legal polygamous union, is not intended for Christian natives, but to legalise the marriages of the heathen inhabitants of the country.84

There was no statutory provision expressly prohibiting African Christians from contracting marriage under customary law. As already noted, however, the assumption that African Christians would abandon customary marriage systems and adopt the imported English system tended to be reflected in the actual provisions of the 1902 Ordinance. Thus, the Ordinance recognised only Christian marriages which were contracted in accordance with its provisions (as read with the 1912 Ordinance) and clearly seemed to proscribe any other forms of church marriage ceremonies. To the extent that they were bound to have their marriages blessed by the churches, African Christians had also to be bound by the obligations of the Marriage Ordinance.

The kind of church ceremony demanded by the Bishop of the Universities Mission was intended simply to constitute an appendage to a customary marriage and not a form of marriage sui generis. Since the customary marriage had already been given legal recognition, there does not seem to have been any proper

reason for the Government to deny the missions the power to bless such marriages. Of course, the view of the Government on the matter underlined the belief that customary marriage was wholly incompatible with Christianity. Surely, however, the missions rather than government officials were the better judge on the question of whether or not customary marriage was so repugnant to Christianity as to warrant the exclusion of a religious blessing. The view of the Government amounted to a somewhat unwarranted interference with church practice.

At first, many of the missions in the territory do not seem to have been unduly perturbed by this aspect of the law. Indeed, for some years after 1912, the administration felt that the position it had taken on the matter had the support of the majority of the missions. Until later, the Bishop of the Universities Mission was almost the only person who is recorded as having seriously questioned the Government's policy.[85] With experience of the actual difficulties involved in applying the provisions of the Marriage Ordinances to their converts, however, an increasing number of missionaries, and even government officials, began to sympathise with the views of the Universities Mission. By 1920, it had become clear to most of the people concerned that drastic changes in the law were desirable. Indeed, afterwards, it was the Government which was to become the true advocate of the idea advocated by the Universities Mission.

3. The Blantyre Conference of 1920

A circular letter from the Acting Chief Secretary, dated 12th November, 1919, addressed all the heads of the leading missions as follows:

> The Governor has had under consideration various questions and difficulties which have been represented to him to have arisen from time to time in the application of the Marriage Ordinance, 1902, and the Christian Native Marriage Ordinance, 1912, so far as Natives are concerned. There appears to be more or less a consensus of opinion, official, clerical and lay, that some reform in the law in this regard is desirable and with a view to the fuller elucidation of the points at issue and a more complete study of amendments required in the Ordinances quoted. His Excellency thinks it will be well if a conference can be arranged between the various missions and the Attorney-General and another Government officer to be hereafter selected.[86]

The suggested task of the conference was to:

> ...consider and report upon the operation of the Marriage Ordinance, 1902, and of the Christian Native Marriage Ordinance, 1912, as affecting marriage between natives and the amendments, if any, which are desirable in the law relating to marriage between natives in accordance with the rites of the Christian churches.[87]

The response from the missionaries invited was enthusiastic. The only missions evincing some signs of hesitation were the Universities Mission and the White Fathers (Catholics). The reason for the former's hesitation had nothing to do with the merits of the proposed conference. It happened that the Head of the Mission, Bishop Cathrew Nyasaland, was going to be away in England on mission business. It was the Bishop who for the preceding four years had been pressing the Government for such a conference. So cautious and suspicious, however, was the Bishop that he could only agree to send a representative on the condition that the Universities Mission would not be bound by the outcome of the conference.[88] His explanation was that whereas any other member of the Mission had a detailed knowledge of the problems of his own station, he (the Bishop) was the only one who had been "in contact with the whole". He could thus not

entrust the task of negotiating at the conference to any other person. He wrote:

> ...as things are it will be best for the UMCA to take no part in the conference. I can only hope that legislation on the subject will not again be rushed, as it was with regard to the 1912 Ordinance. All the difficulties that have arisen in consequence of it might have been avoided if time had been given for its consideration.[89]

Members of the Universities Mission seem to have been fearful of the influence of Dr Hetherwick of the Church of Scotland, whom they believed to have been responsible for the enactment of the 1912 Ordinance.[90] Without the equally authoritative voice of the Bishop, it was feared that the proposed conference would result in the enactment of a law unacceptable to them. However, as a result of a personal interview between the Governor and the Bishop on 8th December, 1919, the Universities Mission in the end agreed to send a representative without any preconditions. Indeed, it might have been naive on their part to believe that non-participation in the conference would have helped them. For much as the Government wished for the broadest consensus on its reforms, once enacted, the new law would be binding upon any missionary, irrespective of whether or not such missionary had participated in the antecedent negotiations.

Father M. Guillemé of the White Fathers, after stating that he had no serious objection to the proposed conference, observed:

> ....Still, if I consider the result of a similar conference hold [sic] in 1912, I cannot help to believe that the Government, after a written consultation may, by itself arrange the matter of marriages by an Ordinance which will satisfy every body.[91]

He went on to spell out what he thought would be desirable changes in the existing law, the substance of which will be cited in the following discussion. The White Fathers ultimately agreed to send a delegate to the conference, at which the views of Father Guillemé were reiterated.

In all, nine missionary officials attended the conference, representing a total of twelve missionary societies. The Attorney-General, E st.J. Jackson, chaired the conference and also represented the Government. The Blantyre District Resident, C.A. Cardew, was appointed to represent the interests of Africans.

The conference was held in Blantyre over three days, 7th, 8th and 9th April, 1920. The first day was devoted to a general meeting at which the various representatives presented their views on the existing law and made suggestions as to the possible directions of reform. On the second day, the Attorney-General (and Chairman) reduced the various ideas expressed at the meeting of the previous day into specific proposals in the form of two bills, tagged "Bill A" and "Bill B". The missions spent the day in informal consultations amongst themselves. The general meeting was reconvened on the third and last day. The various delegates, now split into defined positions, presented their views on the two Bills prepared by Jackson. The conference closed with each of the delegates expressing his preference for one or the other of the two Bills.

a) <u>The Missionary Viewpoint</u>

The repeal of the Christian Native Marriage Ordinance, 1912, was unanimously recommended by the missions.[92] The key problems

of the missions have just been described in the foregoing outline of the provisions of the Ordinance. At the 1920 Blantyre conference, Dr Hetherwick recapitulated the main objections of the missions to the 1912 law.[93]

Firstly, Hetherwick observed that the 1912 Ordinance did not represent the wishes of those missionary bodies whose representations had led to its enactment. It may be noted, however, that Hetherwick and some of his colleagues had actually taken part in the preparation for the 1912 Ordinance. It was Hetherwick who had campaigned for the introduction of the model of the 1903 Uganda law in British Central Africa.[94] The 1912 Ordinance had been modelled on the aforesaid Uganda law. The enactment of the 1912 Ordinance represented a recognition of Hetherwick's arguments. In fact, Hetherwick and the other missionaries who had attended the meeting of 1912 with the Acting Attorney-General, had not raised any objection to the Christian Native Marriage Bill. On the contrary, they seemed happy with its contents. Indeed, Hetherwick indicated later, after the 1920 conference, that, at first, he had been happy with the Ordinance; that his realisation that it was unworkable had come only as a result of the experience with its actual operation.[95]

Secondly, it was pointed out that the reservation of jurisdiction to the High Court made it impossible for many people to obtain any remedy.

Thirdly, the penalties prescribed for violation of the provisions of the Ordinances were described as being excessive, "in view of the state of native life". Moreover, it was observed,

the administration had not demonstrated any willingness to enforce any of the penal provisions, thereby bringing the law, as well as the officiating Ministers, into disrepute in the eyes of the Africans. Hetherwick observed that the non-observance of the law had become the rule rather than the exception.

Fourthly, it was stressed that, apart from the procedural difficulties of contracting marriage under the Ordinance, the missionaries were not happy with most of the consequences flowing from the statutory marriage. Most notable among these consequences was the substitution, in case of intestacy, of the English law of succession for customary law. Hetherwick observed that:

> Among certain tribes the provisions of the Ordinance as regards the law of succession to property made too abrupt a change in the social life of the people.

It must be noted by way of comment on Hetherwick's observation that there is no evidence that the succession clause had anywhere been invoked with respect to Africans.

Some modern commentators on the history of marriage legislation have tended to single out the question of succession as the main, or even only, factor leading to the repeal of the 1912 Ordinance and, hence, the enactment of the Native Marriage (Christian Rites) Registration Ordinance, 1923.[96] As must be clear from the present discussion, this was not the case. In fact, missionary feeling on this point was not as strong as it was on the other issues more related to missionary work - for example, declarations with regard to divorce, penalties prescribed against officiating Ministers for procedural irregular-

ities, etc. The Bishop of the UMCA, the chief critic of the 1912 law, even had a word of sympathy for the provision relating to succession; although like other missionaries, he wanted it removed. He once wrote:

> ...with its [the succession clause's] object I am much in sympathy if, as I take it, it is intended to help African husbands to realise their duty to their wives and children. To effect this, however, I cannot see that it is in any way necessary to say that their property should be distributed according to the law of England. No African, and few missionaries[97] are in a position to study such laws, and it is not easy to explain them. It would be far better to say simply what is wished, e.g. that a named proportion, a half or a third, whatever it may be, shall go to the wife and children...[98]

He added, however, that even an arrangement on the suggested lines might not be effective, considering "the [existing] state of Native custom". It is interesting to note that, in fact, it was on these lines that the Wills and Inheritance Act, 1967, would be patterned.

What clearly emerges from the relevant transactions is that the missionaries were, perhaps naturally, mainly interested in ensuring the smooth-working of their programmes for bringing Christianity to Africans, and not in the formulation of an ideal law for Africans, let alone in the preservation of indigenous customary law.[99] It can be seen from the foregoing discussion that most of the objections raised against the 1912 Ordinance were equally (or even more) applicable to the Marriage Ordinance, 1902. It can also be noted that the terms of reference for the conference as suggested by the Governor covered the working of the 1902 Ordinance as well... "so far as natives [were] concerned".[100] The conference, however, virtually confined its

recommendations to the repeal of the 1912 Ordinance. Indeed, it was expressly recommended at the conference that the law of the 1902 Ordinance (in its existing form) should continue to be available to Africans. The missionaries were more or less indifferent to the difficulties or consequences of marriage under the 1902 Ordinance insofar as such difficulties or consequences did not affect them or their relationship with their converts. There was still room for such application of the 1902 Ordinance to Africans as would not be detrimental to the missionaries. The same did not hold for the 1912 Ordinance as this Ordinance had been enacted specifically for those Africans whose marriages fell within the ambit of missionary concern.

Enacted specifically to help the missionaries, the Christian Native Marriage Ordinance had failed to do so. It had to be replaced by a more acceptable and useful formula. There could be little doubt that in terms of substantive principles marriage under the Ordinances reflected the ideals of Christian teaching. There were some exceptions, of course: for example, in relation to divorce, as far as the episcopal missionaries were concerned, and with regard to some aspects of the law governing the prohibited degrees. However, the objectives of state law and those of the missionaries were not and could not always be complementary. The methods of the former, with their emphasis on definition and enforcement by physical sanctions, could hardly suit the latter, whose main concern was the propagation of the Christian ideals among a people steeped in radically different beliefs and often hostile to the new teaching. The missionaries would seem to have realised that they could

discharge their tasks more efficiently by a direct ecclesiastical approach than under the heavy and often cumbrous armour of secular legislation. The safe place to proselytise the indigenous population was in the shallow waters of simple but firm church propaganda and not in the rough depths of civil sanctions. It is in the light of the foregoing observations that the apparent missionary preference for indigenous customary law to the imported law of the Ordinances with respect to the marriages of their converts must be viewed. Basically, the missions wanted some measure of autonomy and flexibility in dealing with African Christian marriages.

The missions were not in complete agreement as to how far African Christians should be excluded from the application of the imported English legal principles.

The views of the Universities Mission echoed the ideas of Nunan. In a letter which had finally persuaded the Governor to call for the 1920 conference, the Bishop of the Mission complained that the law treated Christians unfairly:

> ....A native not a Christian can be married in his village with no trouble at all. As a Christian he wishes for nothing more, and as missionaries we wish for nothing more for him, than to be allowed to have his marriage sanctified and blessed with a Christian service. The Priests of the Mission are ready to take such services where the Christian is entitled to them but the Ordinance steps in and says that the Christian blessing may not be given unless the marriage is legalised in the European sense, a thing which very few natives the least wish, and which always involves a great many formalities which they do not fully understand. Sometimes ... it is impossible without long and troublesome ulendos [journeys] of several days duration.
>
> The Ordinances which are therefore meant to help Christian marriage result in very seriously penalising every Christian who simply wishes - surely a very innocent

> wish - to sanctify his marriage with a Christian service. I cannot believe that this is your wish or that of His Excellency.[101]

The Bishop developed this theme in his letter of 2nd December, 1919, to the Chief Secretary,[102] in which he proposed as follows:

> ....What is really needed is the repeal of the 1912 Ordinance in toto, and the addition of a clause to the 1902 Ordinance, stating that, while no religious service of Marriage shall have any legal effect, unless the provisions of the Ordinance are first complied with, and that the law will take no cognisance whatever of such service, yet there was no objection whatever to such being held in the same way that other sacramental services, such as baptism and confirmation are held, of which the law takes no notice. ....Practically, all we want is that our ordinary people where they qualify for it and desire it, should be able to obtain the sacrament of marriage without having to conform to elaborate regulations, no doubt necessary and proper to establish a legal marriage in the European sense, but which seem to be quite unsuitable to the general level of native life here.[103]

It is tempting to associate this position of the Universities Mission with what has been observed as a distinctive feature of their general policy in Africa. Professor McCracken writes:

> ....The UMCA, with a recruitment policy which ensured that almost every missionary would have his own private income, was almost exclusively staffed by what an observer described as "charming, and devoted priests and laymen of great culture and refinement". With their public school and largely Oxford or Cambridge backgrounds these sons of country parsons and small-town solicitors were often ignorant of or repelled by the dynamic, self-assured world of Victorian industry. They thus sought in Africa, not to transform societies, but to insert Christianity into them with as little disturbance as possible. "It is not our wish to make the Africans bad caricatures of the Englishmen", wrote Bishop Smythies. "What we want is to Christianise them in their own civil and political conditions; to help them to develop a Christian civilisation suited to their own climate and their own circumstances".[104]

This policy seems to have been exemplified by the stand of the Mission on the question of marriage legislation. However, there is no evidence that the Universities Mission was any more committed to the preservation of indigenous marriage institutions than other missions. Indeed, in terms of church doctrine, the Universities Mission tended to be less tolerant of customary marriage than most, if not all, of the missions in the territory. The position of the Mission on the questions of marriage legislation was influenced not so much by any liberal attitude towards customary law as by a general antipathy towards the intervention secular authority in marriage matters. This will be elaborated in later discussions, especially in relation to the question of divorce.

Be that as it may, the Universities Mission representative[105] at the 1920 conference reiterated the Bishop's proposals.[106] In the end the view of the Universities Mission was endorsed also by the Catholic missions. At the beginning, the latter had presented their own proposal. Whereas the Universities Mission had called for a total exclusion of "European" law from the marriages contracted by simple Christian rites, the Catholics had initially not gone as far as that. In his letter of 25th November, 1919, for example, Father M. Guillemé had urged the Government:

> ...to adopt simply the Ordinance of 1902 which is the English law, and to apply it to the Protectorate in a liberal spirit as it is applied, as far as I know, in all British colonies.[107]

The "liberal spirit" the Father had in mind included: the appointment of church Ministers as Registrars of Marriages with

full powers - so that neither the parties nor the officiating Ministers would be required to contact any civil authorities. The latter would be involved only as depositories of Marriage Registers; and the exclusion of all declarations, as to divorce, from the marriage ceremonies, entries or certificates. These suggestions were reiterated at the 1920 conference by Father Martem (of the Marist Fathers) and Father Mazé (of the White Fathers). However, as noted above, the Catholics subsequently abandoned their proposals in favour of those submitted by the Anglicans.

The general principle of the Anglican proposal was also reflected in the proposals of the non-episcopal missionaries attending the conference. The latter were not, however, prepared to allow all questions of marriage celebrated by Christian rites to be governed by customary law. They urged that a distinction ought still to be maintained between such marriages and marriages contracted purely under customary law. In particular, they recommended specific provisions to deal with the questions of divorce and monogamy.

The Blantyre conference of 1920 can be seen as a turning point in Government policy. At least since 1912, the Government had maintained that African customary marriages were "pagan" contractswhich should not be given Christian benediction or sanction. At the Blantyre conference, the strongest support for the proposals of the Universities Mission came from the officials of the administration, Cardew and Jackson. As will be seen shortly, Jackson's support for the proposal of the Universities Mission was to prove all crucial in the end.

b) Bills of the Blantyre Conference, 1920

As already noted, the views submitted by the missionaries on the first day of the above conference were summarised by the Attorney-General and Chairman of the conference, Jackson, in the form of two bills, labelled "Bill A" and "Bill B". The full title of each of the two Bills was stated as "The Christian Native Marriage [Ordinance], 1920".

"Bill A" embodied the wishes of those who wanted Christian African marriages to be governed completely by customary law. The Bill had five clauses, but its essence was contained in clauses (2) and (3). Clause (2) provided that:

> Notwithstanding anything contained in the Marriage Ordinance of 1902, it shall be lawful for any person licensed by the Governor for the purpose of celebrating marriage under this Ordinance to celebrate marriage at any hour and in any place, according to the rites or usages of the church or other religious body to which such person belongs, between any two natives between whom there is a subsisting marriage contract according to native law or custom governing marriage between such natives.

And clause (3) read:

> No ceremony of marriage performed under this Ordinance shall be deemed to alter or affect in any way the status or consequences which the previously subsisting native marriage may have in accordance with native law or custom governing such marriage and all questions and legal proceedings arising out of any such marriage shall be within the jurisdiction of the subordinate courts of the Protectorate and shall be decided in accordance with native law and custom.

Unexpectedly perhaps, rather harsh penalties - £100 fine or 2 years imprisonment - were prescribed for persons who would knowingly and willingly celebrate marriage without the Governor's licence or otherwise in contravention of the Bill.

Africans making use of the proposed Ordinance would first have to fulfill the formalities requisite to a valid customary-law marriage. The Christian ceremony would not be a substitute for the customary-law contract. Apparently, the Christian ceremony would not even be accepted in a court of law as evidence of the intention to be bound by a customary-law marriage contract. Hence, there was no need to make any provision for registration. Any difference between marriage under the proposed law and marriage contracted purely under customary law would lie merely in the fact that parties to the former would be subject to the ecclesiastical discipline of their church. In the eyes of secular law, the two marriages would absolutely be the same. Indeed, it is for this very reason that the penalties prescribed for irregularities in the celebration of the marriage appear to be too severe.

"Bill B" embodied the wishes of those who wanted some distinction to be made between marriage celebrated by Christian rites and marriage contracted purely under customary law. The general principles of the Bill were the same as those of "Bill A": Notwithstanding the provisions of the 1902 Ordinance, it would be lawful for any licensed person to celebrate marriage under the proposed Ordinance according to the rites or usages of his church between any two Africans. Marriage so celebrated would (except as stated below) be governed by the customary law of the parties thereto. The same penalties as in "Bill A" were prescribed.

The main difference between the two Bills was that "Bill B" specifically provided that:

> ...a decree of divorce [by subordinate courts] shall not be granted to a petitioner for the dissolution of a marriage celebrated under this Ordinance except for the following reasons:-
>
> (a) adultery of the respondent
>
> (b) desertion by the respondent without reasonable excuse for a period of three years or more[108]

The proviso was no doubt inspired by the belief that restrictions on the grounds upon which divorce could be obtained would strengthen the marriage tie which, it was generally accepted, was weak under indigenous systems of law. The clause was severely criticised by Cardew, the official representing African interests:

> ....It appears to me that the missions in favour of this divorce clause wish the civil law to strengthen their hands in a matter which rests solely on religious doctrine and which should therefore be left to the control of religious authority.[109]

Further, "Bill B" expressly prohibited the celebration of marriage:

> ...between two natives either of whom is already married to any other person than the person with whom the intended marriage is to be performed, either by the law or custom of the tribe to which either party to the intended marriage belongs, or in any manner recognised by the law of the Protectorate.[110]

In practice, as will become clear in a later chapter, it was of course unlikely that any of the missionaries would knowingly celebrate marriage to which one party was already married to a third party. The Bill also contained express prohibitions of marriage between persons between whom there were impediments of consanguinity or affinity under their respective systems of

customary law and marriages celebrated without the requisite customary-law parental consents.

Under "Bill B", marriages would be subject to registration at missionary level. The main reason for registration was that evidence would be required, in the event of divorce, to show that a marriage is one that can only be dissolved on the basis of the grounds specified by the Bill. It was also the view of the missionaries supporting the Bill that in future there might be changes in the status of marriages celebrated under the proposed law, and therefore that records of such marriages had to be kept.

Both Bills purported to repeal the Christian Native Marriage Ordinance, 1912, and the Christian Native Marriage (Amendment) Ordinance, 1913. The Bills left the Marriage Ordinance, 1902, intact.

Members of the conference informally made declarations as to which of the two Bills their respective missions would support. Subsequently, a full report of the conference with the two Bills attached was prepared by Jackson and dispatched to all who had taken part for their formal signatures. With their signatures, they were also required to make formal confirmations as to which Bill they supported. The final tally was: For "Bill A":- (1) The Attorney-General (and Chairman of the conference), Jackson; (2) Cardew, representing African interests; (3) G.H. Wilson for the Universities Mission; (4) Father Regent for the Marist and White Fathers. For "Bill B":- (1) Dr Hetherwick for the Church of Scotland Mission and also on behalf of Charles

Stuart of the Livingstonia Mision; (2) J.J. Holmes for the Zambezi Industrial Mission, the Nyasa Industrial Mission, the Baptist Industrial Mission, and the South African General Mission; (3) G.A. Ellingworth for the Seventh Day Adventist Mission; and (4) W.H. Murray for the Dutch Reformed Church.[111] The underlying differences in attitudes between the respective supporters of "Bill A" and "Bill B" will be discussed later when considering the specific questions of monogamy and divorce. In general, it will be shown that the differences had nothing or very little to do with attitudes towards customary law itself.

4. The Enactment of the Native Marriage (Christian Rites) Registration Ordinance, 1923

After further exchanges among colonial officials, and after a rather long period, the Native Marriage (Christian Rites) Registration Ordinance, 1923, was enacted as the response to the presentations of the missions at the Blantyre conference of 1920. Although the Ordinance resembled "Bill A" of the Blantyre conference, its text did not derive directly from that Bill.

Viewed exclusively from what had transpired at the Blantyre conference, "Bill B" would seem to have been more favourably placed for adoption than "Bill A". Perhaps because of Jackson's own inclinations, this view was not, if at all, adequately conveyed in the final report of the conference, which in turn formed the basis of the Governor's report to the Colonial Office.[112] A clear majority of those who had attended the conference had voted in favour of "Bill B". Not only that, but further, those missions which had voted for "Bill A" had made an

express, albeit informal, commitment that they would not object to "Bill B" if it were to be enacted. On the other hand, those in support of "Bill B" did not make a similar commitment about "Bill A".

While expressing his support for "Bill B", Dr Hetherwick refused to subscribe to Jackson's final report of the conference. Hetherwick's letter to Jackson, fills in some of the details as to what had transpired at the conference. He wrote:

> ....It should have appeared that the large majority of missionary opinion [at the conference] were entirely in favour of Bill B. And the Representatives of the other Missions ... stated that they would not object to Bill B as it was not necessary for them to make any use of the clause in that Bill regarding proceedings for divorce in the civil courts.
>
> The conference thus separated with an implied consensus amongst the missionary representatives as to the acceptance of Bill B. This would have settled the whole question as far as missionary opinion went....
>
> Without the provision relative to the divorce of Christian marriages in the civil courts there is the danger of a collision between these courts and the churches ... a thing to be avoided at all costs especially in this country. The report reads as if this were a small point of difference between the two Bills. To my mind, it is large and vital. The clause in question safeguards the position of the marriage of the Native Christians. To remove it and make no provision for it as Bill A does is to wipe out of the legislature (sic) of the Protectorate any recognition of the position that Christian marriage has secured in the Native community and to throw the Native regislature (sic) of the Protectorate back into the conditions of heathenism.[113]

He went on to express his firm opposition to "Bill A". Almost simultaneously, the Rev. H. Murray of the Dutch Reformed Church made similar observations.[114] Indeed, even the representative of the Universities Mission seems to have left the conference with the impression that "Bill B" would become law. This comes out clearly throughout his report on the conference to his

superior, Archdeacon A.G.B. Glossop. Thus, for example, he ended his report with the consolatory observations that, although the next Ordinance might still contain references to divorce, the missionaries at least would not have to explain it to the parties. "We can stand entirely aloof from it as a church", he wrote.

Jackson's report, on the other hand, put much emphasis on those arguments which favoured the adoption of "Bill A". Thus, even though the Governor's covering letter to the Colonial Secretary did not expressly indicate which of the two Bills was being recommended for approval, it was implicit that the Government was pressing for the approval of "Bill A". The overall conclusions of the Colonial Office were in favour of "Bill A"; although it was strongly recommended that a provision should be made for the registration of marriage celebrated in accordance with the provisions of the proposed law. It was noted that registration would be desirable for statistical purposes; that there might be a change in future in favour of altering the legal status of such marriages; and that registration would enhance the "native's" respect for marriage. Instead of directly approving the enactment of "Bill A", however, the Colonial Secretary referred the Governor in Nyasaland to the law of Northern Rhodesia as a possible answer to the problems of the missions in Nyasaland.

It was in relation to the law of Northern Rhodesia, it would seem, that the Colonial Office had first departed from its previous firm opposition to any arrangement whereby Christian

missions would bless marriages contracted in accordance with customary law. When North Eastern Rhodesia and North Western Rhodesia were amalgamated to form Northern Rhodesia, in 1911,[116] each territory had its own marriage legislation. North Eastern Rhodesia had what were known as Marriage Regulations[117] enacted from the draft Ordinance received from the Foreign Office in 1902.[118] These provisions were, of course, similar to the provisions of the British Central Africa Marriage Ordinance. Most importantly, they were theoretically available to Africans. North Western Rhodesia received a draft Marriage Proclamation from the Colonial Office in 1904. After some involved exchanges between the Colonial Office and the local administration,[119] the draft was enacted in 1906.[120] In 1918, the two statutes were consolidated.[121]

In one important aspect, the resulting Marriage Proclamation followed the North Western Rhodesia Marriage Proclamation of 1906. This latter Proclamation had never applied to Africans. So too, Section 47 of the Northern Rhodesia Marriage Proclamation excluded from its application marriages contracted between "natives".[122] Thus, Northern Rhodesia stood out, almost throughout the colonial period, as the only British territory where the option of a statutory marriage was entirely denied to the African population. The local officials in North Western Rhodesia had anticipated innumerable problems if the Marriage Proclamation was to be applied to Africans.[123] It must be pointed out that the exclusion of Africans from the relevant law was the result of the same kind of thinking which had characterised the official reaction to the Marriage Ordinance

in British Central Africa. In contrast to the officials in Whitehall, the local colonial official tended to be less enthusiastic about the application of the imported English marriage law to the indigenous populations.

The position in Northern Rhodesia was that Christian marriages between Africans could be celebrated in church, after the requisite customary-law formalities had been completed. The church ceremony had no legal consequences other than those flowing from the customary-law contract. There was no statutory instrument specifically providing for this arrangement. There was merely an informal arrangement between the administration and the missions, in particular, the Bishop of Northern Rhodesia.[124] The arrangement had received the approval of the Colonial Office.[125]

When the Bill "to make provision for the registration of Native Marriages celebrated according to Christian rites" was ultimately prepared in Nyasaland in 1923, it reflected some of the ideas of the Blantyre conference, the suggestions of the Colonial Office, as well as the experiences of the neighbouring territory of Northern Rhodesia. The Native Marriage (Christian Rites) Registration Ordinance, 1923, as the resulting statute came to be known, provided under Section 3 that:

> Notwithstanding anything contained in the Marriage Ordinance it shall be permissible for any minister and at any place to celebrate marriage according to the rites of the Church, Denomination or Body to which he belongs between any two natives:
>
> Provided that the celebration of marriage under this Ordinance shall not as regards the parties thereto alter or affect their status or the consequences of any prior

> marriage entered into by either party according to native law or custom or involve any other legal consequences whatever.

"Minister" was defined as any person:

> ...duly ordained, appointed or authorised by any Christian Church, Denomination or Body to celebrate marriage between natives according to the rites of such Church, Denomination or Body.126

Thus, unlike the proposal under "Bill A", a "Minister" under the 1923 Ordinance had no official status as an appointee of the Governor. Further, the Ordinance contained provisions for registration. Apart from the obligation to transmit annual records of marriages celebrated under its provisions to the Registrar-General, the Ordinance left all matters of preliminaries for each church to decide.

Unlike the case of Northern Rhodesia, Africans in Nyasaland could still, if they so wished, contract marriage under the Marriage Ordinance, 1902. The argument which finally won the day was that:

> ....In the existing circumstances of native life and mentality the natives of Nyasaland are not sufficiently advanced to understand and appreciate that higher sense of the marriage tie inculcated by the tenets of the Christian Churches and that it would be better to maintain the civil status recognised by native law or custom in general to the union of natives.127

It must be noted, however, that the 1923 Ordinance was hardly the outcome of any firmly held policy on the part of the colonial Government. It can be seen, for example, from the remarks of the Colonial Office about the need for registration, that the Ordinance was regarded as a temporary measure while efforts

continued to find a satisfactory formula. The Ordinance was introduced primarily for the convenience of Christian missions. It had not been intended as a formula for integrating the indigenous laws of marriage into any framework of some administrative philosophy. Its main intended achievement was that it freed the missions from the fetters of bureaucratic control in celebrating marriages between African converts.

5. The Proposals to Repeal the 1923 Ordinance

Although the 1923 Ordinance met some of the main objections by the missions to the regime under the 1902 and 1912 Ordinances, it was not welcomed by all the missions. For those missions who had supported "Bill B", the Ordinance had clearly failed to take into account some of their main concerns. The implication of Section 3 of the 1923 Ordinance was that, for legal purposes, the marriages celebrated under the Ordinance would be treated entirely as though they were ordinary customary marriages.[128] The supporters of "Bill B" had wanted the application of customary law to be excluded with respect to divorce and the number of spouses a person could have. The enactment of the Native Authority Ordinance in 1933, which inaugurated the system of Native Authority courts with jurisdiction over matters relating to customary law, added a new dimension to the question of African Christian marriage.[129] Even the missions that had supported "Bill A" at the Blantyre conference gradually became disenchanted with the 1923 Ordinance. The following discussion is merely a historical outline of missionary attempts to have the 1923 Ordinance repealed and replaced by some other formula. The main issues raised by the relevant proposals are examined more fully in later chapters.

The attempts to repeal the 1923 Ordinance spanned the years between 1934 and 1948. In 1934, the Synod of the Church of Central Africa, Presbyterian submitted a draft Bill to the Government with the request that the Bill be enacted in the place of the 1923 Ordinance.[130] The Bill in question was a revamped version of "Bill B" of the 1920 Blantyre conference.[131] In the relevant communication, the Clerk of the Synod informed the Government that the situation created by the 1923 Ordinance was "wholly unsatisfactory". There were mainly two related objections to the position under the 1923 Ordinance.

The first was that the Ordinance failed to "recognise the status of Christian natives in the rapidly increasing native Christian community".[132] This was because marriages celebrated under the Ordinance involved no legal consequences whatever and were therefore indistinguishable from purely customary marriages. Secondly, the missions wanted the 1923 Ordinance repealed because of "the new situation created by the Native Authority Ordinance, 1933".[133] The minutes of a meeting of a committee of the CCAP Synod in 1933 noted, as some of the problems created by the introduction of the Native Authority courts, as follows:

> (i) That there is no uniformity in District Commissioner's Courts in dealing with marriage cases before them. From which it would be inferred the District Commissioners have no guiding principle.
>
> (ii) That when the District Commissioner hands such cases over to Native Courts, the chiefs, if a pagan or Mohammedan, often penalises the Christian.
>
> (iii) In a Native Court, divorce is often granted for reasons of which the church cannot approve and which are repugnant to the Christian conscience.134

After several exchanges between the Synod and the Government, and between the Government and the episcopal missions, it was agreed that a conference should be held between Government officials and representatives of the various religious denominations. The conference was held on 16th October, 1936.

In 1934, both the Catholic and the Anglican missions had refused to support the Synod's demand for the revival of "Bill B" and had expressed satisfaction with the 1923 Ordinance. At the end of the 1936 conference, however, a motion was unanimously passed proposing that:

> ....Legislation be enacted on the lines of draft Bill 'B' making provision for the celebration of Native Christian marriages. That the legislation contain a penalty not exceeding 12 months I.H.L. for failure to comply with any provision.
>
> Provision also to be made for the governing bodies of the various religious denominations to make, with the approval of the Governor-in-Council, rules for the divorce of natives married in accordance with their respective religions and for the nullity of such marriages.135

This was the first indication that the attitude of the Catholic and Anglican missions towards the 1923 Ordinance was changing.

The issue regarding the jurisdiction of the Native Authority courts was the decisive factor in the change of attitude on the part of the episcopal missions. Hitherto, these missions would seem to have been under some misapprehension as to the implication of Section 3 of the 1923 Ordinance on the question of jurisdiction. It will later be seen that even some government officials were not sure about the implication of Section 3 of the 1923 Ordinance as regards jurisdiction. At the 1936 conference, the representative of the White Fathers Mission,

Fr. Paradis, for example, insisted that Native Authority courts had no jurisdiction over marriages contracted under the 1923 Ordinance.[136] The fact that this view was contradicted by other participants, in particular the Attorney-General,[137] apprised the episcopal missions to the full consequences of Section 3 of the 1923 Ordinance.[138] Thus, for the first time, all the European missions in the territory formed one strand of opinion which pressed for change.

Relying mainly on the argument that Africans were not yet ready for the kind of marriage law proposed by the missions, the Government rejected the above motion of the 1936 conference.[139] This, however, was not the end of the matter. The missions continued to press the Government for new legislation. However, World War II intervened in 1939 and therefore little happened until 1945.

In 1945, the Government appointed a standing committee which was charged with the task of considering "all questions affecting Native Christian Marriages" and to make recommendations for legislation which would have the support of all missions.[140] The first meeting of the Committee took place on 6th November, 1945, in Zomba.[141] At this meeting, the Committee drew up a list of proposals for inclusion in any new legislation. A subcommittee[142] was appointed to draft a Bill on the lines agreed upon by the Committee. The relevant proposals were based on the views of the various missions.

A draft Bill, entitled "The African Christian Marriage [Ordinance], 194_" was soon prepared. The Bill contained the most

radical provisions that had ever been proposed regarding African Christian marriages.[143] Hitherto, the missions' objections to the 1923 Ordinance had been confined to questions of jurisdiction, divorce and monogamy. The proposed Bill on the other hand, purported to provide for further matters, including widow inheritance, the support of widows and children after the death of the husband, and, in relation to matrilineal societies, the right of a husband to remain in the village of the deceased wife. The Bill also sought to end the availability of customary marriage law to African Christians.

Although representing the definite views of the missions, the 1945 Bill was not intended for immediate submission to the Government for enactment, but was intended to provide a basis for further consultation with various groups of people within the Protectorate. The draft was widely circulated and attracted a great deal of criticism, especially from colonial officials in the districts and from African commentators.[144] It can be noted in this connection that discussions relating to the enactment of the 1902 Marriage Ordinance and the enactment of the Christian Native Marriage Ordinance, 1912, had been carried out only by Foreign/Colonial Office officials, the top officials of the local administration and a few missionaries. There had been no African participation. Still only a few administrators, but a greatly increased number of missionaries had taken part in the discussions leading to the enactment of the 1923 Ordinance. Again, however, no Africans had participated, although, by that time, there was a sizeable number of Africans holding responsible positions in the missions as well as government institutions.[145] The absence

of African participation partly serves to illustrate the attitude of paternalism, the tendency to treat Africans as though they were all minors, for whom important decisions had to be taken by the European officials. It also tends to underline the fact that the relevant discussions were not so much concerned with the social advancement of the African people as with the resolution of conflicts between government policies and missionary interests.

In contrast, the discussions involved in the attempts of the missions to have the 1923 Ordinance repealed were characterised by fairly representative and widespread participation, in particular from the 1940s. More importantly, Africans began to be treated as subjects rather than mere objects of the controversies over the marriage question. Significantly, active participation in discussions dealing with the question of marriage legislation started with the CCAP Synod. As early as 1931, the Synod began to include Africans in its various committees, which had been set up in preparation for the proposals which the Synod submitted in 1934 and 1936.[146] At the conference of 1936 referred to above, an African clergyman was among the Synod's delegation.[147] Indeed, the original intention had been to send three African representatives, one from each Presbytery.[148] However, the plan was abandoned, it would seem on the advice of the Chief Secretary, who had warned that unless the conference was to become "unwieldy" the mission had to limit the number of representatives.[149] In the Committee appointed in 1945, two places were reserved for Africans.[150]

African participation was not confined to church officials, although the relevant proposals were confined to African Christians. In 1936, for example, the Blantyre Native Association (without any invitation from either the Government or the missions) formally submitted its objections to the suggested repeal of the 1923 Ordinance.[151] The publication of the recommendations of the Committee on Christian marriage legislation after its first meeting in 1945 led to far more widespread African participation. The recommendations were circulated to all districts for comment by the District Commissioners, African chiefs "and other responsible Africans, whether Christian or not".[152]

After considering the various criticisms, and after making a few changes, the Committee submitted its final report and final draft Bill in 1948.[153] When the report was forwarded to the Colonial Office, the latter expressed reservations on certain key aspects of the Bill,[154] and asked the Nyasaland Government to make the necessary revisions. In Nyasaland, the matter was considered between the Chief Secretary and the three Provincial Commissioners. These failed to find any satisfactory solution to the objections raised by the Colonial Office and recommended that the whole attempt to change the law should be abandoned for the time being.[155] H.C.J. Barker, Provincial Commissioner of the Northern Region, recommended the abandonment of the attempted reform with the observation that, at the existing stage "of the development of the African":

> ...it is impractical to reconcile religious conceptions of moral conduct with statutory obligations, and for this

> reason I can see no possibility of success in trying to introduce a specially designed Marriage Ordinance when there is such conflict of ideas between the parties concerned....[156]

The conflicting views referred to by Barker will be considered in detail in relation to the questions of divorce and monogamy, after the following chapter.

Thus, it can be noted, the Native Marriage (Christian Rites) Registration Ordinance, 1923, was the last principal legislation to be introduced as far as African marriages were concerned. The only other main legislation was the Asiatic (Marriage, Divorce and Succession) Ordinance in 1929. This Ordinance was modelled on the Tanganyika Asiatics (Marriage, Divorce and Succession) Ordinance, 1921. The Ordinance provided for the regulation of marriage, divorce and succession on death to property of non-Christian Asiatics in the territory. The Ordinance falls outside the ambit of this study.[157]

NOTES

Chapter Six

1. See "Memorandum on The Christian Native Marriage Ordinance", 8th Nov. 1912, by Joseph Sherridan, Acting Attorney-General. Encl. in Sir William Manning (Ag. Governor) to the Colonial Secretary, CO, dated 30th Nov., 1912, PRO CO 525/44.

2. See "Memo", note 1 above; also "Notes on the Christian Native Marriage Ordinance", by Donald Fraser (of the Free Church of Scotland, Loudon), dated 14th Sept., 1919, MNA S1/1622/19. See also following notes.

3. Bishop Cathrew Fisher, commonly known as "Bishop Nyasaland": Declaration in The Diocesan Chronicle for April, reprinted in the UMCA monthly Gazette, Central Africa Vol. XXXI (1913), p. 231. Also in a letter to the Governor of Nyasaland, dated 7th Oct., 1912, MNA UN1/1/3/6/1.

4. See "Memo", note 1 above. Also Agt. Governor, Major F.B. Pearce, to the Bishop of the UMCA, 13th Sept., 1912, MNA UN1/1/3/6/1.

5. Ag. Government Secretary, W. Duff, to the Bishop of Nyasaland, 3rd May, 1913, MNA UN1/1/3/6/1.

6. See Chap. 5 above.

7. The Scottish missionaries, in particular Dr Hetherwick and the Dutch Reformed Church missionaries were the ones mainly involved.

8. "Proceedings of the Nyasaland Missionary Conference, 1910", quoted by Dr Wanda, op. cit., p. 72.

9. Ibid.

10. Hetherwick to the Attorney-General for Nyasaland, E. st. J. Jackson, 24th Dec., 1920, MNA S1/1622/19.

11. See "Memo", note 1 above.

12. See Hetherwick, note 10 above.

13. Bishop of UMCA to the Chief Secretary, 31st March, 1913, MNA S1/3337/12.

14. See note 4 above.

15. See note 3 above.

16. See below for some of the specific objections to the Ordinance.

17. Section 22.

18. Under the 1902 Ordinance, the rules applicable were those obtaining in England.

19. No. 25 of 1929.

20. Section 2(24).

21. Section 47 of No. 1 of 1918. Even this definition did not, however, clarify whether a person of mixed African and Asian blood could qualify as a "native".

22. Attorney-General to Winspear (UMCA, Mponda), 2nd July, 1940, MNA L3/30/1.

23. See Bishop Cathrew Nyasaland (UMCA) to the Chief Secretary, dated 23rd February, 1915, MNA UN1/1/3/6/1.

24. MNA S1/3337/12.

25. See letter of Bishop, note 23 above.

26. Acting Resident, Nkhota-Kota (Colin Kennedy) to Archdeacon A. Glossop (UMCA), 27th Nov., 1914. The Acting Resident was only relaying the opinion handed down to him by the Office of the Attorney-General, MNA UN1/1/3/6/1.

27. See note 23 above.

28. Turnbull to Cathrew Nyasaland, 20th March, 1915, MNA UN1/1/3/6/1.

29. Unreported case no. 39 of 1916/17. An account of the cases was contained in a letter of the Registrar-General, Keith Coutache to the Chief Secretary, 11th Feb., 1919, MNA S1/3337/12.

30. Unreported case no. 18 of 1918/19, also contained in above letter (note 29).

31. See note 29 above.

32. See Coutache to Bishop of UMCA, 4th March, 1919, MNA UN1/1/3/6/1.

33. See complaint of Bishop of UMCA to the Chief Secretary, 11th July, 1919, as to the burdens of this, MNA UN1/1/3/6/1.

34. See Bishop of UMCA to the Governor, 7th March, 1919, MNA S1/1622/19.

35. Reply to Bishop's above letter, from the Ag. Chief Secretary, 19th March, 1919, MNA S1/1622/19.

36. See following note.

37. Section 7.

38. Section 6(1) as read with Section 2.

39. That is, if no caveat had been entered (Section 7).

40. This could be a "Minister" under Section 2 of the 1912 Ordinance or a civil Registrar under the 1902 Ordinance (see Instructions, text to note 24 above).

41. It would seem clear that the documents filed under Section 8(3) were not itnended to serve as evidence of marriage. The evidential aspect of marriage under the Ordinance was adequately covered under Section 6(2) which enjoined every officiating Minister to send to the Registrar a certified copy of all entries made in the Marriage Register Book of each licensed building within ten days after the last day of each month.

42. Supra, Chap. 5.

43. Supra, Chap. 5.

44. See letter of Registrar-General, W.H. McCullough, to the Resident, Nkhota-Kota, 6th June, 1917, MNA S1/1622/19.

45. Resident, Nkhota-Kota (E.F. Colville) to the Registrar-General, 5th May, 1917, MNA S1/1622/19.

46. See note 44 above. See also a complaint by T. Cullen Young, Minister-In-Charge of Ngara Mission in a letter to the Registrar-General, 27th April, 1919, MNA S1/1622/19.

47. Bishop of UMCA to the Chief Secretary, 14th Feb., 1917, MNA UN1/1/3/6/1.

48. Govt. Notice no. 9 of 1917. Of course, the Bishop was not entirely rid of the problem as there were other UMCA stations which were unaffected by the above Notice.

49. This was indeed the opinion of the Attorney-General, E. st. J. Jackson, letter of 19th Jan., 1919, to the Resident, Nkhota-Kota, MNA S1/1622/19.

50. Indeed, the Priest-In-Charge there returned all the unused forms to the Registrar-General's office; but these were later returned to him with the observation that, technically, the 1912 Ordinance was also still in force on the Islands.

51. See remarks in note 48 above.

52. By the Christian Native Marriage Amendment Ordinance, no. 7 of 1913.

53. Section 2 of 7 of 1913.

54. Section 12 of 1912 Ordinance.

55. Schedule to the 1912 Ordinance.

56. See Chap. 9 below.

57. See e.g. letter of the Bishop of Shire to the Governor, 23rd May, 1916, MNA S1/3337/12.

58. See note 57 above.

59. Declaration in The Diocesan Chronicle, see note 3 above.

60. 2nd Dec., 1919, MNA UN1/1/3/6/1. See also observations by Fraser, note 2 above.

61. See Bishop of UMCA to the Chief Secretary, 2nd Dec., 1919, MNA UN1/1/3/6/1. See also note 59 above.

62. Corruption of "Captain", often used to refer to African middlemen employed by expatriate officials as overseers of fellow African labourers.

63. Fraser to the Registrar-General, 19th Feb., 1919, MNA S1/1622/19.

64. Fraser was aware that magistrates had no jurisdiction. His argument was also partly intended as a plea for the extension of jurisdiction to such courts.

65. Ibid.

66. See note 3 above.

67. Fraser's "notes", above.

68. Chaps. 8 and 9 below.

69. Op. cit.

70. Op. cit.

71. The amount was required to cover the costs of the foreign service of process in Southern Rhodesia.

72. "Extract from the Marimba [Nkhota-Kota] District Report for the Month of August, 1919", MNA S1/1622/19.

73. Jackson to the Acting Chief Secretary, 22nd Sept., 1919, MNA S1/1622/19.

74. No. 8 of 1913.

75. Section 2 of 8 of 1913.

76. See e.g. Nellie v. Machinjili (unreported) Bt. Dist. Ct. civ. case no. 75 of 1922, MNA BA1/2/4. See below, Chap. 9.

77. District Resident, Zomba, to the Chief Secretary, 9th Aug., 1916, MNA S1/3337/12.

78. Chief Secretary to the District Resident, Zomba, 23rd Aug., 1916, MNA S1/3337/12.

79. MNA S1/3337/17.

80. The obvious implication that marriage under customary law or between non-Christian Africans was less grave a matter and that divorce in such marriage could be granted lightly must not be overlooked.

81. See e.g. Bishop of the UMCA to the Governor, 27th Jan., 1913, MNA S1/3337/12.

82. See discussion in Chap. 5 above.

83. Agt. Chief Secretary to the Bishop of the UMCA, 1st March, 1913, MNA S1/3337/12.

84. Ibid.

85. For further details, see below.

86. MNA S1/1622/19.

87. Ibid.

88. Bishop of the UMCA to the Chief Secretary, 1st Dec., 1919, MNA UN1/1/3/6/1.

89. Ibid.

90. This is the impression given by some damaged correspondence of Archdeacon Glossop, and a report of H.G. Wilson (representing the UMCA at the 1920 Conference) to Glossop, 11th Apr., 1920, MNA UN1/1/3/6/1.

91. Fr. Guillemé to the Chief Secretary, 25th Nov., 1919, MNA S1/1622/19.

92. See e.g. Cathrew Nyasaland to the Governor, 2nd Dec., 1919, MNA UN1/1/3/6/1; Fraser, "Notes", note 2 above; Fr Guillemé, note 91 above; Also statements of Dr Hetherwick and Fr Mazé at the Bt. 1920 Conference, see below.

93. Jackson's Report of the 1920 Conference, 23rd Nov., 1920, MNA S1/1622/19. See also, PRO CO 525/98.

94. See Chap. 5 above.

95. Hetherwick to Jackson, 24th Dec., 1920, MNA S1/1622/19.

96. See e.g. Simon Roberts "A Revolution in the Law of Succession of Malawi"; 10 J.A.L. (1966), p. 21 at p. 24.

97. The Bishop was himself a legally trained man.

98. Bishop of the UMCA to the Chief Secretary, 2nd Dec., 1919, MNA UN1/1/3/6/1.

99. See below for further comments on this.

100. Supra.

101. Bishop of the UMCA to the Chief Secretary, 11th July, 1919, MNA UN1/1/3/6/1.

102. MNA S1/1/3/6/1.

103. Ibid.

104. Politics and Christianity in Malawi, p. 177.

105. H.G. Wilson.

106. Jackson's Report.

107. See note 91 above.

108. Clause 4(a).

109. Jackson's Report.

110. Clause 2.

111. Jackson's Report.

112. Sir George Smith, Governor, to the CO, 17th Oct., 1921, MNA S1/1622/19, also CO 525/98.

113. See note 95 above.

114. Murray to Jackson, 23rd Dec., 1920, MNA S1/1622/19.

115. Wilson to Glossop (date of report not clear), MNA UN1/1/3/6/1.

116. See Northern Rhodesia Order-In-Council, 1911.

117. Legislation for this territory was effected by means of Regulations made by the Administration subject to approval by the Commissioner of British Central Africa. It could also be effected by means of King's Regulations made by the BCA Commissioner.

118. Supra, Chap. 5.

119. See below.

120. Legislation of this territory was effected by Proclamations by the High Commission, Cape Colony.

121. Northern Rhodesia Marriage Proclamation (later renamed "Ordinance") no. 1 of 1918.

122. For the definition of "native", see text to note 21 above.

123. For a full account of the history of Northern Rhodesia law, see Morris, "The Development of Statutory Marriage Law", pp. 55-57.

124. See Secretary for Native Affairs (Northern Rhodesia), J.C.C. Coxhead, to the Governor of Nyasaland, 22nd Sept., 1922, MNA S1/1622/19.

125. See Morris, op. cit., pp. 56-7.

126. Section 2.

127. Sir George Smith to the CO, see note 112 above.

128. See particularly Chaps. 7, 8 and 9 below.

129. See below, and also Chap. 9.

130. See note 131 below. The relevant documents, belonging to the Blantyre Mission, are found in the Zomba Archives (MNA), but were at the time of the research not yet "filed". They were contained in a box marked No. I. The source will therefore be cited as "Box I".
The Zambezi Industrial Mission, the Nyasaland Mission and the South African General Mission also associated themselves with this representation. All these were misions which had supported "Bill B".

131. Encl. in Clerk of the CCAP, James Alexander, to the Chief Secretary, 3rd May, 1934, MNA "Box I".

132. See note 131 above. Also the minutes of a committee of the CCAP which had met on 5th Oct., 1933, MNA "Box I".

133. Ibid.

134. See note 131 above.

135. Transcript of the Report of a Conference of Missionaries and The Government of 16th Oct., 1936, MNA NS2/1/2.

136. Ibid.

137. Statement of Attorney-General, H.G. Morgan, ibid.

138. See Chap. 7 below.

139. See Governor, H. Kittermaster to CO, 23rd Jan., 1937, PRO 525/170.

140. Circular of the Chief Secretary to Provincial Comissioners, 13th Sept., 1945, MNA NS1/21/6. The committee was made up of: the Attorney-General (Chairman of Conference), two other government officials, a representative of the UMCA, two representatives of the Roman Catholic missions, two representatives of the non-episcopal missions and two African representatives.

141. Minutes of the Meeting of the Committee Appointed to Consider All The Questions Affecting Native Christian Marriage, 6th Nov., 1945, Zomba, MNA NS1/21/6.

142. This included the Attorney-General, a UMCA representative, A Roman Catholic representative, a representative of the non-episcopal missions and an African.

143. Some of the key aspects of the Ordinance are examined in Chaps. 8 and 9. The main provisions of the draft were:

Section 2 contained the definition of Christian marriage which was, "...the voluntary union for life of one man and one woman (either or both being Christians) to the exclusion of all others, contracted before a Minister".

Section 3 provided that the provisions of the 1902 Ordinance would (except as otherwise provided) apply to marriage under the proposed law.

Section 4 provided for the celebration of Christian marriage in accordance with the formalities established in the denomination of one or both of the parties.

Section 5 would enable a Minister or a District Commissioner to consent to marriages of minors in cases where there was no parent or where the parent refused to give the necessary consent.

Section 6 provided for the conversion of customary marriages or marriages contracted under the 1923 Ordinance into marriages which would be governed by the provisions of the proposed law.

Section 7(1) provided for the appointment of Ministers as Registrars of marriages within the meaning of the 1902 Ordinance, for the purposes of the proposed law. And Section 7(2) provided for the celebration of marriage in any church, whether licensed or not.

Section 9 provided for the dissolution of marriage (see Chap. 9).

Section 10 defined the jurisdiction of the courts (see Chap. 9).

Section 11 stated that "No marriage by native law and custom contracted by a Christian is of any legal effect". This was perhaps the most far-reaching provision; it reflected the earlier arguments of the CO. Christians would still be free to contract marriage under the 1902 Ordinance (Section 12).

Section 13 provided that:

"Native customary law shall not apply to any marriage under this Ordinance so as to:-

a) deprive the widow and children of a deceased man of a reasonable share of his property; (see Chap. 3 above);

b) compel the widower of a deceased woman to leave the house in which he is living (see Chap. 4 above);

c) compel a widow to marry a relation of her deceased husband (see Chap. 4 above)."

Section 14 purported to deal with the principle of monogamy and is discussed fully in Chap. 8 below.

Section 16 purported to repeal the 1923 Ordinance and certain relevant Sections of the 1902 Ordinance.

144. See Chaps. 8 and 9 below.

145. See Chap. 1.

146. Between 1931 and 1937, Africans like Joseph Kaunde, the Rev. Harry Matecheta, Stephen Kundecha, all of the Bt. Mission, took part in the relevant marriage discussions. See MNA "Box I".

147. Stephen Kundecha.

148. See Alexander (Clerk of the Synod) to Dr Murray of the Dutch Reformed Church, 14th July, 1936 in MNA (DRC documents) also in "Box I".

149. There is no clear evidence here of any deliberate attempt by the administration to discourage African participation.

150. These were filled by Lewis Bandawe of the Bt. Mission and Rev. Charles Chinula of the independent African Church, Eklesia Lanangwa.

151. BNA to PC (Bt.), 15th Oct., 1936, MNA NS1/21/6.

152. Minutes of the first meeting of the 1945 Committee, encl. in a circular of 6th Nov., 1945, MNA NS1/21/6.

153. Report of the Committee appointed on 13th Oct., 1945, Govt. Printer, Zomba, 1948, MNA NS2/1/2.

154. See Chap. 9 below.

155. See circular letter of 27th Sept., 1950, MNA NS2/1/2.

156. Letter of 14th Aug., 1950, to the Chief Secretary, MNA NS2/1/2.

157. For relevant documents as to the enactment of the Ordinance, see MNA S1/1549/27.

P A R T III

THE IMPACT AND IMPLICATIONS OF COLONIAL MARRIAGE LAWS

CHAPTER SEVEN

THE DEVELOPMENT OF THE LAWS GOVERNING THE REGISTRATION OF CUSTOMARY MARRIAGES

1. Introduction

This chapter examines the introduction and significance of legislation dealing with the registration of marriages contracted under customary law.[1] To this day, no attempt has ever been made to introduce a general statutory provision for the registration of marriages contracted purely under customary law. The 1923 Act/Ordinance, which in effect contains the earliest provision for the registration of customary marriages, is applicable only to marriages which are solemnised in accordance with Christian rites. The registration of marriages contracted purely under customary law was first provided for under Rules passed by various Native Authorities. These Rules were later adopted in basically common form by the District Councils, which constitute units of local government today.

The bulk of the material examined in this chapter will outline the history of Native Authority registration schemes. At the core of the discussion is an attempt to assess the contribution of these schemes to the development of customary marriage law, especially with reference to the formalities of marriage. The exercise constitutes a small, but important, aspect of the broader endeavour of the study, which is to highlight the role of colonial legislative machinery in the development of African marriage law. Registration of marriage was practically the only way in which African authorities directly contributed to

the development of marriage legislation. It is useful to set some of their concerns alongside those of the colonial officials who dominated the national legislative machinery, contrasting the respective aims of these two sets of legislators. The registration of marriages under the 1923 Ordinance is also considered in this chapter as part of the attempt to determine the implications of Section 3 of that Ordinance for customary marriages. Thus, one of the issues discussed is the question whether and, if so, to what extent registration under the 1923 Ordinance conflicted with, or obviated the need for, registration under Native Authority registration. The wider implications of this question will become apparent in the following two chapters, which contain even more detailed discussions of the interactions of African law, Christianity and secular statutory regulation of marriage.

2. The Introduction of Native Authority Rules

Under Section 18 of the Native Authority Ordinance, 1933, Native Authorities were for the first time empowered, subject to the approval of the Governor, to make rules "for the peace, good order and welfare" of Africans within their respective areas of jurisdiction.[2] It was in pursuance of this power that Native Authorities introduced Rules providing for the registration of marriages contracted under customary law.

Until 1946, the Rules introduced by the Native Authorities did not seek to impose any obligation to register marriages; they merely provided for a procedure by which marriage could be registered voluntarily. Among the common features of these

Rules was the provision enabling either party to a marriage contracted within the jurisdiction of a particular Native Authority to apply, either to the Native Authority or to a Subordinate Native Authority, to have the marriage registered. Upon such application, the Native Authority would hear evidence on the particulars of the marriage intended for registration. These included the names of both parties to the marriage, the names of their witnesses, their villages, the Native Authority (or Authorities), district(s), the date of the marriage, the amount of malobolo paid and the balance due.[3] If satisfied that a valid marriage had been contracted, the Native Authority would register the details and issue a certified copy of the registration to the party applying; if requested, a second copy could be issued to the other party to the marriage. Many Rules also provided for the registration of marriages contracted before the commencement of Native Authority registration schemes. There was also provision for the replacement of lost or destroyed certificates. Provision was made for the cancellation of a certificate upon divorce. The responsibility for initiating such cancellation was in many of the Rules placed on the party who had applied for the initial registration. It is perhaps important to mention that the activities of the Native Authorities in this regard fell within their administrative, and not their judicial capacities.

From 1946 the Rules providing for voluntary registration began to be replaced by Rules providing for the compulsory registration of marriages. Under the latter Rules, the male party to a marriage was placed under a legal obligation to apply

for registration with the Native Authority or Subordinate Native Authority within one month after the marriage had been contracted.[4] A penalty, the most common being a fine of ten shillings or one month imprisonment, was imposed for failure to apply for registration or to comply with any of the other obligations relating to registration. For reasons which will be considered later, failure to register did not, and could not, affect the validity of marriage which had been duly contracted under customary law. In many other respects, Rules providing for compulsory registration were patterned on the earlier models providing for voluntary registration.

The change from voluntary to compulsory registration models of Native Authority Rules was not dictated by any recognised change in the social needs of the African people. In fact, the whole programme of Native Authority registration was characterised by the absence of any clear conception as to the objectives or desirability of registration. It is useful to mention that the form and content of the Native Authority Rules were determined mainly by the European colonial officials and not by the Native Authorities themselves. The Native Authorities did not have any real power to adopt independent policies. The whole process of introducing registration Rules had received its initial impetus from the central government, which also issued models upon which Native Authorities patterned their legislation. Attempts to depart from the standard models did not usually succeed, but would be blocked, mostly by Provincial Commissioners or the Chief Secretary.

Thus, even before 1946, some Native Authorities had indicated that they wished to introduce compulsory registration of customary marriages.[5] Some District Commissioners had supported, or even prompted, the attempts to introduce compulsory registration.[6] Compulsory registration had, however, been opposed by senior colonial officials. The view of the Government had been that the majority of Africans living in the rural areas would not only be apathetic to, but also that such Africans had little need for, registration. The best course, it had been contended, was to introduce registration gradually and on a voluntary basis.[7]

Throughout the colonial period, only in one respect was the need for registration keenly felt on the part of Africans. This was in the context of the growth of the migration of workers to neighbouring territories. In 1936, for instance, a memorandum by a government officer who had just returned from Southern Rhodesia noted that:

> ....Many cases connected with marriage were brought to the courts of the Native Commissioner [in S. Rhodesia] by Nyasaland Natives but lack of evidence that a valid state of marriage existed constituted the great difficulty in dealing justly with such cases.[8]

In 1939, the Nyasaland Government learned, not for the first time, from the Nyasaland Labour Office in Salsbury that:

> ....Married couples from Nyasaland often find difficulties in obtaining quarters through being unable to establish to the satisfaction of the Southern Rhodesia authorities, that their marriages are regular and in accordance with native laws and customs of Nyasaland.[9]

Registration of marriage would be the obvious solution to such

difficulties. It may also be noted in passing that officials in Southern Rhodesia had long been used to the idea of compulsory registration of customary marriages. Southern Rhodesia was one of the few territories which from a very early period had adopted statutes on a national basis imposing compulsory registration of customary marriages.[10]

The problem of migrant workers no doubt highlighted the need to adapt customary marriage practices to the complexities of modern life. However, in introducing the registration Rules, the Native Authorities generally did not think in terms of the modernisation of customary law and its adaptation to new conditions. On the contrary, registration schemes tended to be associated with the desire to reinforce traditional values and authority.

It can be seen, for example, that the Native Authorities rarely viewed the problems of migrant Africans in terms of proof of marriage in foreign jurisdictions. For many Native Authorities, the problem more readily associated with the introduction of registration was the emigration of women. In particular, the registration of marriages was seen as an aspect of measures that could be introduced to control the movement of unmarried women from rural areas to the towns, especially those of Southern Rhodesia and South Africa. This, for example, was the main objective of a Rule unsuccessfully proposed by Native Authority Gomani in 1937 which stated that:

> No native woman shall apply to the District Commissioner for a pass to leave the Protectorate unless she is in possession of a marriage certificate issued under the

> Registration of Native Marriage Rules 1937 or under the Marriage Ordinance or other legislation providing for the registration of marriages.[11]

Since 1935, the Atonga Tribal Council Native Authority in Chintheche had made similar attempts to curb the movement of unmarried women from Nyasaland to the neighbouring territories. None of these attempts received the approval of the colonial authorities.[12] In practice, the District Commissioners were already able to restrict the movement of women by utilising their administrative powers to withhold the necessary "identification certificates". Without these certificates it was difficult to travel either to Southern Rhodesia or South Africa.[13]

The desire to control the movement of women partly arose from the need to strengthen the traditional structures of authority. These structures of authority were closely linked to the control over access to women. The movement of women to distant cities, where the elders could not hope to exercise their power of control, clearly threatened the social fabric of traditional life. The Native Authorities also shared the apprehension of many Africans about the social effects of modern urban life, to which they attributed what was perceived as a decline in moral standards.[14] In its attempts to restrict the emigration of women, the Atonga Tribal Council, for example, expressed the fear that, when abroad, unattached women lapsed into immoral ways and, on their return were a bad influence and also "brought diseases".[15]

The initial introduction and subsequent proliferation of Native Authority Rules providing for the introduction of the

registration of marriages owed more to the desire to raise funds than to any commitment on the part of the Native Authorities or the colonial officials to modernise customary marriage law. When Native Authority M'Mbelwa proposed to introduce compulsory registration in 1937, he emphasised that the raising of revenue was the main object of the proposal.[16] The proposed measure was rejected by the Provincial Commissioner, who noted that there were many people who should not be bothered with the suggested regulation:

> ...particularly as it is primarily a revenue raising measure i.e. disguised poll tax of 6d for the year of initial registration.[17]

When, in 1935, Native Authority Kyungu in Karonga proposed to introduce compulsory registration, setting a fee of two shillings for such registration and a fine of ten to twenty shillings for failure to register, the District Commissioner minuted:

> This is prompted, I am afraid, by a desire to raise revenue, nevertheless such rules will have a beneficial effect on domestic relationships.[18]

In Ncheu District, Native Authority Gomani clearly seemed to interpret the authority to introduce registration as an authority to levy tax on marriage. Responding to a missionary who had accused Gomani of impeding missionary work because he had introduced registration,[19] Gomani stated:

> ....I do not do anything without approval from the Government; and know this, that between all people, there are various taxes - some are paid to the mission, and some to the Government as well. Now then, how could the tax paid to me abase the country?
>
> Furthermore, I did not command the people to pay these taxes to ... me at all. They do these things according to their own wishes as to do honour to their leading men.[20]

The focus on the collection of revenue characterised the whole history of Native Authority legislative activities. This was perhaps inevitable. Indigent Native Authorities received nothing by way of grants or subsidies from the central government. Itself convulsed in financial paralysis, the central government, to use the words of one colonial administrator, "could afford no largesse for the Native Authorities".[21] Native Authority expenditures had to be met solely from local rates, dues, and fines. Inevitably, far from introducing Rules "for the peace, good order and welfare" of their people as anticipated under the 1933 Ordinance, the Native Authorities became preoccupied with schemes which had the potential to bring in revenue. Legislation on such matters as agricultural methods, fishing, beer-brewing, tree-cutting and so on, wove a maze of restrictions whose ultimate result would only be the entanglement of an unwary people into violations and consequent fines and penal labour. In this climate, even such seemingly sanguine Rules as those concerned with the registration of marriages had a distinct oppressive aura about them. This aspect of Native Authority legislation tended merely to reflect the character of the colonial administration in general, which, in the words of one historian:

> ...seemed to devote nearly all of its energy to the collection of taxes and the punishment of defaulters.[22]

It was probably due to financial pressures that from 1946, the Government began not only to approve, but actually to encourage, the introduction of compulsory registration by Native Authorities. Almost suddenly, a circular was issued by the

Chief Secretary to Provincial Commissioners on 14th November, 1946.[23] Enclosed with the circular were model Rules for Native Authorities providing for compulsory registration of marriage. The circular contained instructions to the Provincial Commissioners to determine whether registration of all African marriages should be made compulsory, and whether the enclosed model Rules were suitable for the purpose.

The circular of 1946 may have been prompted by a resolution passed at a meeting of the African Provincial Council of the Southern Province which had been held the previous month. Unfortunately, it has not been possible to secure a full record of this meeting. All that is known is that a resolution had been passed by twenty-one votes to two to the effect that "all native marriages should be registered with the Native Authorities".[24] Details of the meeting would perhaps have shed some different light on the desirability of compulsory registration. Equally regrettable was the fact that the circular of the Chief Secretary failed to elicit any detailed comments on the desirability of compulsory registration. Whether rightly or wrongly, Provincial Commissioners, and in turn District Commissioners and Native Authorities, seem to have interpreted the circular simply as an invitation to introduce compulsory registration. The Native Authorities simply responded by replacing the old Rules for voluntary registration with new Rules requiring the registration of all customary marriages. By 1947, compulsory registration as government policy was firmly rooted.[25]

3. The Legal Status of Registration Under the 1923 Ordinance

The introduction of Native Authority registration of marriages immediately raised the question as to the exact relationship between such registration and the registration of marriage under the Native Marriage (Christian Rites) Registration Ordinance, 1923. This question largely centred on the implications of Section 3 of the 1923 Ordinance. Section 3, it may be recalled, was the operative clause and provided, inter alia, that:

> ...the celebration of marriage under this Ordinance shall not as regards the parties thereto alter or affect their status or the consequence of any prior marriage entered into by either party according to native law or custom or involve any other legal consequences whatever.

This clearly raised the question as to whether the registration of marriage under the 1923 Ordinance had any legal utility so as, for example, to obviate the need for further registration under Native Authority Rules. Could a certificate or other evidence of registration under the Ordinance properly be accepted as evidence of the existence of a valid marriage? Could a court of law dispense with the traditional methods of establishing the existence of a customary-law marriage merely because registration under the Ordinance has been proved? Put differently, was registration under the Ordinance merely a record of the religious ceremony or was it also a record of the customary-law contract which was supposed to precede or accompany such a religious ceremony? The attempt to answer these questions in the present discussion constitutes merely one aspect of a broader endeavour, pursued throughout this study, to define or determine the meaning of Section 3 of the Native Marriage (Christian

Rites) Registration Ordinance and to assess its implications for the development of customary marriage law.

In the Nyasaland High Court case of Gombera v. Kumwembe (1958),[26] Spencer-Wilkinson, C.J. unequivocally hinted that registration under the 1923 Ordinance could be utilised in the same way as, for example, registration under the Native Authority Rules. The facts of the case were as follows. A marriage had been arranged between Kumwembe and Gomera's daughter. Following the matrilineal custom of the parties,[27] Kumwembe built a house for his prospective bride on land provided by Gombera. Subsequently, however, Gombera prevented the wedding from taking place. Kumwembe thereupon instituted proceedings in an African court to recover sundry expenses incurred in contemplation of the marriage, including compensation in respect of the house. Eventually, the case came in appeal before a Provincial Commissioner. Details of the judgements are not particularly pertinent to the present discussion. On the final appeal to the High Court, it was alleged that the parties had intended to solemnise their marriage under the Native Marriage (Christian Rites) Registration Ordinance, 1923, in addition to customary law.

A point of law was raised to the effect that the African court of first instance had no jurisdiction to try the case because it was a case "in connexion with marriage other than a marriage contracted under or in accordance with Mohammedan or Native Law or Custom"; that Section 11 of the African Courts Ordinance had expressly stated that no African court should

have jurisdiction to try such a case. No attempt will be made here to unravel the numerous legal points raised by this submission. It is sufficient to relate that the High Court rejected the submission on the basis of what in our view was generally a correct interpretation of Section 3 of the 1923 Ordinance. Commenting on the Section, Spencer-Wilkinson stated:

> The proviso to this Section is a very wide one and appears to provide that the ceremony of marriage conducted as between two Africans shall of itself have no legal consequences of any kind. I read this as meaning that the marriage in such a case is completed by the carrying out of whatever is necessary to be carried out according to native law or custom, and that the [religious] ceremony is merely an additional matter which enables the marriage to be registered under the Ordinance instead of being registered with the Native Authority or otherwise.[28]

With regard to the relevant question before the court, the above view of Section 3 is unimpeachable. The 1923 Ordinance was not intended to confer any special status on marriages solemnised in accordance with its provisions. To argue that African courts had no jurisdiction over these marriages - an argument frequently encountered throughout the history of this statute[29] - was to render meaningless the whole of the proviso to Section 3. What presently requires detailed comment is the implication of the underlined part of the above quotation. The suggestion here clearly seems to be that the 1923 Ordinance provided an alternative mechanism for effecting the registration of customary-law marriage to that provided under Native Authority legislation. Registration under Native Authority Rules was not without legal utility. A certificate of marriage resulting from registration under these Rules served as prima facie evidence of the existence of a valid customary marriage.[30] The

suggestion that registration under the 1923 Ordinance could be substituted for that under Native Authority Rules carried the implication that the former could similarly be utilised as evidence of the existence of a valid customary marriage.

Before considering the immediate issue regarding the relationship between registration under the 1923 Ordinance and that under Native Authority schemes, it may be useful to recapitulate the background to the enactment of the 1923 Ordinance. It is worth emphasising that the issues leading to the enactment of this Ordinance focussed on the conflict between missionary interests and existing Government legislation on marriage which consisted of the Marriage Ordinance, 1902, and the Christian Native Marriage Ordinance, 1912.[31] The issues had little or nothing to do with the development or improvement of indigenous customary marriage law, even for Christian Africans. The inclusion of clauses providing for the registration of marriage in the 1923 Ordinance was not motivated by any desire to alter or improve the means of proving the existence of marriage under customary law. The question whether registration under the Ordinance could be so utilised was never considered.

It will also be recalled that of the two bills proposed at the Blantyre conference of 1920, the one which was closer to the provisions of the 1923 Ordinance, "Bill A", did not contain any provision for registration. Such provision had been deemed as unnecessary, since there was to be no legal difference between marriage solemnised under the anticipated Ordinance and marriage contracted purely under customary law.[32] It was the

unsuccessful bill, "Bill B", which had purported to provide for some form of registration, the assumption being that marriage under the anticipated law would have certain special consequences. The principle of monogamy and the restricted grounds for divorce, which were to characterise marriage under the law of "Bill B" made registration imperative, because it would be necessary to distinguish these marriages from marriages contracted under customary law. As already noted, it was at the behest of the Colonial Office that clauses providing for registration were incorporated in what in essence was "Bill A" of the Blantyre conference.[33]

A Colonial Office memorandum on the subject tends only to confirm the absence of any intention behind the proposal for registration to provide the parties solemnising marriage under the proposed law with any special facility that would obviate the need, for example, to have such marriage registered under Native Authority schemes. Commenting on the argument offered for the absence of any provision for registration under "Bill A", the memorandum stated:

> But whatever the logic of this reasoning, I cannot believe that it is sound to give up the registration of marriages which are celebrated in accordance with Christian Rites. For statistical purpose, if no other, such registration seems to be desirable and I should prefer to retain the existing arrangements [i.e. under the 1912 Ordinance], which cannot in effect be very burdensome to those who have to carry them out. Moreover, someday even if native Christian marriages were now introduced which had no legal consequences, the time might come when it would be desired to revise this policy, and presumably it would be necessary then to have a record of the marriages.[34]

As already noted, the 1923 Ordinance was viewed by many of the participants in its enactment as a temporary measure, while

the search continued for a more satisfactory formula. It was mainly, if not solely, in anticipation of possible future changes in the law that it had been deemed necessary to make some provision for registration in the 1923 Ordinance. The provision, as seems clear from the above quotation, had not been viewed as having any immediate utility. It is normal for instruments providing for registration to state expressly that a certificate of marriage resulting from the registration would serve as prima facie evidence of marriage.[35] No such provision was made in the 1923 Ordinance.

Further, and perhaps more decisively, must be the consideration that the 1923 Ordinance did not place any obligation on the officiating Minister to ascertain whether or not a contract of marriage under customary law in fact existed before performing the religious ceremony. True, in practice, particularly as more and more Africans began to assume responsible positions in missionary institutions, clergymen would normally ascertain whether or not the necessary customary-law formalities had been concluded before solemnising marriage under the Ordinance. Nevertheless, a ceremony of marriage under the Ordinance was possible without the parties first fulfilling the relevant customary-law formalities.[36] It is clear that in such a case the parties to the ceremony could not legally be considered as husband and wife.[37] The existence of a customary-law marriage could not be inferred merely from the existence of the religious ceremony under the Ordinance. To do so would amount to an "alteration" of the status of the parties under customary law, which would be that of an unmarried couple. Such an "alteration" would of

course constitute a contravention of the express fiat of Section 3 of the Ordinance. It follows that where the existence of a customary marriage was at issue proof of a ceremony of marriage under the 1923 Ordinance was irrelevant.

The view expressed above was, for example, implicitly endorsed in the High Court judgement of Kandoje v. Mtengerenji (1966).[38] In this case, which is considered more fully under the subject of monogamy,[39] it was held that a couple who had gone through a ceremony of marriage under the 1923 Ordinance were bound by a contract of marriage under customary law. This was of course an obvious inference from the words of Section 3. What is important is that the existence of the customary-law contract was not established on the basis of the religious ceremony. The court had to base its finding as to the existence of the customary marriage on the husband's averment and the wife's concession that there had been a meeting of the traditional advocates before the Christian ceremony.[40]

4. The Application of the Native Authority Rules to Marriages Under the 1923 Ordinance

The dominant view among officials involved in the framing of Native Authority Rules for the registration of marriage was in favour of extending the application of these Rules to marriage solemnised under the 1923 Ordinance.

Initially, Native Authorities had been supplied with model Rules in which the phrase "non-Christian marriage" had been used to define marriages capable of registration by the Authorities.[41] This phrase was liable to cause some confusion, for the converse

phrase, "Christian marriage", had no definite legal meaning. The phrase "Christian marriage" was sometimes used to describe what Lord Penzance had characterised as "marriage ... in Christendom",[42] that is, traditional Western monogamous marriage, irrespective of whether or not such marriage had been solemnised in accordance with Christian rites or whether or not the parties thereto professed the Christian religion. In Nyasaland, "Christian marriage" could, according to this usage, simply have meant marriage under the Marriage Ordinance, 1902; or under the (repealed) Christian Native Marriage Ordinance, 1912. The phrase "non-Christian marriage" could have been construed as including marriage under the 1923 Ordinance. However, the phrase "Christian marriage" was in Nyasaland also used to describe what in reality was a customary marriage, but to which a Christian ceremony of marriage had been added. The phrase "non-Christian marriage" used in the Native Authority Rules could thus have been read as excluding marriage under the 1923 Ordinance. The latter seems to be the way the phrase was subsequently understood. This was shown most clearly by the fact that those who advocated the application of Native Authority Registration to marriage under the 1923 Ordinance always felt the need to substitute a different phrase for "non-Christian marriage".

One example of such substitution was made in Ncheu District by Native Authority Gomani. In 1935 Gomani had passed registration Rules in which the phrase "non-Christian marriage" had been used.[43] Gomani had no intention of excluding Christians from Native Authority registration of marriage. In this, he had the full support of the District Commissioner in Ncheu. As a result,

a new set of Rules which contained the phrase "native marriage" instead of "non-Christian marriage" was proposed. Explaining the need for the change to the Provincial Commissioner,[44] the District Commissioner for Ncheu District observed that the earlier phrase had seemed to exclude marriage under the 1923 Ordinance from Native Authority registration. He went on:

> The intention is, I think, that such registration should be in respect of what may be termed the native "civil" ceremony, through which the majority of natives go even if married according to Christian rites.[45]

Similarly, the phrase "native marriage" was substituted for "non-Christian marriage" in the Rules passed by Native Authority M'Mbelwa Jere of Mzimba District in 1937.[46] The intention was the same as that of Gomani, namely, to extend Native Authority registration to marriages solemnised under the 1923 Ordinance. To the same effect, the Atonga Tribal Council, comprising Native Authorities Kabunduli, Mbwana and Boghoyo in what was then known as Chintheche District, rephrased their Rules of registration in 1943. The District Commissioner in Chintheche recommended the change in the following words:

> Marriages in the areas in question ... have hitherto been registered under the Registration of Non-Christian Marriage Rules which are now in force. In practice, however, I find that all marriages, whether of Christians or otherwise, have been registered under the present rules and it is considered desirable, in order to regularize the position and to obviate the necessity for invidious distinctions which would be entailed by the correct application of the present rules, that the latter should be repealed.[47]

On its part the central government not only approved these changes, but also issued a new model of Rules in 1939 which reflected the desire to include marriages celebrated according to the

1923 Ordinance under Native Authority registration.[48] The phrase "non-Christian marriage" was furthermore, discarded in the model Rules providing for compulsory registration issued in 1946.[49]

The legal consideration for wishing to extend Native Authority registration to marriage under the 1923 Ordinance was clear. Registration under the 1923 Ordinance had no legal effect. A certificate of marriage issued under the Ordinance was of no legal utility whatsoever. Thus if Africans "married" under the Ordinance wished to have documentary evidence of the existence of valid marriages, they could only obtain such evidence by registering their marriages with the Native Authorities. It is important to emphasise that what the Native Authorities purported to register was not the religious ceremony, but the customary-law contract which preceded such religious ceremony. The point was well put by a Provincial Commissioner in 1937 in reply to a query from the District Commissioner in Nkhota-Kota. In a letter dated 26th August, 1937, the District Commissioner had put the following question to the Provincial Commissioner:

> Incidentally, I would like your ruling as to whether a Native Court should accept a Christian Native Marriage (1923 Ordinance) 'Certificate' as proof of marriage. It would seem that a Parson's "certificate" has no legal standing in a Native Court and consequently that Christians will also be required to register their marriages in the Native Court (sic).[50]

The Provincial Commissioner, after consulting the Attorney-General, replied in the following terms:

> I presume that the reference is to marriages celebrated under Cap. 82. Such marriages are not "legal" marriages (Section 3) and therefore in my opinion Certificates under Cap. 82 cannot be accepted by a court nor can such marriages be registered ... under the proposed rules. It is however probable that in such cases there is a "civil" ceremony in the village of such a nature as to bring them within the scope of the rules.[51]

E.C. Barnes, Senior Provincial Commissioner in 1952, and an influential figure in the history of marriage legislation in Nyasaland, defined the relationship between Native Authority registration and marriage under the 1923 Ordinance in almost the same terms. In a letter to the Zomba District Commissioner, dated 22nd August, 1952 he wrote:

> You should remember that marriages celebrated in church under the 1923 Ordinance have no legal consequence, as it is expressly stated in that Ordinance. For that reason, no court can take cognizance of any such marriage, because, at law, there is no valid marriage. However, in most cases there is also a marriage by Native Law and Custom, and where there is such a marriage it should be registered by the Native Authority, for that marriage is a valid marriage. To sum up, it is immaterial whether a marriage ceremony has been performed in church or not. What is material is whether there is a valid marriage by Native Law and Custom.[52]

Despite such certainty as to the law, the Government was not dogmatic on the issue. For example, it accepted the wishes of those Native Authorities who had decided to exclude marriage under the 1923 Ordinance from their registration. The Rules for compulsory registration passed by Native Authorities Kyungu and Mwafulirwa in 1947, for example, departed from the model issued by the Chief Secretary by expressly exempting marriage under the 1923 Ordinance from compulsory registration.[53] The reluctance on the part of the Government to take a definitive stand on this question perhaps resulted from the desire to avoid

direct confrontation between the Government and the missionaries.

Records of missionary reaction to the specific question of the extension of Native Authority registration to marriage under the 1923 Ordinance are scanty. Even with such dearth of information, however, it is clear that the attitude of most missionaries to Native Authority registration was at best one of grudging tolerance and at worst one of open hostility. This is evident, for example, from a statement by one senior official who, arguing against the introduction of compulsory registration in 1937, cited as one of the complications:

> ...the mission difficulty regarding Christian marriages which crops up from time to time and has not yet been settled. I apprehend that while the missions tolerate voluntary registration they would object to compulsion.[54]

On the face of it missionary objections to Native Authority registration seemed to focus on the question of fees. For example, it was alleged by some missionaries in Ncheu District that Africans celebrating marriage under the 1923 Ordinance were refusing to pay the fee charged by the church on the ground that they (the Africans) were already paying registration fees to the Native Authority. The Rev. S.J. Jordan of the Zambezi Industrial Mission, for instance, complained to Native Authority Gomani in the following terms:

> ....I heard you were trying to get the Christian people when wanting to marry to pay two taxes. A chicken to the village Headman[55] and one shilling to yourself. The heathen are expected to pay only these two taxes whereas the Christians must pay to the church [as well].
>
> I was very surprised to hear of this wish of yours and I hope you will realize that this is a step backwards

> for your country. Even now it is difficult to get Christian marriages - with your wishes fulfilled there will hardly be even one.[56]

However, missionary hostility towards the application of Native Authority Rules to marriage under the 1923 Ordinance went beyond the question of fees. Beneath the squabbles about fees was a more fundamental question regarding the status of African Christian marriage. The question here was not simply one of how Section 3 of the 1923 Ordinance was to be interpreted. The missionaries were unlikely to approach the question of Native Authority registration in isolation from their attempts to have the 1923 Ordinance replaced by a more acceptable formula. The very introduction of the system of "indirect rule" through Native Authorities in 1933 heightened the desire on the part of a large section of the missionary establishment to have the 1923 Ordinance repealed.[57] The implementation of the proposal to repeal the 1923 Ordinance, as already shown, would have had the effect of removing marriages of African Christians from the jurisdiction of Native Authorities. The fate of the 1923 Ordinance was the subject of discussion at the very time the Native Authorities were introducing their registration Rules. For the missionaries, the extension of Native Authority registration to Christian marriages represented the very problem they sought to remove.

5. <u>The Impact of Registration Laws on Customary Marriage</u>

The introduction of the laws providing for the registration of customary marriages has not had much formative impact on the development of African marriage practices. The contri-

bution of the relevant legislation to the development of the law may be assessed in relation mainly to the formation and proof of marriage. Firstly, however, it is useful to consider the question of the actual utilisation of the law by the people contracting customary marriages.

a) The Resort to Registration Facilities

It can be stated at the outset that the only form of registration of marriage to which Africans have resorted on a large scale is that instituted by the Native Marriage (Christian Rites) Registration Ordinance, 1923. Thousands of marriages have been registered under this Ordinance/Act since its coming into force in 1923. Actual records have not been kept in any consistent or systematic manner. In 1934, for example, 3,017 marriages were registered under the Ordinance (compared to only 1 marriage registered by an African under the 1902 Ordinance).[58] In 1964 5,297 marriages were registered under the 1923 statute (compared to 18 marriages registered under the 1902 Act).[59] In 1970 8,550 were registered (compared to 96 registered under the 1902 Act).[60]

In contrast, registration under Local Authority laws, which cater for the majority of marriages contracted by Africans, has not been utilised so extensively. Although there have been no actual figures, it is clear that few people have taken interest in registering their marriages under these laws. In 1947, for example, the Colonial Annual Report noted that only about 1 to 33 out of 1,000 marriages contracted under customary law were registered with the Native Authorities.[61] The provisions imposing

penalties for failure to register marriage remained a dead letter. The passage of time has not eroded the general apathy towards registration.

Illiteracy may be cited as a possible factor to the general absence of interest in registration. Even in a literate society, however, the success of registration would have depended, in a great measure, on what people perceived to be the practical utility of such registration. In the past, only in relation to people travelling abroad, especially where husbands sought to be joined by their wives in their countries of employment, was registration seen as valuable. Today, it is mainly in urban areas that registration has remained popular. As will later be shown, however, registration in urban areas has often been used in a manner not originally intended under the relevant provisions. The resort to registration in urban areas has thus only tended to highlight what the relevant registration laws have actually failed to provide for.

It is not the actual notarial aspect of registration, but the Christian marriage ceremony itself, which accounts for the popularity of the 1923 legislation among Africans. African Christians are under a religious obligation to have their marriages blessed in church. Willy-nilly, the church ceremonies have to be registered under the provisions of the 1923 statute.[62] Even apart from the religious obligation, the Christian marriage service has acquired the character of an imperative social convention in modern African communities. In the eyes of most people, even those who are only marginally "Christians", a

customary marriage without a church blessing tends to lack in prestige. Denuded of many of the traditional ceremonial accompaniments, customary marriages have tended to gain much of their solemnity from such modern accompaniments as the church ceremony. Thus, it is not always entirely out of religious commitment that some people marry in church. This could also be true even in some Western European societies.

A familiar explanation for the popularity of the 1923 legislation as opposed to the 1902 Act has been that Africans do not wish to be bound by the legal obligations engendered by a contract of marriage under the latter, especially with regard to succession, divorce and the adherence to monogamy. This explanation can only be correct to a point. It fails to take into consideration the possibility that most people contract marriages without any clear knowledge of the alternative system of marriage law available under the 1902 Act, let alone of the detailed legal implications of the relevant provisions. Indeed, many of the people who have solemnised marriage under the 1923 law, have done so under a genuine, though essentially erroneous, belief that they are contracting a binding monogamous marriage which can only be dissolved with the approval of the church.[63] The differences in legal consequences between the 1902 and 1923 legislation are not usually so fully appreciated as to form the basis of decisions whether to register marriage under one or the other of the two instruments. A more relevant factor would seem to be the fact that few people, particularly in rural areas, are familiar with the procedure for registering marriage under the Marriage Act. Even among the middle-class, urban residents, the

procedure for contracting marriage under the Marriage Act is not well-known.

b) Registration and the Formation of Customary Marriages

Of the many problems relating to the adaptation of traditional customary marriage law to the conditions of modern life, the one mostly associated with the introduction of registration is the problem of marriage formalities.

As already observed, marriage under customary law is first and foremost conceived as a contract between the elders of the respective families of the parties, rather than between the parties themselves. Although nowadays the agreement between the bride and the bridegroom may be a necessary preliminary, the actual marriage can only be validated by a contract between the elders. This is particularly the case in matrilineal societies, where marriage does not involve the payment of malobolo to the bride's people.

Thus, in Amani Ali v. Christina Mhango (1970),[64] the High Court of Malawi upheld an appeal against the judgement of the Blantyre Traditional Court, "dissolving" a "marriage" between the appellant and the respondent, and ordering the appellant to pay £30 compensation to the appellant for breaking up the marriage. The appellant and the respondent had met in the city of Blantyre where they started to live together as husband and wife. They never went through a ceremony of marriage. Four children were born as a result of the association. One died, but three survived. After a period of six years, the wife filed a suit in the Blantyre Traditional Court, alleging that

she was not getting support from the appellant and that the latter had chased her from the "matrimonial" home. On his part, the appellant alleged that the respondent had deserted him and stated that he no longer wanted her back in his house. The court proceeded to dissolve the "marriage" and to make the compensation order without receiving any evidence as to the existence of marriage. This judgement was upheld by the Blantyre Traditional Court of Appeal.

On further appeal to the High Court, the question as to the existence of a marriage was raised. It was observed that in matrimonial cases, a court of law had to establish the existence of a marriage before proceeding to grant any relief. As to the existence of marriage in the particular case, Chatsika, J., observed as follows:

> Marriage is a special type of contract which is governed by well established principles. It has been common ground in this case that the proposal for marriage was made by the appellant personally to the respondent. No other parties were involved, and the respondent went to live with the appellant. One of the essential formalities which constitutes a valid marriage in this country is the getting together of advocates from either party who meet to arrange the marriage contract. It is not sufficient for the parties to marry merely to make verbal arrangements between themselves and regard their union as a marriage. The assessors have unanimously advised me that in their opinion no valid marriage existed between the appellant and the respondent. With respect, I agree with their advice and now find that no valid marriage was in existence.[65]

The National Traditional Appeal Court of Malawi has in recent years passed many decisions to the same effect.[66] Thus, even if, in the context of the general law, the parties who seek to get married are not minors, they can contract valid customary marriages only with the consent of their elders.

The fact that people have purported to contract marriage without consulting their parents, as in Ali v. Mhango, underlines the ascendancy of individualism and the breakdown of family authority. Needless to say, this phenomenon is more common in the urban centres, such as Blantyre, Lilongwe, Mzuzu and Zomba, than in the rural areas, although the latter are by no means altogether exempted. In urban areas, the traditional requirement that the arrangement of marriage should involve the parents of the parties can also be expensive, cumbersome or even impossible to fulfill. Marriages contracted in urban areas so often involve parties who not only belong to different customary-law systems, but also whose elder relatives reside in different and distant parts of the country. How, to take an extreme example, does a customary marriage between a man and a woman who meet in Blantyre get arranged, where the man's elder relatives reside in Chitipa in the North and the woman's relatives reside hundreds of miles away in Nsanje in the South?

Apart from the difficulties of fulfilling the traditional requirements of marriage in distant urban centres, there is a more general, and perhaps more important, conceptual or ideological question as to the suitability of emphasising the inter-parental as opposed to the inter-spousal agreement as the basis of legal validity in the formation of customary marriages. As must be evident from the discussions in Part I of the study, parties to customary marriages have tended to become less dependant on the wider kin in their married lives. The superimposition of the courts and other state structures over kinship and clan ties; the introduction of the money economy; improvements

in, and the introduction of new, communication systems; the introduction of European forms of education: all these factors have combined to diminish the individual's reliance on traditional superiors and kinfolk. The availability of the state judiciary, for example, has enabled individuals to seek and obtain legal remedies without or with minimal involvement of members of the kin-group. Legal rights can be enforced and obligations discharged outside traditional structures. In the light of such realities, it may be argued that a shift in emphasis is necessary from inter-parental to inter-spousal agreement (or transaction) as a basis of the customary marriage contract.

The local authority registration laws in this country were not introduced with any design to modify customary marriage formalities. The type of registration envisaged under these laws could not properly be utilised to accommodate the new developments in African social life. Registration under local authority laws was not analogous, for example, to registration under the Marriage Ordinance, 1902. In the case of the latter, registration and the execution of marriage formalities were one and the same process. In contrast, registration under local authority laws was intended merely as an appendage to an already completed customary marriage. The formation of the customary marriage and its registration were not intended to be simultaneous transactions. Registration had to follow all necessary arrangements under customary law. Neither could registration alone constitute a, nor could the absence of registration vitiate an existing, valid customary marriage.

In practice, however, there is a growing tendency in the urban centres to utilise local authority registration laws as though such laws provided for an alternative mechanism for contracting customary marriage. Without any prior marriage arrangement under customary law, the parties simply go to a District Council Office where registration takes place and a marriage certificate is issued. The question whether the parties have duly completed the marriage formalities under customary law does not seem to receive adequate treatment by the relevant officers. In most cases, it suffices if the parties bring with them two people, each of whom is presented as a witness of either spouse. Often, the witnesses are friends, workmates or relatives of some sort - people not qualified to act as "sponsors" under strict traditional practice. As T.D. Thomson pointed out, under strict traditional law, the marriage sponsors or ankhoswe ...

> are not merely casual witnesses to a ceremony but may be described as the trustees for the two parties.... They meet before the actual marriage and discuss all the necessary arrangements, they are always charged with the preservation of the marriage and with the settlement of any disputes which may arise in connection with it.[67]

The witnesses under consideration are far removed from the traditional marriage sponsors as described above. Their function is more analogous to witnesses to a marriage under the Marriage Act, 1902, than to ankhoswe under customary law. Often, they are picked at short notice and their role as "marriage witnesses" is forgotten almost before the ink is dry on the marriage certificate. Nevertheless, it has been suggested by the National Traditional Appeal Court that unions arranged in this way could still constitute valid customary marriages.

In the controversial and rather unsatisfactory decision of Justina Malenje Kakhobwe v. Samson M. Kakhobwe (1981),[68] the National Traditional Appeal Court dealt with an appeal against a judgement of the Blantyre District Traditional Court. In the lower court the respondent (Samson Kakhobwe) had petitioned for dissolution of marriage on the ground that the respondent was "unco-operative" and "quarrelsome". The court dissolved the marriage, but on the basis of the petitioner's behaviour and refusal to live with the appellant. The petitioner was ordered to pay MK270 to the appellant and also to pay for the transportation of the appellant and the children of the marriage to the woman's home, which was in Lesotho. In her appeal against this judgement, the appellant contended that the (Blantyre) Traditional Court had no jurisdiction to dissolve the marriage and, in the alternative, that the compensation ordered was too small for her needs and those of the children.

For the purposes of the present discussion most of the details of the case can be omitted. However, mention should be made of the following facts. The appellant's original home was Lesotho, whereas the respondent was from Malawi. The two had met when the respondent was studying in Lesotho. The marriage was arranged in Malawi and the woman had to fly from Tanzania where she was a student. From the record of the court, it would seem that the marriage arrangements had consisted of three things. Firstly, there had been the registration of marriage with the Blantyre District Council. Secondly, the registration had been accompanied by the appointment of "ankhoswe". Thirdly, it was alleged that the man had paid MK600 as malobolo. As regards the

last item, the judgement leaves several questions unanswered. It does not indicate the person to whom, and at what stage of the proceedings the malobolo had been paid. Furthermore, the court made no ruling as to what should be done with the malobolo after the divorce. Nevertheless, the allegation as to malobolo was critical to the appellant's contention that the Blantyre Traditional Court had no jurisdiction. The respondent's personal law in Malawi followed the matrilineal system where the payment of malobolo was not required. On the other hand, the woman's personal law in Lesotho followed the patrilineal system in which lobola was an essential element of marriage. The payment of malobolo in the particular case was a strong indication that the parties had sought to contract their marriage under Sesotho law, which in Malawi was foreign law and perhaps subject to the jurisdiction of the High Court.[69] The reasoning of the National Traditional Appeal Court in holding that the Blantyre District Traditional Court had jurisdiction over the case is not pertinent to the present discusion and therefore shall not be considered here. The same applies to the final judgement on the appeal.[70]

More pertinent to the present discussion is the issue relating to the ankhoswe. The exact role played by the alleged ankhoswe in arranging this particular marriage is not known. One may be justified in suspecting that they did nothing more than merely witness the registration at the District Council Office. That aside, however, the important thing in this case is that the nkhoswe representing the woman was none other than a relative of the man. Thus, even if the nkhoswe had been

actively involved in the arrangement of the marriage, the resulting marriage contract would not have exactly conformed to the classical definition of a customary marriage as a contract between two families. This choice of the woman's nkhoswe was necessitated by the fact that all the woman's relatives were in Lesotho. She had come to Malawi alone. In the view of the National Traditional Appeal Court, however, the fact that the woman was represented by a complete stranger did not vitiate the marriage. The court observed:

> ...at custom it was not unoften (sic?) that a man or a woman left his home for some far away land [and] while there he would decide to marry. It was not strictly required that the actual ankhoswe should be called. In such a case the one who intended to marry would ask the man in whose hands he was to stand for him in that marriage. That marriage would still be valid at customary law. In the instant case there was a valid marriage between the appellant and the respondent at customary law.[71]

It is necessary to emphasise that no court, including the National Traditional Appeal Court, has ever held that mere registration under local authority schemes can constitute a valid customary marriage. However, the view expressed in the Kakhobwe case, as to which persons can act as marriage sponsors, in effect clears the way for people who seek to utilise such registration as an alternative form of contracting customary marriage to do so. For even while accepting that registration does not in itself constitute marriage, it can still be argued that the witnesses to such registration simultaneously fulfill the customary-law requirement of chinkhoswe. The fact that a person other than some particular elder relative of a party can act as a "marriage sponsor" or nkhoswe does blur the distinction (in terms of both legal character and function) between the tradi-

tional ankhoswe and what Thomson characterised as "merely casual witnesses to a marriage ceremony".[72]

The view that someone else can be substituted for the traditional nkhoswe in formalising a customary marriage undoubtedly constitutes an attempt to adapt customary law to modern conditions of urban life. However, it would have been useful had the National Traditional Appeal Court clearly laid down the conditions upon which a "substitute" nkhoswe could be legally recognised. Can a party elect a "substitute" nkhoswe entirely on his or her own? Or is it necessary for the parents, however far they may be, to give some consent or direction as to the choice? What degree of hardship in securing the presence of the "real" nkhoswe is necessary to justify the use of a "substitute" nkhoswe? How much involved in the marriage arrangements should a person be in order to be considered as a valid nkhoswe or "sponsor"?

Supplying definitive answers to the above questions is perhaps more properly the task of the legislature than the courts. The phenomenon of urban customary marriages clearly underlines the inadequacy of traditional princples of customary law in a society that is becoming increasingly complex. As must be clear from the foregoing discussion, the existing schemes for the registration of customary marriages have not altered the substantive requirements of customary law. Cases like Kakhobwe v. Kakhobwe do however, point to the need for some revision of the existing registration laws, so that these laws could actually provide for alternative ways of contracting customary marriages. As far as the validation of marriages is concerned,

there is perhaps a need to replace family-orientated with state-orientated mechanisms. The latter would not only provide a convenient facility for the parties involved, but would also establish a degree of public control over the formation of customary marriages, in cases where traditional social structures are weak.

c) Registration and Proof of Marriage Under Customary Law

The most readily acknowledged effect of registration of customary marriage is that it simplifies or facilitates proof of marriage. At least in theory, a certificate of marriage constitutes an important improvement upon traditional methods of proof, which invariably involve the calling of actual witnesses to tender oral evidence as to the existence of a valid marriage.

The exact nature of the information required to prove the existence of marriage under customary law varies from community to community. In general, as already noted, it is the agreement between the elder relatives of the parties that constitutes marriage. However, each group follows its own procedures in effecting such an agreement and, indeed, variations may exist even within one group. To generalise, a distinction may be drawn between those groups which follow the matrilineal system and those which follow the patrilineal system. At least for marriage purposes, all the districts in the Northern Region today follow the patrilineal system. All districts in the Southern and Central Regions, again at least for marriage purposes, follow the matrilineal system. There are exceptions to this provided by some sections of Ngoni communities, for example, in Ncheu, Dowa,

Nchisi and Dedza Districts, and a section of the Senas in Nsanje District. These tend to follow patrilineal practices, albeit in a diluted form.

The main characteristic of marriage under the patrilineal systems is that it involves the making of substantial payments by the man's side to the woman's side. Upon marriage, the woman normally leaves her people to reside among the husband's people. On the other hand, marriage under the matrilineal systems does not involve any payments of legal consequence. Instead, the man is required to live with the wife's people during the period of coverture. These are the broad distinctions between the two sets of systems, which, in reality, constitute a continuum containing intricate variations.[73] In the local parlance, the terms chikamwini and lobola are usually employed to describe the matrilineal and patrilineal systems respectively.

As far as marriage under the chikamwini system is concerned, evidence that there are ankhoswe on both sides (or that there has been chinkhoswe)[74] is all the courts ask for in order to establish the existence of marriage.[75] The courts never go into such details as to whether the woman was actually handed over to the man for cohabitation;[76] or whether one or the other of any particular ceremonial was followed.[77] It would seem that any such ceremonials are not absolutely necessary to the creation of a valid marriage. This aspect of customary marriage may be an important factor in developments such as those detailed above in relation to the use of "substitute" nkhoswes in marriages contracted in urban communities.

On the other hand, in determining whether marriage under the lobola system exists, the courts have tended to put emphasis on the payment of malobolo. Indeed, the National Traditional Appeal Court seems to hold that marriage under the lobola system can only be fully validated by the actual payment of malobolo or part thereof. This principle was clearly stated, for example, in Martin Yohane v. Kepson Ntondo (1979).[78] In this case, the respondent's daughter had been betrothed to the appellant. The latter had paid what was described as a "betrothal fee". At the time, the girl in question was still very young. It was agreed between the respondent and the appellant that upon the girl reaching the age of maturity, she would commence cohabitation with the latter. This part of the agreement had been fulfilled. However, there had been a further agreement to the effect that, after the birth of three children, the appellant would pay malobolo worth MK30. Although three children were born, the appellant failed to pay the MK30, whereupon the respondent "repossessed" his daughter and "gave" her to another man. The appellant had commenced the proceedings to gain custody of the children and for the return of the "betrothal fee". The lower court awarded the "betrothal fee" to the appellant but refused to give him custody of the children unless he could pay MK66. The decision must have been based on the assumption that a valid marriage had been created, albeit imperfectly, otherwise the order as to custody could be construed as an implicit endorsement by the court of a "child-sale". On appeal to the National Traditional Appeal Court, however, it was held that:

> In those areas where the payment of lobola is the prerequisite for the contraction (sic) of a valid marriage, there can be no marriage until lobola, or part thereof has been paid.... This court and other Traditional Courts does not (sic) and will not recognise a union with cohabitation of any duration as marriage.[79]

This principle has been reiterated in many other decisions of the court.[80] Clearly, the court does not seem to accept that a mere agreement concerning malobolo is enough.[81] This is rather unfortunate. Where there is an agreement as to malobolo and the woman has actually been handed over to the man for cohabitation, there seems to be little point in insisting that no marriage exists. Of course, in certain particular cases, failure to pay the malobolo after they have been announced may signify an unwillingness to formalise the marriage. It is submitted that whether such is the case in any given instance must be ascertained as a question of fact and not predetermined as a matter of legal principle. It is submitted that mere failure to pay an already agreed amount of malobolo should only give rise to a right of action in favour of the woman's people and not vitiate the marriage contract. Indeed, the lower court in Yohane v. Ntondo (above) followed what would seem to be a principle of more respectable antiquity than the absolute rule of "no-lobola-no-marriage".

Where all proper arrangements had been made and the woman had been handed over to the man, but the latter had failed to pay the malobolo, it was not usual to hold that there was no marriage. The courts used to hold merely that there was an "imperfect" marriage which could be perfected by the man or his relatives by effecting the payment, even upon divorce or death

of either of the parties.[82] The marriage was "imperfect" only in the sense that the man forfeited certain rights that would normally have accrued to him, for example, the rights with regard to children. He could still proceed against a third party who committed adultery with his wife. Indeed, even with regard to such rights as those concerning children, "suspension" rather than absolute "forfeiture" was the idea.

There is an illuminating case on the point decided by the court of Native Authority M'Mbelwa II, in 1934. The facts of the case, Simon Chavula v. Kamzati Nyirenda (1934),[83] were as follows:

> John Nyirenda (deceased) was the brother of the defendant Kamzati Nyirenda. John had married the sister of Simon Chavula, the plaintiff. Four children, all girls, were born of the marriage. John's wife had died shortly after the birth of the fourth girl. Following his wife's death, John had sent all the children of the marriage to their maternal grandparents - the plaintiff's natural parents. Later, John himself had died without having paid any malobolo for his wife. The children had continued to stay with the Chavulas. When the first of the daughters got married, Chavula's father received four cows as malobolo for her, which he kept. On the marriage of the second daughter three cows were received as malobolo. Acting as John's successor, Kamzati collected two of the three cows and left one for the Chavulas.

Simon Chavula, who during the two marriages had been away from Nyasaland, instituted the proceedings to regain the two cows taken by Kamzati. He also sought the court's declaration to the effect that he should be entitled to any subsequent payments made on the marriages of the other two daughters. Chavula's case was that John had not paid any malobolo for his sister and that, since her death, the children had been cared for entirely by the Chavulas without any help from the Nyirendas. The

defendant's case was that although his brother had failed to pay malobolo, the omission had been rectified when the first of John's daughters got married and the Chavulas had been allowed to retain the malobolo paid for her.[84] In other words, the daughter's malobolo had cancelled out the debt owed by her father to her maternal grandfather. After the marriage, all the rights that may have been denied to the Nyirendas had been restored to them. Thus, the defendant was entitled, not only to the malobolo of the second daughter, but also to those of the remaining two daughters.

The Native Authority court decided in favour of the defendant as regards both the malobolo on the second daughter and any subsequent malobolo on the marriages of the other two daughters. The plaintiff's appeal to the District Commissioner was emphatically dismissed. The District Commissioner (S.J. Oliver) stated:

> ....The court questioned the elders at the hearing as to the Angoni law and custom on this matter, and found that a father is entitled to the dowry of his children whether he brought them up in their Youth or not, since they are his flesh and blood. In this case Kamzati did not claim dowry for the first daughter as his brother John had not paid dowry on his wife. But when the second daughter married he claimed two of the three cows paid for her dowry, to which according to Angoni custom he is entitled. He is also entitled to any further dowry which may be paid on the two remaining daughters.[85]

It is useful to note that the use made of the malobolo paid on the first daughter was only possible on the assumption that John was the legal father of the children, and hence that the marriage between John and the plaintiff's sister had been a valid one. It is interesting in this case that the father of

the plaintiff had allowed the defendant to take the malobolo of the second daughter. It was only upon the plaintiff's return from abroad that the dispute started.

This case would seem to be a particularly strong one on the relevant point of law. On pure grounds of conscience, the defendant's case was a very weak one. Indeed, on those grounds, he hardly had any case. The Nyirendas had all but abandoned their daughters. They only appeared to remember their responsibility to the daughters when it came to the collection of malobolo. Furthermore, if it is taken into account that Kamzati was not the natural father of the children, the law would seem to have been particularly strong in his favour. The relevant law, if applied in its full force, is clearly unsatisfactory as the Kamzati case seems to demonstrate. It is nevertheless submitted that the approach advocated by the National Traditional Appeal Court, whereby it is insisted that a marriage is vitiated unless the malobolo or part thereof have actually been paid, is not the best way of reforming the law. Moreover, there are some parents who altogether waive the payment of malobolo on their daughters' marriages. Even the National Traditional Appeal Court would in such cases be prepared to accept that valid marriages exist.[86]

The important point for the purposes of the present discussion is that proving the existence of marriage under whatever system of customary law may be a cumbersome process. Registration offers certain advantages. A certificate of marriage can be carried about easily and at no expense. Its evidential value is not diminished with the passage of time. Unlike human beings,

if lost or destroyed, a certificate can be replaced. Its use can help to avoid the waste of time involved in hearing oral evidence. The circumstances of marriage, for example, with respect to the amount of malobolo paid or agreed upon, can easily be forgotten or distorted for the sake of a particular dispute at hand. Indeed, where malobolo payments are made in instalments over a long period of time, there may be different witnesses to each instalment. With registration, each payment can be recorded on a certificate and notorised.

It has to be noted, however, that under strict traditional practice, the presence of the elders or other members of the families of the parties to a matrimonial dispute is required, irrespective of whether or not the validity of marriage is at issue. Such third parties are required to take an active or even the main part in the proceedings.[87] A court of law can correctly refuse to entertain a petition if, for example, the marriage "sponsors" of the parties are not present. Therefore, even if a party is in possession of a marriage certificate, he or she may still have to be accompanied by third parties when attending matrimonial judicial proceedings. Indeed, perhaps in this limited respect, the introduction of registration laws may be said to have underlined the conceptual transformation taking place in customary marriage. All registration schemes introduced by the local authorities in this country have either expressly or implicitly provided for the acceptance of a marriage certificate by a court of law as prima facie evidence of the existence of a valid marriage. These provisions seem to reflect a social and legal setting in which marriage or disputes

about marriage are first and foremost a matter for the husband and the wife and not between wider social units.

In practice the availability of registration schemes has made little difference. Two factors have accounted for this. Firstly, as already observed, the majority of marriages contracted by Africans under customary law are not registered. So, even where the existence of marriage is disputed the parties have had to do with the traditional procedures of proof. Secondly, the principle, stated by Chatsika, J., in Ali v. Mhango,[88] that in matrimonial cases, the first consideration by the courts must be to establish the existence of a marriage has rarely been followed. The practice of first establishing the existence of a marriage before attending to the substantive issues of a dispute reflects the procedures of the imported English law and has understandably tended to be confined to the High Court. In the majority of cases decided by "African" courts, the validity of marriage is assumed unless one of the parties disputes it.

6. A General Comment

Neither the Native Authority Rules providing for the registration of customary marriages nor the 1923 Ordinance, which also in effect made provision for the registration of customary marriages, had been introduced with any intention to alter the principles of customary law. The Native Authority Rules had been introduced, primarily, it would seem, as one of the numerous methods of raising Native Authority revenue. Their only real utility has been the furnishing of ready documentary evidence of marriage, especially for people involved in travel or

employment. In urban centres, some people have resorted to the relevant registration laws as an alternative way of contracting customary marriages. This is an improper use of the law and only serves to underline the limited scope of the registration system fostered. The 1923 Ordinance, as already discussed in the preceding chapter, had been enacted solely to facilitate the celebration of African Christian marriages. The Ordinance had nothing to do with the improvement of African customary law. Registration under this statute entails no legal consequences whatever. It is not surprising therefore that, in real terms, the introduction of the laws providing for the registration of customary marriages has had little formative impact on African marriage law and practice.

However, there was perhaps some sentimental, or even historical, significance to the introduction of Native Authority Rules providing for the registration of customary marriages. The Rules can be seen as the beginning of a more complete and formal recognition of African customary marriages within the colonial legal system.[89] Under the British Central Africa Order-in-Council, 1902, the institution of customary marriage was recognised only obliquely, as part of the recognition given to the application of customary law in general. Customary marriages were given more direct statutory recognition under the Marriage Ordinance, 1902. As already noted, however, there was a sense in which the provisions of the Ordinance tended to be associated with the idea that the recognition of customary marriage practices would be an interim measure - necessitated by the practical consideration that most Africans were not yet

sufficiently "civilised" to comprehend the European system of marriage. Even when the 1923 Ordinance was being enacted, customary marriages had never really been recognised as a permanent feature of the legal system.

The sanctioning of Rules providing for the registration of customary marriages, which took place under an administrative set-up fostered by the philosophy of indirect rule, appeared to accord the institution of customary marriage a more permanent and more respectable status within the legal system. The registration of customary marriages had the potential, not actually realised, to enhance the solemnity of customary marriages and to enable such marriages to command greater respect among Africans. This may indeed have contributed to the resentment of some of the missionaries against the relevant Native Authority laws. To the missionaries, the registration of customary marriages may have been seen as a move to perpetuate an "uncivilised" form of marriage systems, instead of leaving them to die a natural death.[90]

NOTES

Chapter Seven

1. The relevant laws also deal with the registration of divorce.

2. Hitherto, the chiefs or "Principal Headmen" had been used only administratively.

3. See e.g. Rules passed by NA M'Mbelwa in Mzimba District, in 1938, MNA NN1/21/16.

4. See e.g. Rules of NA Mwafulirwa in Mzimba (later Rumphi) District, in 1946, MNA NN1/21/18.

5. See below for specific examples.

6. See e.g. DC Mzimba to PC (N.P.), 8th Feb., 1937, MNA NN1/21/16.

7. See PC (N.P.) to DC Mzimba, 11th Feb., 1937, MNA NN1/21/16.

8. Memo of Capt. Burden, encl. in PC (S.P.) to the Chief Secretary, 14th April, 1936, MNA S1/918/31.

9. Labour Comm., W.S. Phillip (Bt.) to PC (C.P.), 11th Feb., 1939, MNA NCN1/1/17/16.

10. See Southern Rhodesia Native Marriage Act, 1950 [Section 3(1)] amending the Native Marriage Ordinance, 1917. For some discussion, see Arthur Phillips, Survey, pp. 211-114.

11. MNA NCN1/1/17/16. The proposal did not receive the approval of the Government, mainly because it was ultra vires. The NA had no power to set conditions upon which a DC, in his administrative capacity, could issue a "pass".

12. Order no. 2 of 1935, MNA NN1/2/4. See also minutes of a meeting of the ATC held on 23rd Dec., 1936, MNA S1/918/3. See also Cutrufelli, op. cit., for an account of similar legislative measures in Northern Rhodesia (Zambia), pp. 22-26.

13. See note of PC (N.P.) to DC Chintheche, 11th Jan., 1937, MNA S1/918/3.

14. For further discusion of this subject, see Martin Channock, Law, Custom and Social Order, pp. 192.

15. Explanation to Order no. 2 of 1935, above.

16. See Letter of PC (N.P.) to DC Mzimba, 5th Feb., 1937, MNA NN1/21/16.

17. PC (N.P.) to DC Mzimba, 5th Feb., 1937, MNA NN1/21/16.

18. DC Karonga to PC (N.P.), 22nd June, 1935, MNA NN1/21/15.

19. See below for full details.

20. NA Phillip Gomani to S.J. Jordan, Zambezi Industrial Mission (Ncheu), 24th March, 1937, MNA NCN1/17/18.

21. Griff Jones, Britain and Nyasaland (London : George Allen and Unwin Ltd., 1964), p. 77. Also the whole of Chap. III.

22. Robert Rotberg in his introduction to Mwase's Strike a Blow and Die, p. xix.

23. MNA NCN1/17/9.

24. Circular of Chief Sec., note 23 above.

25. Nyasaland Colonial Report (London : HMSO 1947).

26. Rhod. and Ny. L.R. [1958], 849.

27. The record does not disclose to which specific community the parties belonged.

28. P. 853. Emphasis added.

29. See Chap. 6 above, also Chap. 9.

30. This was expressly provided for in all the Rules passed by the Native Authorities.

31. Supra, Chap. 6.

32. Ibid.

33. Ibid.

34. Memo on Governor Smith's despatch of 17th Oct., 1921.

35. See e.g. the Marriage Ordinance, 1902, the Asiatics Marriage Ordinance, 1929 and the Native Authority Rules.

36. See Comments during the proceedings of the 1936 conference of missions and government officials, supra.

37. See Mpozera v. Mwachuma, H.C. Civ. App. (LC) case no. 10 of 1965. See also David Gray, "Marriage and Problems of Internal Conflict in Malawi", p. 82.

38. 1964-66 ALR (Mal.), p. 556.

39. Chap. 8.

40. P. 566.

41. See e.g. Ncheu Dist. NA Registration of Marriage Rules, 1935, MNA NCN1/17/8.

42. Hyde v. Hyde.

43. Supra, note 41.

44. Native Authority Rules had to be forwarded to the relevant Provincial Commissioner who in turn forwarded them to the Chief Secretary for the necessary Governor's approval. In many cases, the various points of policy tended to be decided at the PC's level.

45. DC Ncheu to PC (N.P.), 31st Aug., 1936, MNA NCN1/17/18.

46. DC Mzimba to PC (N.P.), 18th Feb., 1937, MNA NN1/21/17.

47. DC Chintheche to PC (N.P.), 18th May, 1943, MNA NN1/21/17. See also Rules submitted by NA's Kandumbi and Chikulamaembe (in what is now Rumphi District), Asst. DC Mzimba to DC Mzimba, 22nd April, 1941, MNA NN1/21/20.

48. Chief Sec. to PC (N.P.), 22nd July, 1940, MNA NN1/21/20.

49. Supra.

50. MNA NCK3/5/2. The functions of the NA were in their administrative and not judicial capacities.

51. PC (N.P.) to DC Nkhota-Kota, 14th Sept., 1937, MNA NCK3/5/2.

52. MNA NS21/12/2.

53. MNA NN1/21/18.

54. Senior PC (Bt.) to the Chief Sec., 18th Nov., 1937, MNA NN1/21/16.

55. The payment of a chicken to the village headman was not in the Rules, but might have been paid as a courtesy to the village headman through whom some people approached the Native Authority.

56. 18th March, 1937, MNA NCN1/17/8. Also Mr Gregory of the Church of Christ (Mlangeni) to DC Ncheu, 5th June, 1936, MNA NCN1/17/18; and Rev. R. Pemberton to DC Ncheu, 4th Jan., 1939, MNA NCN1/17/8.

57. Supra.

58. Source : Annual Report of the Social and Economic Progress of the People of Nyasaland (London : HMS St. Off., 1935).

59. Source : Annual Report of the Ministry of Justice Including the Registrar-General's Department (Zomba : Govt. Print., 1964).

60. Ibid (1975 vol.).

61. Colonial Annual Report (London : HMSO~~St. Off.~~, 1947).

62. See relevant discussions in Chap. 6.

63. This seems to have been the case, for example, in Kandoje v. Mtengerenji (1964-66) ALR Mal. 558, where the respondent would seem to have been under the belief that the marriage solemnised in accordance with the provisions of the 1923 statute bound her husband to monogamy. For a detailed discussion see Chaps. 8 and 9 below.

64. Supra, Chap. 2.

65. P. 178. See also Brown Elias v. Beatrice Magaisa (supra) and other cases cited in Chap. 2.

66. See citations in Chap. 2.

67. Op. cit., p. 4. See also remarks of the High Court in Ngongola v. Kabambe (1964-66) ALR Mal. 139.

68. No. 102 of 1981.

69. See Kamcaca v. Nkhota (1966-68) ALR Mal. 509. See also opinion of the NTAC in Black Nyoka v. Nyadani, NTAC civ. app. case no. 63 of 1980. In this case, a marriage had been contracted by two Malawians in Zimbabwe in accordance with Malawi customary law. The court had no doubt about its jurisdiction over the case, but it was stated that had there been a slight hint of any foreign element in the marriage, the case would have had to be transferred to the High Court.

70. The ordered payment of MK270 in compensation was increased to MK1,000. The other orders of the lower court were not varied.

71. Judgement transcript.

72. Op. cit.

73. Supra, Chap. 2.

74. "Chinkhoswe" describes the whole series of transactions including the appointment of and the actual agreement between ankhoswe.

75. See Ali v. Mhango. Also see Chap. 2.

76. See Ibik's Restatement, vol. 3, where it is shown that the handing over of the woman to the man for cohabitation is the most common way of completing marriage arrangements.

77. Compare, for example, with some of the customary laws in Kenya : Case v. Ruguru [1970] E.A.R., p. 55 (Embu Customs) and Mwaguru v. Mumbi [1967] E.A.R., p. 639 (Kikuyu).

78. NTAC civ. app. case no. 34 of 1979.

79. Judgement transcript.

80. See Chap. 2 above.

81. See Karonga Traditional Appeal Court judgement in Mhango v. Mtawale, civ. case no. 290 of 1970 and 84 of 1971, discussed by Gray, op. cit., p. 78.

82. See relevant discussions in Chaps. 3 and 4 above.

83. NA M'Mbelwa civ. case no. 77 of 1934, MNA NNM1/17/4. See also discussion on rights over children, Chap. 3 above.

84. The cow given to the Chavulas on the marriage of the second daughter would seem to have been treated as a courtesy.

85. Transcript of judgement of the DC Mzimba, 28th Sept., 1934, MNA NNM1/17/4.

86. See relevant discussion in Chap. 3 above.

87. See Joshua v. Joshua, NTAC civ. app. case no. 99 of 1981. Also High Court case of Ngongola v. Kabambe (above).

88. Supra.

89. See the remarks of Phillips in Survey, p. 213.

90. See the remarks of Phillips, op. cit., p. 214.

CHAPTER EIGHT

AFRICAN MARRIAGES AND THE QUESTION OF MONOGAMY

1. Introduction

The superimposition of rules of monogamy upon indigenous systems of marriage constitutes one of the most important features in the development of the law of marriage in Malawi. As already noted, in the traditional African societies, the ability of any man to marry more than one wife was not limited by any legal, social or moral principle. How this position has been affected by the general process of social change has already been considered.[1] The main aim of this chapter is to discuss how, and to what extent, the traditional position has been affected by colonial marriage laws and policy.

The notion of monogamy as the ideal form of marriage was first introduced into African communities through the agency of Christian missionaries. Monogamy was among the main institutions of Western Christianity which the missionaries impressed upon those Africans towards whom their evangelical and "civilising" activities were directed. The view that polygyny[2] is incompatible with both Christianity and civilised standards of life in general was almost a universal one among Christian missions in Africa. The differences and controversies which arose amongst the missions or missionaries related almost entirely to the question of what methods should be adopted or supported in the implementation of this belief.[3]

One aspect of this question concerned policies regarding the admission of polygynists or their spouses to church member-

ship. This was largely a purely ecclesiastical matter, though, from the missionary viewpoint, the most important one. With the introduction of secular legislation, the missionaries were presented with a new set of problems. Should secular law be utilised to reinforce the Christian teaching against polygyny? Should secular law attach any significance to the religious view of a marriage by Christian rites as a monogamous one? As already shown, these latter questions provided one of the central issues surrounding the enactment of the Native Marriage (Christian Rites) Registration Ordinance, 1923. The questions continued to form a central issue in the subsequent history of this Ordinance.

It was through the British Central Africa Marriage Ordinance, 1902, that monogamy as a legal institution was first introduced among the African population. One important aspect of this Ordinance was the provision of legal penalties against those who violated the principles of monogamy as defined in the Ordinance. The enforcement of these provisions against members of the African population was, and continues to be a focus of discussion regarding the operation of the relevant statute. Why were these provisions included in the Ordinance, and what has been the basis of official attitude towards their enforcement? Did the colonial administration and the missionaries seek to work hand in hand to eradicate polygyny?[4]

As must be clear from the discussion in one of the previous chapters,[5] the colonial administration never actively worked towards the abolition of polygyny. However, this is not to deny that colonial rule engendered a less favourable climate

for the practice of polygyny.[6] It is clear both from the provisions of the 1902 Ordinance and from official statements that colonial officials viewed the practice of polygyny as representative of inferior systems of marriage and as incompatible with civilised ways of life.[7] The officials assumed that, through the influence of Christianity and European civilisation, polygyny would eventually give way to monogamy. Polygyny was nevertheless not regarded as being so repugnant or so objectionable as to warrant direct intervention by the Government.[8]

The extension of the policy of non-interference with African traditional social systems to the case of African Christians was an issue over which the Government had sharp disagreements with some of the missions. It is clear that disagreements between administrative officials and the missionaries seldom reflected any real differences in the way they viewed such aspects of customary marriage as polygyny. Their differences arose largely from their different understanding of the nature and potential of African society and of the individual African. The attitudes of administrative officials towards African communities not only led to disagreements with the missionaries, but also influenced official responses to the implementation of the penal provisions of the 1902 Ordinance in cases of violations by Africans. The widely-acknowledged ineffectiveness of these penal provisions cannot be explained simply in terms of the inherent incompatibility of African customs and the Western institution of monogamy. Attitudes of administrative officials also played a crucial role.

It is possible, on the basis of official reluctance to enforce the penal provisions, to underestimate the practical impact of marriage under the Marriage Ordinance on the legal position of members of the indigenous African community. The principle of monogamy under the Marriage Ordinance, 1902, did not only involve criminal penalties, but it also made it legally impossible for those to whom the Ordinance applied to contract more than one marriage at a time. Thus, it will be seen that the provisions of the Marriage Ordinance provided - as they still do - an effective avenue to monogamy as far as the rights of the parties vis-a-vis each other were concerned. It is also possible to exaggerate the resilience of traditional customary law if the institution of polygyny is seen merely in terms of the ability to contract valid marriages with more than one wife simultaneously. It is equally important to ask whether, and if so, to what extent, the law is changing and is beginning to recognise and even safeguard the wishes of women who are parties to potentially polygynous marriages. This question has already been examined elsewhere in the study.[9] In this chapter, it will only be examined in relation to the provisions of the existing statutes.

This chapter falls into three main parts. It begins with a brief general review of missionary policies and African reaction with regard to the admission of polygynists into church membership. This provides the necessary background to the discussion of issues arising from the Marriage Ordinance, 1902, and the 1923 Ordinance; which respectively constitute the second and third parts of the chapter.

2. Christianity, Monogamy and African Custom

The polygynous character of indigenous African customary marriage has, in the words of Arthur Phillips, constituted "the central point of conflict between Christian marriage and African custom".[10] It may be added that the question of polygyny has perhaps received more attention, and given rise to more rancour, in missionary circles than any other question arising from the encounter between Christianity and indigenous African cultures. Polygyny constituted one of the main obstacles to the spread of Christianity among African communities.

a) Church Law and Practice

Polygyny was an obstacle because the missionaries had made adherence to monogamy a *sine quo non* for the admission of Africans into full church membership. As Eugene Hillman put it, adherence to monogamy had been elevated in importance to the "level of ... faith itself" as a condition for the admission of Africans "into Christian fellowship".[11] Practically all the missions refused to baptise any man who had more than one wife. A polygynous convert seeking baptism was required to put away all but one wife. A baptised man who relapsed into polygyny was excommunicated. In many cases, wives of a polygynist were also denied baptism unless they renounced their marriages. Furthermore, children of unbaptised parents were generally not eligible for baptism.[12]

The requirement that a converted polygynist should give up his additional wives before he could be baptised was from the beginning one of the most controversial issues and one that has

attracted much criticism. The application of the rule tended to undermine another vital teaching of the church, namely the indissolubility of marriage.[13] Of course, some missions (most notably the Catholics) regarded all subsequent marriages as void ab initio. On conversion only the first marriage was treated as valid.[14] Convenient as this view was for purposes of doctrinal consistency, it failed to meet another serious criticism, namely that the application of the rule in question involved much deprivation, suffering, betrayal and ill-feelings among those involved. As Hillman asks:

> ....What sort of public image of the Christian God is projected by this application of moral principles in societies which traditionally regard polygamy as a preferential form of marriage? Is the proclamation of the Gospel supposed to threaten family stability, disrupt social covenants, and even separate mothers from their children? Where, in this approach is the patient pedagogy of Yahweh, the God of the Old Testament who is the Father of our Lord Jesus Christ?[15]

John Colenso, the celebrated first Anglican Bishop of Natal (South Africa), asked similar questions when he confronted the Anglican establishment over the issue in mid-19th century. While upholding the principle of monogamy as the highest form of Christian marriage,[16] he vigorously attacked the rule which called upon a converted polygynist to give up his additional wives. He observed:

> ...the practice of requiring a man, who may have more than one wife at the time of his conversion, to put away all but one before he can be received to Christian Baptism, is unwarranted by the Scriptures, unsanctioned by Apostolic example or authority, condemned by common reason and sense of right and altogether unjustifiable.[17]

In an attempt to ameliorate the harshness of the relevant rule, it was sometimes insisted that the converted polygynist should make provision for the discarded wives before he could be baptised. Even assuming that all that the discarded wife would have needed was provision for her material well-being, it is difficult to see how the missionaries expected this to be effectively done. It would have been possible in an industrialised and predominantly cash economy. In the peasant and subsistence economies with which the missionaries were dealing, nearly all the services rendered by a man to his wives (and vice versa) were of a personal nature, including the preparation of gardens, the mending and repairing of houses, stores etc., protection from physical, as well as supernatural, dangers; advocacy during litigation and so forth. It was clearly not very practical to expect a man to provide such services to women whom he had effectively divorced.

Despite strong criticisms and African resistance,[18] missionary establishments in Africa have to this day not abandoned this approach to the question of converted polygynists. Very few, mostly smaller, missions have made some attempts to abandon this approach. The most notable examples are the Evangelical Lutheran Church in Liberia and other smaller Protestant missions in West Africa.[19]

The other difficult question for the missionaries concerned was the baptism of wives of a polygynist. The pressure to depart from the rule which denied baptism to wives of polygynists tended to be greater. This was largely because women were perceived to be victims, rather than active perpetrators, of custom.

Because of this, for example, some Anglican missions in West Africa advocated the baptism of such women "if believed to be true converts".[20] Their counterparts in Central Africa had some qualms about such baptisms. They either baptised such women grudgingly or refused to baptise them altogether. Thus, Bishop Smythies of the Universities Mission to Central Africa (Zanzibar) once wrote:

> ....We have baptised the wives of polygamists, but I have not felt satisfied that it was right without an effort ... to prevent what seems an invasion of the purity of the church.

He went on:

> ....I knew it was hard ... and against the customs of the country for a woman to take any action, but it was for the church to establish new customs ....[21]

Indeed, the Anglican church in Nyasaland has alternately rejected and accepted the baptism of such women.[22]

Although Christian missions in Africa were so ready to exclude polygynists from church membership, it is to this day an open theological question whether or not monogamy is essential to Christianity or is merely an aspect of Western civilisation.[23] There is a respectable school of thought which holds that monogamy, together with many other notions about Christian marriage, are not dictated by the scriptures, but derive from Western cultural traditions (in particular Greco-Roman pagan customs).[24] By insisting on the renunciation of polygyny as a condition for church membership, the missionaries were, according to this view, merely guilty of cultural arrogance, cultural imperialism,

or European ethnocentricism. The missionaries, the argument goes, had assumed the universality of Western European cultural values and that Christianity could exist only within the context of these values. Hillman, a strong proponent of this view, writes:

> Missionaries, ill-acquainted with the findings of the social sciences and burdened with the cultural pride of their own Western world, have been notoriously obtuse in their approaches to the peoples of the larger world. Many of them, so like the "Judaizers" in the very first period of the church's missionary history, have become Christianity's self-assured "Westernizers". For them, Euro-American social institutions and cultural values were inseparable from Christianity; so their evangelical mission was very much a matter of what Jomo Kenyatta refers to, with appropriate scorn, as "civilizing and uplifting poor savages". Where indigenous social structures and cultural patterns were not condemned, they were gradually supplanted or merely ignored. This at any rate, was the usual procedure. For the usual type of missionary imagined that what was good for the peoples of the West would also be good for the peoples elsewhere; so these foreigners, as Stephen Neil says, "intended to reproduce as nearly as possible a replica of the society in which they grew up", and the missionaries' insistence on the monogamy rule is "the classic example of the perils involved in the transference of the principles of one society which has been developed on very different principles".[25]

The view that monogamy is not essential to Christianity is not very new. It has a respectable pedigree, traceable to the writings of St. Augustine of Hippo (A.D. 354-430). It is based mainly on the examples of Old Testament patriarchs who practised polygyny and yet are said to have found favour with God, and on the absence of direct condemnation of polygyny in the New Testament.[26] This view never had much practical use in relation to the converts of the Western world. There had been some isolated exceptions. The notorious matrimonial affairs of Henry VIII and Phillip of Hesse during the 16th Century in England and Germany, for example, became foci of theological debates about

the compatibility of polygyny with Christianity.[27] There had also been actual attempts to practise polygyny at a collective scale. In the 16th Century, the Anabaptists of Münster in Germany, and three centuries later, the Mormons of Utah in the United States, embraced the above interpretation of the scriptures and made the practice of polygyny an integral part of their religion. The Münsterite "revolution" was foiled by Catholic and Lutheran armed intervention.[28] The upsurge of polygyny among the Mormons was checked by threats of military intervention by Federal Forces.[29]

In Africa, discussions regarding whether or not monogamy is essential to Christianity have constituted an integral part of attempts at the indigenisation of the Christian church. Over the years, and with the growth in numbers of African clergy, a new openness has emerged among church authorities in their attitudes towards polygyny. It is no longer usual to cast polygyny in simplistic terms of sexual excess and moral inferiority, as most early missionaries did. Nor is African resistance to the principle of monogamy regarded merely as evidence of the backwardness of African converts and as a measure of the size of the church's task in establishing new values. Increasingly, the question of polygyny is viewed in the context of the adaptation of the Christian religion to African culture.[30] It is mainly in this context that an increasing number of theologians have come to question the orthodox approach, which assumed that monogamy is an essential element of Christianity. However, this change of attitude has seldom been translated into actual church policy. The unconditional accep-

tance or even encouragement of polygyny has been a characteristic of some independent African churches. The policies of these churches constitute an aspect of African resistance or reaction, rather than an example of the emergence of any liberal thought within the missionary movement.

b) African Reaction

Individual Africans reacted in a variety of ways to the missionary demand that they should give up polygyny in order to be admitted to full church membership. Some Africans did abandon their polygynous marriages in order to lead full Christian lives. It would appear that more women than men were willing to do so. As one missionary once complained:

> ....Polygamy remains a great stumbling-block in the way of our work. Few men of any standing are willing to give it up and be baptized, hence [we have] more women than men.[31]

Many tried to lead monogamous lives, but subsequently relapsed. Countless Africans refused outright to give up polygyny. The missionaries almost invariably viewed the latter as being morally or temperamentally weak. High-minded, equitable and conscientious grounds upon which Africans based their decisions were ignored. One missionary noted a typical occurrence, as follows:

> ....It is a matter of perplexity and difficulty to find out the truth about the lives of those men who have married several wives. Many of our men hearers had to be rejected for catechumanate, principally in consequence of their unwillingness to put away the several wives for one. Makelani, one of the most brilliant and attentive of the men had a struggle with himself, but he finally gave way, and said he could not turn away his wives after having married them for so many years. They had hoed his gardens and cooked food for him. Who would protect them now [that] they were old?[32]

Some polygynous marriages came about only as a means by which surviving relatives of a deceased man could provide shelter and succour to aged widows. Yet, the men involved in these marriages attracted even more vehement denunciations from the missionaries.[33]

To some Africans, adherence to monogamy was not a simple matter of giving up extra wives. Monogamy would upset traditional roles, frustrate important social expectations and threaten an intricate network of relationships. These considerations had to be taken into account by individual Africans confronted with the choice between baptism and polygyny. Linden's account of the experiences of the Catholic missionaries with the Ngoni paramount, Kachindamoto, at Mua Mission [Nyasaland], highlights this aspect of African response admirably. Throughout his chieftaincy, Abraham Kachindamoto was a man torn between Christianity and tradition. In 1907, he entered the catechumenate with the Catholic mission with a view to baptism. This was strongly opposed by his traditional adviser (nduna). Linden explains:

> The principal role of the Ngoni paramount was to provide a focus for life in his territory. A constant supply of food was expected to be on hand at the inkosini[34] for visitors. Quite apart from the socio-religious aspects of royal polygamy, simple functions such as this modest but unfailing hospitality depended on the chief's polygamous wives who cooked for, and served, the visitors. The older nduna rightly feared that the missionaries' insistence on monogamy as a condition for baptism risked undermining the Ngoni way of life. He warned the young chief that disrespect for the customs of his ancestors would result in disrespect for the chief himself.

The explanation continues:

> ....The social structure of an Ngoni village was so intimately bound up with the institution of polygamy, even down to the arrangement of huts, that the missionaries' insistence that all but one wife should be renounced was unlikely to be heeded. The priests were not just asking, as they thought, for a personal conversion but for the transformation of a society that had survived for almost a century. Some Ngoni's did choose one of their wives, supported the rest, and submitted to a church marriage, but usually they relapsed. The majority remained polygamous and perpetual catechumens.

As for Abraham Kachindamoto:

> ...the catechumate lasted from 1907 until his death on 2 December 1931. He had fifteen wives, attended mass regularly, and always summoned a Catholic catechist to accompany him where he went shooting, in case he was wounded mortally in a hunting accident and died without baptism.[35]

It was a measure of the missionary success that many Africans, like Kachindamoto, continued to worship as Christians even after being denied full church membership. Africans could simply have reverted to their traditional forms of worship; or worse still from the missionary viewpoint, they could have embraced Islam under which polygyny was allowed.

The missionaries were understandably apprehensive about Islam. Its apparent simplicity and what the missionaries saw as its easy terms would have been more appealing to Africans than the Christianity preached by the missions. As one missionary put it in describing the teachers of islam:

> ....They, too, teach the existence of a God, but the paradise they promise has material joys to be understood, and here on earth they allow many indulgences, including plurality of wives.[36]

That Africans might indeed have found Islam a preferable religion because of its tolerance of polygyny was indicated by one

Yao writer, in the following words:

> ....Speaking of God, I do not see any difference between Mohammedanism and Christianity except the outside ceremonies. After all, do we not all pray to God? Does it then matter much which great prophet we follow? There is one thing in Mohammedan law which is better and that is plural wives, and I think that always Africans will prefer it thus.[37]

African opposition to the policies of the missionaries regarding polygyny was most forcefully expressed through the medium of independent African churches.[38] In contrast to European missions, most of these churches baptised their converts immediately upon confession. In particular, they accepted or even encouraged polygyny. Theological, nationalistic and even sociological grounds were canvassed in support of this approach. In general, these grounds underlined a desire on the part of the founders of these churches to adapt Christianity to the conditions and traditions of the African people. The constitution of The Last Church of God and His Christ, founded by a Tonga of Northern Nyasaland, Jordan Msumwa, in 1925, is a clear example of the conceptual sophistication attained by some founders of these churches. The constitution justified the admission of polygynists in the following terms:

> ...man should live according to his religion and not merely be a nominal member of a church whose rules he cannot carry out. Like other countries, Africa is in need of a church that would correspond with her God-given customs and manners. We believe the commission of the Christian church to Africa was to impart Christ and education in such a way as to fit in with the manners and customs of the people and not that it should impose on the Africans the unnecessary and impracticable methods of European countries, such as having one wife ... which have no biblical authority.
>
> We believe that the immoralities now prevailing among us are the direct result of the unnatural position into

> which the African has been driven coupled by the false and misleading theory that outside one's own church beliefs, others can do no good. We believe in the fatherhood of God and brotherhood of man regardless of colour and creed and that the African religion with its traditions, laws and customs was instituted by Him so that the African may realize Him by their observance.
>
> The aim of this church is the uplifting of the African ... as well as winning those who are considered bad because of polygamy and drink and are [said to have no] latent qualities for doing good any more ... and [to] restore an atmosphere of a deep ... naturally religious life as prevailed in the day of long ago.[39]

As is clear from the foregoing quotation, one of the many and complex aspects of these churches was to assert the compatibility of African traditions with Christianity. European missionaries in general proceeded on the premise that African traditional beliefs, customs and institutions were wholly incompatible with Christianity. They had hoped to transform African society by eradicating or ignoring the various aspects of traditional life. Sometimes, they paid lip-service to the creation of a genuinely indigenous church, but, as McCracken points out, these missionaries "had sufficient confidence in the virtues of Western society to reject any major compromise with habits or beliefs which ran counter to their own".[40] Thus, their main way of operation was, as one missionary put it, "simply to cut the Gordian knot and make a clean sweep altogether".[41] Leaders of the independent African churches were opposed to this method of operation. They regarded it as arbitrary and as an aspersion on themselves, their polygynous parents and ancestors.

The missionaries not only offered the door to spiritual salvation, but also provided what soon became the most effective means of social and material advancement. However, they denied

these means to Africans who failed to comply with their dictates. Education and employment opportunities offered by the missionaries were thus only made available to a small though growing elite whose isolation from the rest of traditional communities the missionaries seemed to welcome. Leaders of independent African churches were themselves usually part of this small elite. One main aim of these churches was to open the doors of spiritual salvation and material advancement to a wider African audience. They hoped to do so partly by pulling down what they saw as arbitrary and unnecessary barriers. Monogamy was one of those barriers.

Of course, the policies of the relevant independent churches towards polygyny were based on the view that polygyny was not condemned by the scriptures. The condemnation of polygyny by the missionaries was seen merely as an example of what today may be called cultural imperialism. The missionaries were seen to be deliberately corrupting the word of God in order to despise African traditional customs. What they were doing, advised Charles Domingo (a prominent separatist), could not be called "Christendom", but "Europeandom".[42] Africans were often equally perplexed at what they saw as the absence of Christian charity and compassion on the part of the missionaries when dealing with African congregations. Charles Chinula, for example, founded the Eklesia Lanangwa (Church of Freedom) in 1934 as a direct counter to the rigid, impersonal and legalistic approach of the Livingstonia Mission towards such matters as polygyny. Chinula himself had been suspended from the pastorate on charges of adultery. For four years he had

"worked devotedly to demonstrate his sincere repentance ..." but the Livingstonia Presbytery refused to readmit him.[43] As a result, he left the mission and founded his own church whose theology emphasised the transforming power of repentance and Christ's infinite forgiveness.[44] Chinula is today best known for the beautiful Tumbuka hymns he composed. These hymns too bear the imprint of Chinula's theology. They underline Christ's infinite love for sinful and an undeserving humankind. According to Africans like Chinula, European missionaries had neglected this spirit of Christianity and emphasised such minor or even unnecessary lessons as those relating to polygyny, drumming, dancing and beer-drinking.

There was also a political, nationalistic dimension to independent African churches. Assertions of African cultural traditions in some cases served to express African rejection of European foreign rule. Leaders of some independent African churches enthralled their audiences by their denounciations of Government taxes and colonial rule in general.[45] It may be noted in this respect that some of these leaders were also much involved in African secular movements such as the Native Associations.[46] Furthermore, with the emergence of more effective African political organisations, independent African churches became less important, thus underlining their originally political orientations. Rotberg puts the matter in somewhat exaggerated terms as follows:

> Where the reaction to colonialism could not be expressed directly, or where healthy protest failed to bring any appreciable amelioration, the conquered people cloaked their rejection of colonialism in religious garb. Where-

> ever there were no other outlets, Africans formed independent religious bodies to exploit or to remedy their grievances. In [both Northern Rhodesia and] Nyasaland a succession of indigenous quasi-Christian groups played upon this theme from the first years of the twentieth century. They expressed separatist or Chiliastic ideas, subverted the tenets of established mission churches, defied the colonial governments, and acted as a major channel of nationalistic sentiment.[47]

It would be wrong to suggest, as Rotberg seems to do, that independent African churches were merely disguises for political agitation. The leaders of most of these churches were committed to the spread of the Christian message, to the creation of alternative educational institutions, and in general to the social and even material advancement of the African people. It was perhaps only unfortunate, as Pachai points out, "that the founding fathers of Christianity in Africa came from an alien culture whose exclusiveness and righteousness they often insisted upon".[48] For in the majority of cases, again to quote Pachai:

> ...the African voice of dissent was not sounded because of its hatred of the church, rather from its love for it and regret that certain practices were irreconcilable.[49]

The question of polygyny was certainly one of those issues where reconciliation proved difficult.

3. Monogamy Under the Marriage Ordinance, 1902

As already noted in earlier chapters,[50] one of the main features of marriage celebrated under the Marriage Ordinance, 1902, was that it bound the parties thereto to the obligation of monogamy. The monogamous character of marriage under the Ordinance was indicated by a number of clauses, which will now be analysed.

Section 43 of the Ordinance provided that:

> Whoever is guilty of bigamy shall be liable to imprisonment, with or without hard labour for a period not exceeding five years.[51]

The term "bigamy" was not defined anywhere in the Ordinance. However, it may be deduced from other clauses of the Ordinance that the term was used in a rather narrow sense. The inclusion in the Ordinance of analogous, but distinct, offences shows that these offences were not regarded as falling within the ambit of "bigamy". Firstly, there was Section 44:

> Whoever, being unmarried, goes through the ceremony of marriage with a person whom he or she knows to be married to another person, shall be liable to imprisonment, with or without hard labour, for a period not exceeding five years.[52]

Then there was Section 51, which provided as follows:

> Whoever contracts a marriage under the provisions of this Ordinance, or any modification or re-enactment thereof, being at the same time married in accordance with native law or custom to any person other than the person with whom such marriage is contracted, shall be liable to imprisonment with or without hard labour for a period not exceeding five years.

Section 52 stated:

> Whoever, having contracted marriage under this Ordinance, or any modification or re-enactment thereof, during the continuance of such marriage contracts a marriage in accordance with native law or custom, shall be liable to imprisonment, with or without hard labour, for a period not exceeding five years.

The term "bigamy", as used in the Marriage Ordinance, could thus be construed as an offence committed only when the offender contracted a statutory (or non-customary) marriage with one person during the subsistence of a similar marriage with

another person. The provisions of the Marriage Ordinance were formulated at a time when it was widely held that a polygynous or potentially polygynous marriage could not afford a foundation for the prosecution of bigamy.[53] The view underlined the now discredited attitude towards customary-law marital unions, namely, that such unions did not constitute "marriage" so properly called.[54] The fact that customary-law marriages were potentially polygynous mainly accounted for this attitude. The Penal Code clearly departed from this narrow definition of bigamy, although this was achieved only by utilising certain provisions of the Marriage Ordinance. What is now Section 162 of the Penal Code stated that a person committed the offence of bigamy:

> ...who having a husband or wife living, goes through a ceremony of marriage which is void by reason of its taking place during the life of such husband or wife....

Section 33(1) of the Marriage Ordinance included, in its delineation of invalid marriages, a marriage:

> ...where either of the parties thereto at the time of the celebration of such marriage is married by native law or custom to any person other than the person with whom such marriage is had.

Thus, Section "162" of the Penal Code, as read together with Section 33(1) of the Marriage Ordinance, extended the definition of bigamy to include the offence described under Section 51 (above) of the Marriage Ordinance.

Since it was legally impossible for a party to a subsisting marriage under the Ordinance to contract a marriage with anyone (including ones own spouse) under customary law,[55] it can be argued that the offence of bigamy under the Penal Code

also covered the offence described under Section 52 of the Marriage Ordinance. On the other hand, however, the definition of bigamy under the Penal Code required that the second marriage should be void specifically because of a subsisting marriage to a third party. The basis of the invalidity of an intended customary marriage under Section 35 of the Marriage Ordinance was not a subsisting marriage to a third party, but simply a subsisting marriage under the Ordinance. An intended customary marriage would still be invalid even if the marriage was being had with the very person who was the party to the subsisting Ordinance Marriage. Although there is no judicial authority on the point, owing to the fact that there have hardly been any prosecutions based on the above provisions, it may be safe to assume that the principles governing the offence of bigamy under the Penal Code equally applied to the offences under the Marriage Ordinance. Most notably, defendants charged with these latter offences should have been able to utilise the defence of presumption of death after seven years absence where the facts warranted such a presumption.[56]

The provisions of the Marriage Ordinance just outlined also applied to marriages contracted under the Christian Native Marriage Ordinance, 1912.[57] Indeed, it was mainly with reference to marriages under this Ordinance and, later, to marriages under the Native Marriage (Christian Rites) Registration Ordinance, 1923, rather than to marriages celebrated under the 1902 Ordinance itself, that discussions about the application of the English-law notion of monogamy to Africans were conducted.

A word of comment on Section 44 (above) is in order. The clause was obviously not intended to abolish polygyny in general. It never became part of colonial policy to do so. The phrase "the ceremony of marriage" in this Section must be interpreted to mean the ceremony of marriage under the Marriage Ordinance. Thus interpreted, it would seem that there was no offence on the part of an unmarried person who went through a ceremony of marriage under customary law with a person already married to a third party under the Ordinance. The intended marriage would of course be void, and the other party to it would be liable to prosecution under both the Penal Code and the Marriage Ordinance.[58] Neither the Penal Code nor the Marriage Ordinance, however, would seem to have provided any basis for the prosecution of an unmarried person who went through a customary-law marriage ceremony with someone who was already married to a third party under the Ordinance. Whether this was intended or was merely an omission on the part of the draftsman is difficult to tell. If intentional, it would seem to show the care taken by the relevant policy makers that the burdens imposed by the Ordinance applied only to those people who contracted or intended to contract marriage under the Ordinance. It would have been unpleasant, even unconscionable, to punish an African person for going through a customary-law marriage ceremony just because the other party to the intended marriage was already married under the Ordinance. The former may even have been someone who had no knowledge of the provisions of, or the existence of a marriage under, the Marriage Ordinance.[59]

Considering that the practice of polygyny among Africans was still tolerated, it is appropriate to ask why it was thought

necessary to extend the application of the above penal provisions to those Africans who decided to solemnise their marriages under the Ordinance. The mere fact that an African contracted marriage under the Marriage Ordinance could not have changed what appears to have been the view of the administration that polygyny as practised by Africans was not socially repugnant.[60] Clearly, if there was any social advantage in penalising violations of the principle of monogamy, there could be no compelling reason to confine the relevant penalties only to Africans married under the Marriage Ordinance. It is equally clear, however, that colonial legislative activities in this field were not aimed at the introduction or improvement of social institutions beneficial to the general African public. A combination of social snobbery and an optimistic view of the transforming effect of European civilisation on African social attitudes were mainly responsible for the inclusion of the relevant penal provisions. It would seem, as must be apparent from earlier discussions,[61] that the need to subject Africans married under the Marriage Ordinance to the relevant penalties arose, firstly, from the need to avoid the subversion of the institution of marriage as understood under Western European cultural traditions. It was feared that such an institution of marriage would be undermined if Africans were "left free to slide in and out of monogamy at will".[62] The relevant provisions were not inserted to help the missionaries in the efforts to eradicate polygyny.[63] The missionary presence was undoubtedly taken into account by the legislators during the preparation of the Ordinance.

As already noted, it was mainly with Christian converts in mind that the application of the provisions of the Ordinance was extended to the indigenous African population.[64] There was no evidence, however, of any intention on the part of the legislators to strengthen the hand of the missionaries in their dealings with their African converts. The local colonial administration was, of course, enjoined, to the utmost of its power, "to promote religion and education among the native inhabitants".[65] This, however, did not mean, or at least was never interpreted to mean, that the administration should take sides with the missions and actively participate in combating what the missions regarded as pagan customs. It would seen that the authors of the Marriage Ordinance merely assumed that Africans converted to Christianity would want their family relationships to be governed by the imported law with all its implications. A related assumption was that Africans seeking to contract marriage in accordance with imported European formularies would be doing so with the desire to abandon their indigenous marriage practices, including polygyny. This latter assumption underlined the belief that indigenous African marriage systems were incompatible with "civilisation", and that the supposedly civilised Africans could not subscribe to such practices.

4. Official Attitudes and the Implementation of the Penal Provisions

The actual operation of the Marriage Ordinance was (and the operation of the Marriage Act today continues to be) characterised by frequent violations in practice of the penal provisions outlined above.

It may be noted in parenthesis that some of the men who have broken the law of monogamy have done so without any desire of reverting to polygyny. Sometimes, the intention of the men has been to abandon their first wives and they have merely failed to take the appropriate steps to effect valid divorces.

The attitude of the government officials within the Protectorate put a seal on the total ineffectiveness of these clauses. A memorandum issued by the Attorney-General, E. st. J. Jackson, in 1919 would seem to have been the furthest the colonial administration had ever gone in giving any hint of a willingness to implement the penal provisions of the Ordinance against Africans. Jackson's memorandum advised, inter alia, that:

> ....Persons who have reason to believe that a criminal offence against the Marriage Ordinance, 1902, or the Christian Native Marriage Ordinance, 1912, has been committed should give information to the District Resident who will hold a preliminary enquiry with a view of committing the accused for trial by the High Court should evidence justify that course. The fact that jurisdiction under both those Ordinances is reserved to the High Court ... does not obviate the necessity of a preliminary enquiry by a magistrate in the case of a criminal offence.[66]

The memorandum had been prompted by a letter of Donald Fraser of the Livingstonia Mission to the Registrar-General, in which the former had observed that the lack of prosecutions had encouraged flagrant violations and suggested that one or two demonstrative prosecutions would deter further violations.[67] Fraser had also pointed out that magistrates in the districts had been refusing to entertain complaints about violations of the Ordinance for want of jurisdiction. Of course, it was a correct view of the law that Residents (or magistrates) had no

jurisdiction over matters arising from the Marriage Ordinance.[68] However, there was something more behind the attitude of district government officials than the mere technical point about jurisdiction. Indeed, as was stated in the above memorandum, the mere want of jurisdiction need not have prevented the district officers from transmitting (and some did indeed transmit) information relating to violations of the law to the relevant officials.[69] However, central government officials barely concealed their opposition to prosecutions based on the provisions of the Marriage Ordinance. Jackson's memorandum must be seen rather as merely an attempt to clarify the theoretical legal position than as an indication of any resolve on the part of the Government to implement the penal clauses of the Ordinance.

To some officials, there was something fundamentally wrong in those measures of the Ordinance which made it a criminal offence to take subsequent wives under customary law while already married under the Ordinance. The obvious implication in the punishment of anyone for contracting a customary marriage during the subsistence of an Ordinance marriage was that the two types of marriage represented one and the same institution. Even during the late years of colonialism, few European administrators could have subscribed to any idea of parity of status between traditional African marriage and marriage under the imported law.

Thus, the objection to the relevant measures was that customary marriages fell too far short of "proper marriages" to provide adequate bases for criminal prosecutions. The remarks of T.L. Moggridge in 1919, then Resident for Mzimba District,

are typical of this attitude. In response to Fraser's remarks about the lack of prosecutions, Moggridge wrote:

> ....If a native so charged were advised by counsel (and he should be if prosecuted by a European), I should think he would take the line that the second marriage (the native one) was no marriage at all. If he likes to take unto himself a concubine and also likes to give [the] said concubine's parents a present of cattle or money, is he doing anything that cannot be paralleled in thousands of legally immune households in St. John's Wood and elsewhere? Native marriage is so slight a bond that to convict him would go near to making any infidelity by a married man a matter for five years - a result which might well give an English Judge pause.[70]

Moggridge was clearly not thinking only in terms of actual concubinage. He went on to state as follows:

> ....Of course the taking of the woman and the payment of the dowry constitutes a native marriage and you may fairly describe my proposed defence as a quibble. I wonder if it wouldn't have a good chance of succeeding though. If it did I should think that in this case the quibble was no bad thing, since the charge itself rests on the false assumption that two wholly different things are similar and equivalent.[71]

It is very doubtful whether the above argument could have stood up to judicial scrutiny. Although European judges were likely to share Moggridge's view about the nature of customary marriage, they could not have disregarded the express and unequivocal intention of the relevant statutory clauses. It may also be observed that the whole tenor of the Marriage Ordinance was characterised by the idea that customary marriages were inferior and representative of a lower state of civilisation. It was therefore rather ironical that this very idea should be utilised to impede the full operation of the clauses of the Ordinance.

More generally, opposition to the enforcement of the penal provisions of the Ordinance underlined basic doubts among administrative officers about African readiness for the type of social relationships defined by the Marriage Ordinance. Despite the introduction of Christianity and Western education by the missionaries, most administrative officers believed that generally, Africans were socially, mentally and morally far too backward to understand or appreciate the Western concepts of marriage.

This attitude was not confined to marriage-law issues, but manifested itself in various spheres of colonial rule. From the early days of Harry Johnston[72] to the time that the Federation of Rhodesia and Nyasaland was instituted in 1953,[73] Africans were more or less viewed as children, capable of little else apart from acting as a reservoir of labour for the growing European economy. Professions of Christianity or achievements in formal education on the part of many Africans were viewed with scepticism. Some of the main differences between government officials and the missionaries, more specifically, the Scottish misionaries, arose from the different ways in which they viewed the African people. Writing about a quarrel between the Blantyre Mission of the Church of Scotland and the British Central Africa Administration between 1890 and 1905, the Rev. Andrew Ross makes the following observation about the missionaries involved:

> ....D.C. Scott, Hetherwick and their leading associates saw Africans as people .... They believed individual Africans to be capable of absorbing Western culture, which was not to be left for their far-distant descen-

> dants. They did not just speak and write these things, but acted on them.[74]

On the basis of the actual abilities and good character of individual Africans, the Blantyre Mission constantly appealed to the European population "to act and live in a spirit of brotherhood and mutual respect with the African people".[75] These appeals, Ross observes, "seem to have had little effect on Europeans, many of whom saw Africans as 'niggers' and 'kaffirs'".[76] People like Hetherwick and Scott believed that Africans were morally and mentally capable of participating fully in the social and economic life introduced by Europeans.[77]

The stand taken by government officials on questions of marriage legislation to some extent represented a readiness on their part to assign attributes of moral and mental inferiority to Africans. A clear example of this were Nunan's observations in the Storey case.[78] It was the introduction of indirect rule in the 1930s which tended to bring some ideological respectability to the stand taken by government officials. The officials began to speak in terms of the "right" of the African people that their laws should be developed on the basis of African social institutions and beliefs rather than on the Western standards. This way of thinking, however, did not entirely replace the crude rationale based on the supposed inferiority of African societies and the African personality. At least in the experience of Nyasaland, European administrators did not fully come round to the view, attributed to the followers of indirect rule, that:

> ...customary marriage was no primitive relic of the barbaric past, but a law certainly not inferior and probably

> preferable in the context of the social conditions of [Africa] ..., to the alien form of marriage imposed ... by the Marriage Ordinances.[79]

The reluctance of European officials to punish Africans for bigamy was not motivated by any respect for the African institution of polygyny. It is possible that such reluctance resulted from a belief that it had been a mistake in the first place to allow Africans to contract marriage under the Marriage Ordinance.

5. The Proposed African Christian Marriage Bill of 1945

To make marriage celebrated in accordance with Christian rites monogamous in the legal, rather than merely ecclesiastical, sense was one of the main objectives of the missions in all their attempts to have the 1923 Ordinance repealed. This had also been the object of "Bill B" of the Blantyre conference of 1920. Unlike the Marriage Ordinance, 1902, however, "Bill B" had not prescribed any positive sanctions against those violating the principle of monogamy. Dr Hetherwick, the chief proponent of this Bill, was in fact the very person who had moved for the exclusion of any penalties from legislation dealing with African Christian marriages.[80] The only penalties included in "Bill B" were the ones which also appeared in the rival "Bill A", and these had been directed at the officiating officers or people acting in that capacity.

As already noted, the attitude of the missions towards the penal provisions was somewhat ambivalent. The delegates at the Blantyre conference of 1920 were unanimous in their condemnation of the penal provisions contained in the 1902

Ordinance. Some missions had realised, from experience, that government officials were after all reluctant to enforce the relevant provisions; others were of the view that the penalties were too harsh, considering that polygyny was socially acceptable among Africans; the majority feared that threats of criminal prosecutions would only frighten Africans away from Christian marriage.

All that the supporters of "Bill B" had wanted was a declaration of principle to the effect that marriage contracted in accordance with Christian rites would be monogamous. The relevant clause contained in "Bill B" might not have produced the desired effect. The clause would clearly have prevented a married person from celebrating a marriage with a third party under the proposed law. However, it did not specifically place any obligation on someone married under the terms of "Bill B" not to contract marriage with a third party under some other law. It is clear, however, that the supporters of "Bill B" had wanted to prohibit even such subsequent marriage. This was implicit in one of the clauses dealing with divorce. One of the two grounds for divorce specified under "Bill B" was "adultery", and this last term was defined as:

> ...sexual intercourse by a party to the marriage with any person other than the other party to the marriage.[81]

Under customary law sexual intercourse between a polygynist and any of his wives did not, of course, constitute adultery with respect to the other wife or wives. However, a man married under the law of "Bill B" could not have engaged in lawful sexual intercourse with any woman other than the party to the

marriage under the said law. It would not have mattered whether such other woman had gone through some ceremony of marriage with the man. The above definition of adultery clearly assumed that a person married under the terms of "Bill B" could not contract a lawful marriage with a third party during the subsistence of the first marriage. The supporters of "Bill B" had intended to make marriage contracted in accordance with Christian rites a monogamous affair in all respects.

The 1945 proposals, on the other hand, included a penal clause. The intention to rule out polygyny from Christian marriages was much emphasised in the 1945 proposals. Thus, significantly, the term "marriage" in the draft Bill submitted by the Committee in 1945 was specifically defined as:

> ...the voluntary union for life of one man and one woman (either or both being Christians) to the exclusion of all others....[82]

The inclusion of such a definition was clearly an improvement on the rather ineptly drafted clauses of "Bill B" of 1920. The 1945 Bill also contained a clause which would have made it an offence carrying a maximum penalty of five years for anyone who:

> ...having contracted marriage under this Ordinance, during the continuance of such marriage shall marry any other person under the provisions of this Ordinance or the Marriage Ordinance.[83]

The inclusion of this clause constituted a departure from previous missionary positions on the question of penalties. Still, it was perhaps a measure of missionary antipathy towards legal penalties that the offence in the above clause was so narrowly

defined. The offence was confined to what may have been considered as bigamy proper;[84] it excluded from the definition the taking of a subsequent spouse under customary law. Still, such taking of subsequent spouses under customary law would have been prohibited under the proposed law. The definition of "marriage" noted above was clearly intended to rule out polygyny. Further, Christians would in any case have been prevented from contracting marriage under customary law whatever the circumstances. The draft Bill contained a provision which stated that:

> No marriage by native law and custom contracted by a Christian is of any legal effect.85

The inclusion of the penalty for bigamy was much criticised by government officials, especially District Commissioners. Many suggested that the proposed penalty would come too prematurely for most Africans and would only lead to considerable misunderstanding, confusion and bitterness.[86] The missions were themselves confident that the Christian community in Nyasaland had reached that stage of development when the application of penalties for bigamy would not lead to any serious problems.

According to the missions, the African Christian community had not only increased since 1920, when the 1923 Ordinance was conceived, but had also reached a level of development which had not been attained earlier and which had therefore not been reflected in the 1923 Ordinance. In the words of Dr Murray of the Dutch Reformed Church:

> ...What we have been pleading for all along is that the status of native Christian marriage should be recognised by the state. Meantime, the native Christian community has grown not only in numbers, but also in its realisation of the meaning of Christian marriage. There are large numbers, many thousand of natives to-day, who do to a considerable extent understand the implication of a Christian marriage as a binding contract. I again deliberately make that statement. There is a big difference between the view of marriage on the part of many native Christians and on the part of raw heathens.[87]

The missions were standing on the horns of dilemma. Critics were bound to observe that, if the African convert was a genuine Christian, there was no need for legal penalties to keep him in line. If, on the other hand, the African convert was one who was fickle and liable to revert to polygyny, then it was so much the less justifiable to bind him or her to the legal obligation of monogamy. Thus, even before the proposed Bill was finally rejected entirely in 1950, the relevant penal clause was removed.[88] Indeed, as the relevant offence was so narrowly defined, it is unlikely that the clause would have had much practical use. An African who was ready to lapse into polygyny was unlikely to do so by taking a subsequent spouse under the proposed law or under the Marriage Ordinance. Such subsequent marriages were likely to take place under customary law and accordingly would not have fallen foul of the penal clause. Up to the end, however, the missions insisted that as a matter of legal principle, marriages celebrated in accordance with Christian rites were to be treated as monogamous. This in itself was more important than criminal sanctions. Indeed, the overall aim of the missions was not to criminalise polygyny, but to safeguard the monogamous character of Christian marriage.

The stand taken by most colonial administrative officers was that the development of such concepts as monogamy among Africans should be left to the influence of missionary religious teaching and not forced by legislative intervention.[89] This idea was of course embodied in the 1923 Ordinance and remained the central feature of colonial marriage legislative policy in Nyasaland. The assumption was that the missions could easily concentrate on the religious aspect of marriage and disassociate themselves from the legal implications even if the two were incompatible. Indeed, this was the position earlier advocated by the Catholic and Anglican missions. As will be shown presently, it was a policy which appeared attractively simple in theory, but which proved very difficult to implement in practice.

Theoretically, there could be little doubt that the effect of Section 3 of the 1923 Ordinance was that marriages celebrated under this Ordinance were potentially polygynous.[90] However, of course, the intention of those missions who had supported "Bill A" on which the Ordinance had been based had not been to countenance polygyny among their converts. The Catholic and Anglican missions were as fiercely opposed to polygyny as their counterparts, who had endorsed "Bill B". By supporting "Bill A", the relevant missions had only hoped to distance themselves from the legal implications of marriage and to be concerned solely with the spiritual side. Perhaps understandably, these missions did not prove very successful in this respect. The attitude of these missions towards the operation of the 1923 Ordinance became somewhat ambivalent.

While appearing to support the principle of Section 3 of the Ordinance, which entailed the application of customary law to African Christian marriages, these missions in fact expected the courts to treat these marriages differently from ordinary customary marriages. For example, Father Paradis of the White Fathers Mission, Bembeke, once observed that the courts should:

> ...not ignore the religious nature of obligations arising out of the rites and usages according to which the marriage has been celebrated.[91]

In particular, the missions expected the courts to protect women married under the 1923 Ordinance if their husbands violated the religious vows and took subsequent wives under customary law. Under the terms of Section 3, men married in accordance with Christian rites were no less entitled to practise polygyny than their compatriots married purely under customary law.[92] Yet, even Catholic and Anglican missionaries expected the courts to provide special remedies for the wives. Thus, in a letter dated 21st December, 1925, the district magistrate for Nkhota-Kota referred to the problems he was experiencing with the Anglican missionaries who, according to the report, had been insisting that, in cases of reversion to polygyny:

> ...the man should support the woman for the rest of her life, as by their church law, she is not permited to marry again.[93]

As long as disputes involving Christian Africans were handled by European magistrates, the missionaries believed that there was a better chance for Christian precepts to be taken into account. It was an entirely different matter with Native Authority courts. The general view of the missionaries was that

Native Authorities were practically all pagans and lacking in competence to deal with questions relating to Christian marriage.[94] The missionaries expected the courts to take into account the religious aspect of the marriage, as a factual background to the legal settlement of relevant disputes. The missionaries could not conscientiously ignore how, for instance, the courts treated wives who, on account of religion, refused to cohabit or remain with husbands who had lapsed into polygyny. Such refusal would entail legal consequences against which mere church discipline was no answer. The view that the church could ignore the legal aspect of marriage and concern itself solely with the religious aspect was less attainable in reality than it appeared to be in theory.

6. The Proposals to Repeal the 1923 Ordinance and African Opinion

As already noted,[95] the proposals to repeal the Native Marriage (Christian Rites) Registration Ordinance, 1923, led to widespread African participation.

In 1936, the Blantyre Native Association had urged the Government that:

> ...before passing any further legislation views or information should first be obtained from the natives themselves - either through their Native Authorities as to what the best method they think (sic) and not only from the evidence given by the representatives of [a] Christian minority, as any change to the existing Ordinance (1923) unless agreed by the natives themselves will be detrimental to native law and customs.[96]

Evidently, Africans were not prepared to watch passively while decisions were being made that would affect important aspects

of their social life. However, it would be a mistake to conclude that the encouragement of African participation was motivated simply by the altruistic desire to satisfy African interests. Both supporters and opponents of the 1923 Ordinance invoked "the African viewpoint" for their own strategic ends. To a significant extent, the Africans who participated in the debates were, so to say, "used".

The missions were only too aware of Government reluctance to repeal the 1923 Ordinance. They knew that their case would be helped if the repeal of the Ordinance was seen to be desired by the African Christian community. The Africans elected to speak for the missions were generally those who were prepared to follow the course paved by their European "counterparts". Independent a man as he was in relation to other Africans, Lewis Bandawe,[97] for example, was a model mission graduate whose orthodoxy sometimes verged on obsequiousness. He stood in sharp contrast to Charles Chinula, and the respective views of both men in the Marriage Committee formed in 1945 virtually epitomised the diversity of African opinion.

The Rev. Stephen Kundecha was one of the representatives sent by the Blantyre Mission to the 1936 conference of missionaries and government officials. At that conference, Kundecha assured the conference that African Christians wanted a change in the law on the lines proposed by the missions. He added that time had already arrived "when polygamy was out of touch with circumstances".[98] This view was echoed by Bandawe in 1945 during the first meeting of the Marriage Committee. The report of the Committee noted that Mr Bandawe had drawn "the

attention of the Committee to the injustices which were being done in the guise of native custom".[99] This remark by Bandawe was put before a large meeting of Africans in Nkhota-Kota. According to the report of the District Commissioner there, the remark was received with laughter and angry denials. The Commissioner noted:

> ....One man got up and asked, "was that Lewis Bandawe who said that?" - Perhaps already known for his unorthodox views on native customs.100

Bandawe's was by no means the only African voice in favour of the new proposals. In Karonga District, two members of the Livingstonia Mission, Aram Gondwe and Robert Gwembe Nyirenda, agreed with most of the new proposals, including the "penal clause for bigamy".[101] In supporting the removal of the jurisdiction of Native Authorities, Gondwe is reported to have put emphasis on:

> ...the inability of Native courts to appreciate the rights of women. They are inclined to regard the jealousy of a wife as something unnatural and not to be able to see she has a right to be jealous.102

In Dedza District, an ex-elder of the Dutch Reformed Church, and clerical officer at the office of the District Commissioner, Rufus Jezana, pointed out that bad African customs had to go. He noted that the punishment of bigamy was good, although he also expressed the view that a maximum of three years imprisonment would be preferable to five years.[103] Although strongly opposed to the removal of the jurisdiction of Native Authorities, the Nyasaland African Congress seemed to agree with Jezana at least on the issue of bigamy.[104]

It was partly to counter missionary claims of African support that the administration decided to seek the views of as many Africans as possible. It is useful to bear in mind that the proposed law was only to apply to Christian Africans. Significantly, however, the administration insisted that due weight had to be given even to the views of non-Christian Africans, in particular the Native Authorities and other influential Africans. The inclusion of Rev. Chinula in the 1945 Marriage Committee was obviously not fortuitous. During the deliberations of the Committee, Chinula presented a very different version of African opinion from that given by Bandawe. On his own, Chinula carried out a series of consultations with fellow Africans, and in conscious opposition to the resolutions of the Committee, he submitted a memorandum in which he argued, inter alia, that:

> 1. African rights and liberties, based on their own law and customs, which are not repugnant to justice, should be protected.
> 2. Africans being also a people just like others have their own institutions to work against which would be working against their conscience.[105]

Chinula criticised the missions for failing to follow what he claimed to be the teaching of Christ, namely, that "an erring brother's case should be dealt with by the church". He expressed regret that:

> ...some missionaries, instead of love and persuasion, threaten their Christians that on breaking marriage vows, they will be prosecuted by the state. If we do so, we build Christianity on fear and not on faith in our saviour.[106]

Chinula, who had worked under Donald Fraser at Loudon (Embangweni),

was speaking from personal experiences with the Livingstonia Mission. At one time before 1923, Fraser, Chinula's mentor, had attempted to introduce a type of marriage for African converts which would be "distinguishable from the normal marriage in church by the absence of legal provisions as laid down by the state".[107] The proposal had been rejected by the Presbytery and as McCracken narrates:

> Livingstonia came to demand of her church members and catechumens that they be married under the provisions of the Christian Native Marriage Ordinance of 1912, which contained the penalty for those lapsing into polygamy of up to five years in goal.108

Chinula subscribed to the view that Africans in Nyasland were not "educationally, financially and politically fit to understand all what was involved in European law".[109] However, for Chinula, fitness to understand European law need not lead to the destruction, but only to the purification, of African customs.[110] On the other hand, he did not criticise Africans who of their own free will decided to rid themselves of customary law and marry under the 1902 Ordinance.

Many of the Africans contacted by District Commissioners throughout the territory objected to the proposed law. The majority of Africans never specifically referred to the 1923 Ordinance. Nevertheless, they did endorse the principle that a Christian marriage ceremony, or mere conversion to Christianity, should not involve the imposition of an alien law of marriage.

Some of the general arguments against the imposition of different laws on Christian Africans are considered in other

chapters of this study. It can be observed, however, that the arguments from Africans in the districts tended to suffer from lack of originality. They seem to have been heavily influenced by ideas of District Commissioners and the latter were practically unanimous in their opposition to any changes in the status quo. It must also be noted that the views of most Africans were collected through meetings presided over by District Commissioners. The missions had little opportunity to counter whatever influence the District Commissioners exerted at these meetings. The initial suggestion that surveys of African opinion should not be confined to Christians only resulted in the opposite error. A disproportionate amount of weight would seem to have been placed on Native Authorities and other Africans associated with the district administration. Government officials were content simply to doubt whether the missionary proposals had the backing of African congregations. No serious attempt was made to probe the views of these congregations. For, although it must be admitted that Native Authorities and African communities in general had a genuine interest in the proposed law, it was Christian Africans who were to be directly affected by it. In particular, was it not strange that a law which would have drastically affected the legal position of women was being discussed apparently without any participation by the women? For understandable reasons, it is amongst women in general, and Christian women in particular, that the resentment against African customs, particularly polygyny, has been mostly manifested. The views of women would obviously have contributed greatly to a more balanced assessment of African opinion.

Be that as it may, it would have been a great surprise had the majority of Africans endorsed a law which purported to abolish polygyny, even if such a step was to be confined to Christian marriages. Polygyny occupied an important and hallowed place in most traditional African societies. In some instances, specific problems were cited to justify the rejection of monogamy. It was contended for example, that polygyny was the best solution where a problem of infertility arose on the part of the first wife. A.T.N. Mkisi, a Senior Hospital Assistant in Port Herald, warned as follows:

> ....What happens is that when the young couple have been married ... all people in [the] village are anxious to see when the woman is going to be conceived. But if there is no child within a period of one or two years people will begin to laugh at them that they are sterile, you will soon see he has married a second wife....
> There are many thousands of African Christians (sic) because they are producing, but it is hard to those who do not produce to remain Christians. The Africans like children. The Committee should consider into (sic) this matter.111

Many Africans rejected monogamy because it was simply not part of African custom. At a meeting with the District Commissioner in Nkhota-Kota, for example, the Africans attending simply observed that polygyny and monogamy were respectively African and European customs. They expressed the wish that the European custom should not be imposed on Africans, nor should the custom of one church be imposed on other churches.[112] This last point was perhaps a reference to the independent African churches, which did not condemn polygyny. The conscious search for reasons or justifications for polygyny must be regarded as a reaction to early attacks and imported attitudes against polygyny. From a purely traditional angle,

polygyny could not have required any justification. On the contrary, it was monogamy perhaps that required conscious justification. Like marriage itself, once it had evolved, polygyny was an institution that was accepted in its own right. Of course, individual people, and even whole communities collectively, consciously utilised it for particular social ends. It was believed to increase the number of children. It was used to ensure wealth and prestige in agricultural and pastoral societies. It was used to widen political and social ties and influence. It was utilised to provide support for widows. It was a solution to problems of wife infertility. It complemented numerous sexual taboos - in some cases, for example, a woman could not have sexual intercourse during the usually-long periods of lactation. It enabled ageing couples to enlist the services of younger partners. The institution of polygyny was consciously exploited to further a variety of social and economic ends.[113] These ends, however, only served to explain why polygyny was preferred to monogamy. They did not serve to justify it. Africans, at least those of Chinula's type, regarded polygyny as an institution that was inherently valid and not as an evil, whose existence had to be justified either on the basis of its social and economic value or as a concession to a still primitive people. It can be seen therefore that, although their respective viewpoints pointed to the same result, namely, the retention of the 1923 Ordinance, the Africans and the colonial officials were thinking at different and even contradictory levels.

7. The Judicial Interpretation of the 1923 Ordinance

As already noted, the theoretical implication of Section 3 of the 1923 Ordinance was that marriage celebrated in accordance with Christian rites would be no different from marriage celebrated purely under customary law, as far as the legal position of the parties was concerned. It is useful to consider how, in relation to the question of monogamy, the principle of Section 3 has been reflected in actual judicial decisions. The majority of the cases bearing on the issue have been divorce proceedings brought by women who have objected to their husbands' subsequent marriages with other women. The courts have generally confirmed the principle that the mere celebration of marriage by Christian rites does not bar a man from taking subsequent wives under customary law. This was, for instance, so held by the High Court in the case of Kandoje v. Mtengerenji (1966),[114] perhaps the most important judgement on the 1923 Ordinance to date.

The following were the pertinent facts of the case, which came before the High Court by way of appeal from the Blantyre Local Appeal Court:

> The respondent wife petitioned the Blantyre Local court for the dissolution of her marriage to the appellant and sought compensation and the custody of the children of the marriage.
>
> The parties were married in church under the [Native] Marriage (Christian Rites) Registration Ordinance. At that time both were Christians and the husband promised in the ceremony not to take another wife. The respondent refused to accept the validity of the second marriage and brought proceedings, contending that her own marriage was a "legal one"[115] which disentitled her husband from marrying again both legally and in the eyes of the church. The appellant also contended that the marriage was "legal" but that it was a customary-law marriage entitling him to marry polygamously.[116]

The court of first instance ordered a divorce, but characteristically, did not spell out the legal grounds for doing so. From the fact that it made no order for compensation and gave the custody of two young children of the marriage to the husband, it can be concluded that the court had viewed the respondent's petition for divorce as groundless. The wife appealed to the Blantyre Local Appeal Court where the decision of the first court was set aside. The appeal court refused to entertain the petition for divorce, observing that the marriage in question was a "legal marriage" and therefore that the court had no jurisdiction. (This was a recurrent error which is considered elsewhere in this study.) Despite the decision that it had no jurisdiction over the case, the Blantyre Local Appeal Court went on to order the husband to pay compensation and maintenance in respect of the children who were apparently supposed to remain with the wife. The husband appealed to the High Court, contending that, while it might have been contrary to the rules of the church to take a second wife, it was not contrary to the law of the land. He maintained that he was legally entitled to take a second wife and that the respondent was wrong to insist on the abandonment of the second wife as a condition for reconciliation. As it was the wife who was in the wrong, he prayed the High Court to set aside the orders for compensation, maintenance and custody.

On the interpretation of the law, the High Court, predictably, agreed with the appellant. Cram, J., observed:

> ....This court required the appellant to produce an extract copy from the register of the Registrar-General. This document is headed: "African Marriage (Christian

> Rites) Registration Ordinance", whereas a monogamous marriage certificate in terms of the Marriage Ordinance bears the words "Marriage Ordinance, Section 26".
>
> The assessors, having had S.3 of the African Marriage (Christian Rites) Registration Ordinance read to them, and having listened to the parties' submissions, expressed the opinion that the marriage was a customary one, unaffected in law by the Christian rites. The marriage, therefore remained a potentially polygamous one and so the husband had a legal right to take a second wife. He could not of course commit adultery with a lawful wife.[117]

Thus, the wife's contention that a Christian marriage ceremony under the 1923 Ordinance prevented the man from taking a second wife was rejected by the court. Even so, the court's decision went in favour of the wife. Whether or not the husband was entitled to take a second wife was obviously not the only question at issue. There was another, related, question involved, namely, whether the woman was entitled to leave her husband on account of his polygyny. The opinion of the assessors, which the court accepted, as to principle under customary law was as follows:

> ...if the first wife objected to the husband taking a second wife, and would for this reason, no longer live with her husband, he had a right to divorce her. If, however, the husband did not wish to exercise this right, as here, the wife had a duty to live with her husband as the elder wife and accept the junior wife. If the wife refused to cohabit, as was the case here, then the marriage had irretrievably broken down. In this dilemma, divorce was permissible at customary law, but understandably, the wife, who was in the wrong, would receive no compensation.[118]

To this statement may be added, parenthetically, the following older decisions of lower courts. In Mwamkumbira Msowoya v. David Mtegha (1940/41),[119] the Mzimba District Commissioner held that the refusal of a woman to stay with her

husband because the latter had taken a second wife amounted to blameworthy conduct entitling the husband to part of the malobolo he had paid. The case of Kamwendo v. Amery (1938)[120] was an interesting one in the sense that a second wife was the one objecting to the husband taking a third wife. Village Headman Jawa, who was called to advise on the relevant Ngoni custom, stated that a second and subsequent wives were not even entitled to consultation if the husband sought to take more wives. The objecting wife was asked to rejoin her husband and warned that if she refused to do so, she would be the party liable for the consequent dissolution of the marriage. In Eley Petros v. Jannes Jackson (1955),[121] a woman who had refused to stay with a husband because the latter had taken another wife was ordered to pay £4 10/- compensation for "wrongful divorce". These cases, and the opinion of the assessors in Kandoje v. Mtengerenji, of course, represent the position under strict traditional law, which, as already noted, has not always been adhered to by the courts.[122]

The reason for the decision in Kandoje v. Mtengerenji virtually amounted to a nullification of the import of Section 3 of the 1923 Ordinance. Cram, J., stated:

> ....In this instance, however, the husband had entered into a collateral agreement to induce his wife to marry him on the understanding that he would not take a second wife, even if he had a legal right to do so. The wife had married on the strength of this promise that she would be the only wife. As the husband had broken his collateral promise, the party suffering would be entitled to an award of compensation ....[123]

He continued:

> ....Customary law never contemplated the superimposition of a church ceremony on customary marriage by which the husband, entitled to take a second wife, vowed not to do so. To be in breach of this collateral promise could be a species of cruelty entitling the wife to stay away from the matrimonial home.[124]

Accordingly, the court decreed divorce. It also held that the wife was entitled to an award of compensation of £25. According to the relevant customary law, apparently, the husband was legally entitled to custody. However, the court held that the children were still very young and that it was in their best interest that the mother should have custody and not the husband who had taken a new wife.[125] The husband was also ordered to pay £1 per month for the maintenance of each child till each reached the age of seven years. Afterwards, he would pay £2 per month per each child. The wife could apply to the Blantyre Local Court for an increase in the maintenance. The husband, on the other hand, could also apply for custody after each child reached the age of seven years.[126]

It is clear from the judgement that the so-called collateral contract was not deduced from any private transaction between the parties but from the very public exchange of religious vows. It may be observed, with respect, that many African people who go through Christian church marriage ceremonies do so in the hope or with the intention of living monogamous lives. The obvious exceptions are those Africans who go through Christian marriage ceremonies in those independent African churches which allow polygyny. The association of polygyny with a Christian marriage ceremony is, generally speaking, contrary to public expectation. Having said this, however, it

must be submitted that the vows made during a Christian marriage ceremony are in substance, though not in form, undertakings by each party towards the church rather than towards the other party. To interpret those vows as a species of private contract amounts to a distortion of their function. Even admitting that such vows constitute a collateral agreement between the parties, it is a doubtful proposition that any principle of customary law can be altered by private treaty. Authorities on the point are hard to come by. The National Traditional Appeal Court, at least, appears to have rejected this proposition in the case of Kakhobwe v. Kakhobwe (1981).[127] In the course of its judgement, the court stated:

> ....If two parties chose to follow a certain custom in the celebration of marriage, this court will follow the dictates of that custom as to the status, obligations and rights that pertain to the parties both during or after the marriage has been dissolved or brought to an end by death. The custom will be followed with all its forcefulness and effect notwithstanding the spouses' intention or representations to the contrary.[128]

Thus, the only way two people can effectively bind themselves to monogamy would be to solemnise their marriage under the Marriage Ordinance [Act], 1902.

Equally, or even more important, was the wording of Section 3 of the 1923 Ordinance. The proviso in that Section, it may be recalled, emphatically stated that the religious ceremony of marriage:

> ...shall not as regards the parties thereto alter or affect their status or the consequences of any prior marriage entered into by either party according to native [African] law or custom or involve any legal consequences whatever.

This clause would clearly seem to have been intended to rule out the very argument used by Cram, J., in Kandoje v. Mtengerenji. A "collateral contract" could certainly not be regarded as not amounting to "any legal consequence whatever". In addition, if the religious vows were to be regarded as amounting to a "collateral contract", why stop at the issue of monogamy? There would have been no reason, for example, why a Christian marriage ceremony in a Catholic or Anglican church could not have amounted to a "collateral contract" ruling out divorce. To date, Kandoje v. Mtengerenji remains the most authoritative judicial decision on the 1923 Ordinance as far as the question of monogamy is concerned. With much respect, however, the decision is not a satisfactory one. It ascribes to a Christian marriage ceremony those legal consequences which the legislators had expressly refused to attach to such a ceremony. On the other hand, the decision can also be viewed in the broader context of changing attitudes towards polygyny. Kandoje v. Mtengerenji, like the other cases considered in a previous chapter,[129] can be seen as an example of judicial reluctance to apply the full force of the traditional principle of polygyny and as an example of the growing recognition of the right of women to opt out of customary marriages which have become polygynous in fact rather than merely in potential.

8. African Marriage and Statutory Monogamy

Although noone has ever been prosecuted for bigamy in Malawi, the courts have always given effect to the monogamous character of marriage under the Marriage Act (Ordinance) when dealing with the rights and obligations of the parties vis a vis each other.

In practically all the cases bearing on the subject, the actions have been either for divorce or for the restitution of conjugal rights. The earliest cases are those decided by the District [Magistrates'] Courts which, without proper jurisdiction, often settled disputes arising from marriages contracted under the Christian Native Marriage Ordinance, 1912. In one such case, decided by the Blantyre District Court in 1913,[130] the husband petitioned the court for an order for the return of his wife who had deserted him. The wife's refusal to live with her husband was based on the ground that the latter had violated the original marriage contract by taking a second wife. A certificate of marriage celebrated in a church of the Zambezi Industrial Mission under the 1912 Ordinance was produced. The court held for the wife, observing that the man had violated and was continuing to violate his marriage contract and would therefore not expect the respondent to fulfill her obligations. In another case held in 1914, the same court observed that a man who had taken another wife when married under the 1912 Ordinance was in breach of his contract of marriage with the first wife and this constituted for the other party a sufficient ground for divorce.[131]

G-A-B Khondiwa v. Evelyn Mtambalika (1965)[132] is a case that came before the High Court by way of an appeal from the Blantyre Local Appeal Court. The case deals with a few other important points, but these will be left out for the moment. The facts were as follows. The parties had first contracted marriage under customary law. After two years, they went through another marriage ceremony at the Blantyre Mission. Al-

though it is not at all certain from the evidence that this was the case, the High Court found that the second marriage had been contracted under the terms of the 1902 Ordinance. In the lower court the woman had complained that her husband had "divorced" her by marrying another woman. The complaint that one is being "divorced" is a familiar way of instituting divorce proceedings in African courts. What the petitioner wants is a divorce decree, but he or she does not want to appear to be eager for divorce as this may prejudice his or her rights regarding compensation etc. In the present case, however, the petitioner would seem to have assumed that the respondent had effectively terminated the marriage by sending her away and by "marrying" another woman under customary law. Thus, she simply asked the court for compensation from her husband and for an order that the husband should build a house for her and provide maintenance for the four children of the marriage. It would seem that the lower court had viewed the matter in the same way as the petitioner. It ordered the husband to pay £75 compensation, to build a brick house for the wife and the children and to provide maintenance for the latter. The Local Appeal Court upheld the decision of the lower court, but further made a specific order that the husband should pay 15/- per month for each child in maintenance.

In the High Court, Cram, J., was not sure whether the lower court had purported to dissolve the marriage or had merely assumed that the marriage had been brought to an end by the husband's unilateral repudiation. Whatever the case, it

was held by the High Court that the second marriage ceremony between appellant and respondent constituted a marriage under the 1902 Ordinance. As such, the Local Court had no jurisdiction to dissolve it. It was declared that the second marriage would still subsist "prohibiting either spouse during its subsistence from contracting a second polygamous marriage". Cram, J., was non-committal on whether or not a customary-law marriage is obliterated if the same parties go through a subsequent marriage ceremony under the Marriage Ordinance. Ex abundanti cautela, he went on to dissolve the customary marriage on the ground of total incompatibility. The husband was adjudged to be the guilty party as he had put his wife away and was "living in adultery with another woman". The orders of the lower court were allowed to stand. The relationship of the appellant with the other woman was "adulterous" because, by virtue of the Marriage Ordinance, 1902, the intended customary marriage was null and void ab initio.

In the more recent case of Eva Chigulu v. Patrick Chigulu and Mrs Chigulu (1982),[133] it was the marriage under the Marriage Act, 1902, that was declared null and void. The petitioner and the first respondent had gone through a marriage ceremony at the Registrar of Marriages at Zomba under the provisions of the Marriage Act. During the ceremony, the respondent had described himself as a widower. In fact, unknown to the petitioner, the respondent's wife (the second respondent) was still alive and her customary marriage to the respondent was still subsisting. Later, the respondent and co-respondent resumed cohabitation. As a consequence, the

petitioner instituted the proceedings praying for the dissolution of her marriage to the respondent on the ground of adultery (joining the respondent's "first" wife as co-respondent) and, in the alternative, for a declaration that her marriage was null and void ab initio. It was held, Villiera, J., presiding, that the marriage of the respondent to the petitioner was null and void because of the subsisting customary marriage between the respondent and co-respondent.

It may be observed in relation to the legal principle discussed in the two last cases that more difficult problems can arise. This is particularly so in relation to the position of the woman in the bigamous marriage. Apart from cases of misrepresentation like the Chigulu case, in a society where polygyny is otherwise allowed, women are likely in good faith to contract marriages with married men. How should such women be treated? It is rather invidious to view them as "adulterers", to put them on the same moral footing as casual lovers or even prostitutes. Yet, under existing law, this would seem to be the position they are in. Their children would be fillius nullius. Before 1967 (when the Wills and Inheritance Act came into force) such children would probably have been excluded from inheritance on the intestacies of their biological fathers. Fortunately, however, the Wills and Inheritance Act does not distinguish between legitimate and illegitimate children. However, women parties to bigamous marriages would seem unlikely to benefit upon their partner's intestacy. The exact position would perhaps depend on the type of marriage between the man and his lawful wife. If the

marriage contracted under the 1902 Act is the one which is valid then intestacy would be governed by Sections 18 and 19 of the 1967 Act.[134] Under these provisions, it is very unlikely that the surviving partner to the invalid marriage would benefit at all. If, as in the Chigulu case, it is the customary marriage which is valid, then intestacy will be governed by Sections 16 and 17 of the 1967 Act.[135] Under these provisions, the surviving partner to the invalid marriage might claim as a "dependant". A "dependant" under the Act need not be a wife, a child or a relative of the deceased. In either case, however, the woman's position would be nowhere close to that of a "widow". There is certainly a dilemma here. If the law were to be relaxed to give some recognition to the bigamous marriage, this would obliterate the distinction between enforceable monogamy and polygyny. Already, the alternatives are limited for a woman whose husband decides to violate his undertaking by taking an additional "wife". If the man insists on continuing with the bigamous relationship, the woman's only way out of a polygynous situation is to seek divorce. A criminal prosecution would be spiteful and would be of no use to her. Indeed, except for the question of intestacy, the fact that divorce is virtually the only real remedy against a husband's bigamous marriage brings the positions of women married under the Marriage Act and women married under customary law (especially if the customary marriage is also blessed under the 1923 Act) very much closer.

9. Monogamy, Law and African Society

In conclusion, it may be observed that the influence of Christianity and other important aspects of European presence have rendered polygyny (in its extreme form, whereby scant attention would be paid to the wishes of women as regards the type of married life they should lead) less acceptable socially and, it would seem, legally. To this limited extent, the enactment of the Marriage Ordinance, 1902, and even the abortive formulae put forward by the missions can be credited with the merit of pre-emption. It will be noticed, however, that the relevant provisions of the Marriage Ordinance/Act not only fail, but were in the first place never intended, to meet the needs of African society.

The most serious objection to the Marriage Act is that, with regard to those married under its provisions, it subjects polygyny to criminal prosecution. Violations of the penal provisions have been ignored by government officials. Allegedly, judges of the High Court have sometimes referred cases involving violations of these provisions to the Director of Public Prosecutions. Noone, however, has yet been prosecuted for the relevant offences. The reluctance of colonial officials to prosecute Africans on account of bigamy and related offences was sometimes influenced by negative attitudes toward Africans and their social institutions. Still, it is submitted that the offences created by the Act have no relevance whatsoever to African social problems. Their enforcement may well pose a greater social menace than polygyny itself. Although many individual Africans may prefer monogamy

to polygyny, it can hardly be said that violations of the principle of monogamy constitutes such outrageous or anti-social behaviour as to warrant criminal prosecution, let alone five years imprisonment.

In Eśkia Mphahlele's novel, Chirundu, one conversation of two of the protagonists turns on the central issue of the novel's plot - a charge of bigamy in a Zambian court brought against a Cabinet Minister:

> ....'Bigamy, bigamy', Chieza says, as if he has been listening to his own private conversation. 'What a petty thing for a Cabinet Minister to be hauled up for.'
> 'That's part of the reason for my contempt, See. Why would the blinking idiot go and legalise a city piece when he could have access to it without all that paper and dotted line and ring stuff? The people who will be looking on must think him an ass because they have extra-mural interests all over the place while they play the dutiful husband and father. Why would the daffer do this kind of thing, why?' [Pitso observes].
> 'The way I read you, the line between contempt and sympathy is very, very thin.' [Chieza retorts].136

A man charged with bigamy is more likely to attract the sympathy rather than the contempt or condemnation of, at least, his fellow men. Polygyny even by those married under the Marriage Act, could hardly be said to offend the public conscience. African society has been a poor soil for the principle of monogamy in its extreme Western form, whereby its violation may even lead to criminal prosecution.

Even in the context of the English legal system from where the relevant penal provisions were borrowed, doubts have been expressed as to the existence of an adequate rationale for the severe penalty (seven years imprisonment) prescribed for bigamy.[137] Glanville Williams observed that:

> ....The only anti-social consequences that are necessarily involved in the mere celebration of a bigamous marriage are (1) the falsification of the state records, and (2) the waste of time of the Minister of religion or Registrar.[138]

Professors J.C. Smith and Brian Hogan observe that bigamy may still fulfill a useful purpose in one type of case, namely "where the other party is innocent and is deceived into taking a highly detrimental course of action".[139] Such conduct, they argue, should be severely discouraged by criminal law.[140] They emphasise, on the other hand, that "where both parties know the facts and marry to make their cohabitation more respectable the offence is a relatively minor one" and that the punishment of seven years imprisonment is "altogether out of proportion".[141]

NOTES

Chapter Eight

1. Chapter 3.

2. In the study, the less popular, but scientifically more accurate, term, polygyny, is preferred to the popular term, polygamy.

3. See Adrian Hastings, Christian Marriage in Africa (London : Hollen Street Press Ltd., 1973), pp. 5-26. Eugene Hillman, Polygamy Reconsidered (African Plural Marriage and the Christian Church) (New York : Orbis Books, 1975), pp. 31-38. Rev. Lyndon Harries, "Christian Marriage in African Society" in Survey, esp. pp. 335-359.

4. See comments by Martin Parr, "Marriage Ordinances for Africans".

5. Chapter 5. See also Phillips, Survey, p. 190.

6. For example, the imposition of the "hut tax", under which a man was required to pay a fixed annual sum for each hut occupied by a woman under his charge was a potential impediment to the practice of polygyny. As a rule, a polygynist had to provide a separate dwelling unit for each of the wives he had. The hut tax could not but put a heavier burden on him.

7. See Chap. 5. See also below.

8. See Phillips, op. cit., where he compares British policy with policies of Belgian and Portuguese colonial powers. The latter governments actively worked towards the abolition of polgyny in their colonies.

9. Chapter 3 above.

10. Op. cit., p. XXIV.

11. Op. cit., p. 27.

12. For specific examples, see below.

13. Even the non-episcopal denominations which did not elevate the indissolubility of marriage into an absolute doctrine (see Chap. 9) regarded divorce with disfavour.

14. See Harries, op. cit., pp. 355-6.

15. Op. cit., p. VI.

16. See Hastings, op. cit., p. 346.

17. Quoted by Harries, op. cit., pp. 351-2. See also Hastings, op. cit., p. 13.

18. See below.

19. See Hastings, op. cit., pp. 22-3.

20. See note 19, above.

21. Central Africa Vol. XII (1894), p. 49.

22. See Hillman, op. cit., p. 34.

23. See cits. in note 3 above.

24. This, for example, is the whole thesis of Hillman's work, cited above.

25. Op. cit., p. 27.

26. See note 3 above. See also John Cairncross, After Polygamy was Made Sin : The Social History of Christian Polygamy (London : Routledge and Kegan Paul, 1974).

27. Cairncross, op. cit., Chaps. II and III.

28. Ibid, pp. 1-31.

29. Ibid, pp. 166-202.

30. See Felix Ekechi, "African Polygamy and Western Cultural Ethnocentricism", 3 (1970) in Journal of African Studies, p. 329. Also Hillman, op. cit., generally.

31. Chauncy Maples of the UMCA, Bishop of Likoma (Nyasaland) between 1886-95, in Central Africa Vol. XII (1894), p. 162.

32. George Phillips, Mponda Mission (UMCA), a report in Central Africa Vol. XVI (1898), p. 11.

33. See a note of Bishop Smythies (UMCA), Central Africa Vol. XII (1889), p. 131.

34. Chief's compound.

35. Ian and Jane Linden, Catholic Peasants and Chewa Resistance in Nyasaland (London : Heinemann Ed. Bks. Ltd., 1974), p. 194. In exceptional cases, Catholics allowed the baptism of polygynous catechumens upon their death-beds. See Harries, Survey, p. 355.

36. Ridder Haggard, "Notes", in Central Africa Vol. XII (1894), p. 15.

37. "The Story of Amin Bin Saidi of the Yao Tribe of Nyasaland," in Ten African Stories, by Margery Perham (ed.) (London : Faber & Faber Ltd., 1963), p. 139 at pp. 156-7.

38. For general discussions of these churches, see John McCracken, Politics and Christianity, pp. 184-200, pp. 273-281. B. Pachai, History of the Nation, pp. 209-214. Robert Rotberg, The Rise of Nationalism, pp. 135-155. And Shepperson and Price, Independent Africa, generally.

39. Constitution of the Last Church of God and its Christ, MNA NN1/20/3, quoted by Rotberg, op. cit., p. 148.

40. Op. cit., p. 194.

41. A.G. McAlpine of the Livingstonia Mission, Proceedings of the Nyasaland Missionary Conference, 1900, pp. 17-20, quoted by McCracken, op. cit., p. 194.

42. Domingo was born around 1875 and was educated at Livingstonia Mission. Domingo became Director of the Seventh Day Baptist Church. He was also the organiser of many separatist churches in Mzimba District. See Rotberg, op. cit., p. 71.

43. See McCracken, op. cit., p. 275.

44. Ibid.

45. For example Eliot Kenan Kamwana of the Watch Tower Bible and Tract Society; Charles Domingo; and Mwane Lesa of "Ana Amulungu" (Children of God) Church.

46. Men like Yesaya Z. Mwasi, Charles Chinula and Yaphet Mkandawire who together founded the "Mpingo Wa Afipa Wa Africa" (the Blackman's Church in Africa) were founder members of their respective Native Associations. See McCracken, op. cit., p. 275-6.

47. Op. cit., pp. 55-6.

48. History of the Nation, p. 209.

49. Ibid.

50. See Chap. 5 above.

51. The relevant clauses were later amended so that a fine of up to £100 could be imposed instead of, or in addition to, the prison sentence.

52. Compare, for example, with the Canadian Penal Code, Sect. 254 which includes such an offence under its definition of bigamy.

53. See Zabel, op. cit., p. 17. H. Morris, Indirect Rule, pp. 330. See also Queen v. Surwan Singh [1962] All. E.R. 612 and, from Zambia, People v. Katongo Z.L.R. (1974), p. 290.

54. See Rex v. Amkeyo, 7 E.A.L.R. (1917), p. 14.

55. Section 35.

56. See Section 162 of the Penal Code. Also see the defences in common law, R. v. Tolson (1889) 1 Q.B. 168; R. v. King (1964) 1 Q.B. 285; and R. v. Gould (1968) 2 Q.B. 65.

57. See relevant discussions in Chap. 6.

58. Infra.

59. If such third party had knowledge of the pre-existing marriage, he or she could arguably be prosecuted for "aiding" and "abetting" under the general principles of criminal law.

60. See below as to similar arguments in the context of the law in England.

61. Chapter 5 above.

62. Zabel, op. cit., p. 17.

63. As, for example, suggested by Parr, "Marriage Ordinances for Africans", p. 2. See Chap. 5 above.

64. See Chap. 5 above.

65. Royal Instructions (consolidated). Under the Nyasaland Order-in-Council, 1907, G.N. 18, 9th Aug., 1907, Rule XXXIV.

66. Jackson to the Registrar-General, 25th Feb., 1919, MNA S1/1622/19.

67. 10th Feb., 1919, MNA S1/1622/19. Fraser was not himself a strong believer in these penalties. Indeed, his attitude on the matter often brought him into conflict with his fellow missionaries within the Livingstonia Mission. For details, see McCracken, op. cit., pp. 195-96.

68. For details, see Chap. 9.

69. See e.g. DC Chintheche to the Registrar-General, 2nd Dec., 1918, MNA S1/1622/19.

70. Moggridge to Fraser, 11th April, 1919, MNA S1/1622/19. Moggridge's view was emphatically endorsed by the Registrar-General, Keith Countache in his reply to Moggridge, dated 2nd May, 1919, MNA S1/1622/19.

71. Ibid.

72. Johnson's view was that it would take a very long time before Africans would attain real civilisation. He even once suggested that improvements could be accelerated by a recruitment of Indians who should inter-breed with the Africans.

See "Report of the Commissioner Johnson of the First Three Years of the Administration of the Eastern Part of the B.C.A. 1894," Vol.69 British Parliamentary Papers, pp. 85.

73. The Central Africa Federation was introduced among S. Rhodesia, N. Rhodesia and Nyasaland in 1953 against almost universal African opposition. European politicians in all the three territories were of the view that African opposition amounted to very little or nothing at all as Africans were still very ignorant and backward. See Rotberg, op. cit., pp. 214-252.

74. The article is appropriately entitled: "The African - A Child or a Man - the Quarrel Between the Blantyre Mission of the Church of Scotland and the British Central Africa Administration 1890-1905", in The Zambezian Past - Studies in Central Africa History, by Eric Stokes and Richard Brown (eds.) (Manchester : University of Manchester Press, 1966), p. 332.

75. Ibid, p. 335.

76. Ibid.

77. For a detailed treatment of this theme, see K. Nyamayaro Mufuka, Missions and Politics in Malawi (Ontario : Brown and Martin Ltd., 1977). See also the deposition of Hetherwick in the "Judicial Inquiry Into Certain Charges Against the Armed Forces of the British Central Africa Protectorate", held at Blantyre by Judge Nunan, 5th Nov., 1902, PRO FO 608. Also Hetherwick's testimony during the case of Storey v. The Registrar of Marriage (Chap. 5 above). For a general analytical study of the colonial racial problems see Phillip Mason, The Birth of a Dilemma (London : Oxford University Press, 1958).

78. Supra.

and the Search for Justice

79. See Morris, Indirect Rule, p. 221. This was also Parr's argument in "Marriage Ordinances for Africans".

80. Supra.

81. Clause 5(ii) of "Bill B".

82. Section 2 of the draft Bill.

83. Section 14.

84. See supra.

85. Section 11.

86. See e.g. DC Port Herald to Barnes, 8th Dec., 1945; DC Ncheu to Barnes, 18th Oct., 1945; DC Mulanje to Barnes, 19th Dec., 1945, and PC (S.P.) to Barnes, 25th Nov., 1946, MNA NS1/21/6.

87. Report of Proceedings at the 1936 conference. See Chap. 6.

88. Final Report, above.

89. See note 86 above.

90. See below.

91. Fr. Paradis to the Chief Secretary, 26th Feb., 1934, MNA L3/30/6.

92. See below.

93. DC Nkhota-Kota to the Attorney-General, 1st Jan., 1936, MNA L3/30/6.

94. See Chap. 6.

95. Chapter 6.

96. B.N.A. to PC (Bt.), 15th Oct., 1936, MNA NS1/21/6.

97. Bandawe was included in the 1945 Committee at the suggestion of the Blantyre Mission.

98. Transcript of conference.

99. Report of the Committee, above.

100. DC Nkhota-Kota to Barnes, above.

101. DC Karonga to Barnes, 24th Dec., 1946, MNA NS2/1/2.

102. Ibid.

103. Encl. in DC Dedza to Barnes, 23rd Jan., 1946, MNA NS2/1/2.

104. Minutes of a Meeting of the Nyasaland African Congress of Dedza District, held on 6th Jan., 1946, encl. in DC to Barnes, above.

105. Chinula's memorandum, encl. in the minutes of the Committee's proceedings, 6th Dec., 1947, MNA NS2/1/2.

106. Ibid.

107. McCracken, op. cit., pp. 195-6.

108. Ibid.

109. Memo, above.

110. See McCracken, op. cit., p. 196.

111. Mkisi to DC Port Herald, 11th Dec., 1945, MNA NS1/21/6.

112. DC Nkhota-Kota to Barnes, above.

113. See Hillman, op. cit; Jomo Kenyatta, Facing Mount Kenya, pp. 170; Aylward Shorter, African Culture and the Christian Church, pp. 56. See also above quotations from Linden on Ngoni society.

114. 1964-66 ALR (Mal.), p. 558.

115. The term "legal marriage" is loosely employed here to refer to a monogamous statutory marriage. Of course, as Cram, J., observed in the present case, even a customary marriage is a "legal" marriage.

116. Judgement of the High Court.

117. Ibid, p. 567. See also Mwamkumbira Msowoya v. David Mtegha, Mzimba Dist. Ct. civ. app. case no. 2 of 1941 (from NA Chikulamaembe), MNA BR4/1/1.

118. Op. cit., p. 567.

119. See note 117.

120. Chiradzulu Dist. Ct. civ. app. (NA) case no. 22 of 1938, MNA BD1/1/1.

121. Blantyre (Urban) Local Ct. civ. case no. 250 of 1955, MNA 2.25.11.R/10,554.

122. Chapter 3 above.

123. Ibid, p. 567.

124. Ibid.

125. See supra.

126. Ibid, pp. 567-8.

127. Supra.

128. Transcript of judgement. See also Mailesi Yilo Pangaunye v. Evelesi Bonongwe NTAC civ. app. case no. 15 of 1980. Here too, the court stated that custom was made by society and could therefore only be changed by society and not by individual parties.

129. Chapter 3.

130. G. v. M., civ. case no. 278 of 1913, MNA BA1/2/2.

131. Jessie v. Ndecheka, civ. case no. 272 of 1914, MNA BA1/2/2.

132. Civ. app. (LC) case no. 126 of 1964, MNA 6.5.6F/16118.

133. Yet unreported High Court Case No. 84 of 1982.

134. See earlier references to the Act, in Chap. 3. Sections 18 and 19 apply to people whose intestacy would have been governed by Section 40 of the Marriage Act before 1967.

135. These Sections apply to people whose intestacy would have been governed by customary law before 1967.

136. Chirundu (Surrey : Thomas Nelson and Sons Ltd., 1980), pp. 4-5.

137. Originally an ecclesiastical offence only, but later declared a capital felony by statute in 1603 (I James, c. 11, now Section 57 of the Offences to Persons Act, 1861). See Smith and Hoggan, Criminal Law 4th ed. (1978), p. 676.

138. (1956) 72 L.Q.R., pp. 77-8. See Smith and Hoggan, op. cit., p. 688. It must be noted that even this would not be true in Malawi where a man married under the Marriage Act goes through another ceremony of marriage under customary law.

139. Ibid. Even here it may be argued that a civil action for damages by the innocent party may be more appropriate.

140. Yet see remarks under note 139 above.

141. Ibid.

CHAPTER NINE

THE QUESTION OF DIVORCE IN THE DEVELOPMENT OF STATUTORY MARRIAGE LAW

At every crucial stage in the history of the law of marriage in Malawi, the subject of divorce has been one of the most central and controversial. This chapter details some of the key points already mentioned in preceding chapters and presents further relevant material. It will be seen that it is in relation to the subject-matter of divorce that some of the basic issues of marriage-law policy can best be highlighted.

The structure of the law governing divorce generally corresponds to the structure of the law of marriage. Divorce and related disputes arising from marriages contracted under the Marriage Act fall under one legal regime within which the Divorce Act is the principal legislation. For the purposes of this study it is unnecessary to examine that Act and its origins in detail.[1] The discussion of the Divorce Act [Ordinance] in this chapter will be concerned mainly with the question of its application to Africans, and with the relationship between the Ordinance and other legislation passed or merely proposed with respect to the marriages of African Christians.

The other type of divorce law is that applicable to marriages contracted under customary law. The main principles of this law have already been described in an earlier chapter.[2] Apart from local authority by-laws dealing with the registration of marriages and divorces, there has never been any

legislation on the customary law of divorce, nor has any question of introducing such legislation ever been mooted. Thus, the task of adapting customary law to the needs and ideas of modern life has rested entirely on the courts.

Between the law under the Divorce Ordinance, which was designed primarily for Europeans, and customary law, which was preserved solely for Africans, the Native Marriage (Christian Rites) Registration Ordinance, 1923, occupied a somewhat ambivalent place and this was in turn a reflection of the ambivalent position or status of African Christians within the colonial social and legal structure. The history of this Ordinance will be reviewed with specific reference to the question of the application of customary divorce law to African Christians. The current practice in divorce cases involving African Christians will be considered and the question will be raised whether the 1923 Ordinance has had any impact on the evolution of customary divorce law.

1. The Divorce Ordinance, 1905, and its Application to Africans

When originally enacted in 1905,[3] the Divorce Ordinance was specific (although by no means entirely clear) as to the categories of people to whom its provisions would be available. More specifically, it was clear that members of the indigenous population could not avail themselves of its provisions unless they had been married under the provisions of the Marriage Ordinance, 1902. The relevant clause of the Divorce Ordinance read:

> Nothing hereinafter contained shall authorize - The grant of any relief under this Ordinance unless the petitioner resides in the Protectorate at the time of presenting the petition; and (a) is not an aboriginal native of Africa, or (b) being an aboriginal native of Africa has been married under the provisions of the Marriage Ordinances in force in the Protectorates of East Africa, Uganda, or British Central Africa....[4]

Thus, save for the condition of residence, it would seem that the Ordinance was available to any person who was not "an aboriginal of Africa". On the face of the Ordinance, this would still include, for example, an aboriginal Nigerian or South African.[5]

Later editions, including the present Act, are not as specific. The only people they seem to exclude are those who have not acquired domicile in the country. Thus, it is only by implication, from those provisions of the Marriage Ordinance expressly preserving customary law, that marriages contracted under customary law can be said to be excluded from the statutory law of divorce.

Perhaps even less clear in both the Divorce Ordinance/Act (even as originally enacted) and the Marriage Ordinance/Act is whether or not it is obligatory that a marriage contracted under the latter statute should be dissolved in accordance with the provisions of the former. The Marriage Ordinance made it clear that jurisdiction over marriages contracted under its provisions would be reserved to the High Court - and the relevant clause still forms part of existing legislation.[6] Yet the mere fact that the High Court would exercise jurisdiction did not mean that the Divorce Ordinance necessarily provided

the only law applicable. As long as the parties to a dispute were Africans, the High Court had power to apply customary law, so long as the same was not repugnant to justice and morality or contrary to any written law. Thus, in theory customary law could have been applied (by the High Court) to dissolve a marriage contracted under the Marriage Ordinance between Africans.[7]

At least in practice, it has never been questioned, however, that a statutory marriage can only be dissolved in accordance with the statutory law of divorce.[8] This undoubtedly must also have been the intention of the relevant legislators. Indeed, it can be observed in this regard that the Divorce Ordinance, like the Marriage Ordinance, was framed in a way which seems to indicate an intention to lay down what would be a general law of the land. The conditions upon which divorce could be granted, for example, were expressed in clearly exclusive terms. Thus, the only instances in which the court could apply some different law had to be those expressly provided for under some statute.

As already indicated, the Christian Native Marriage Ordinance, 1912, had been enacted simply to facilitate missionary compliance with the requirements of the law in celebrating statutory marriage between African Christians.[9] The substantive law applicable to marriages contracted under the Ordinance was to be exactly the same as that applicable to marriages contracted under the principal Marriage Ordinance. This also meant that the position with respect to divorce would be the same.

In 1913, the Divorce Ordinance, 1905, was amended to enable the Governor to authorise (by notice in the Gazette) any magistrate holding a District Native Court to exercise jurisdiction with respect to marriages celebrated under the 1912 Ordinance.[10] To this day, the 1913 amendment remains the only statute ever actually enacted in an attempt to extend jurisdiction under the Divorce Ordinance/Act beyond the High Court.

The 1913 amendment was - as far as can be ascertained - never officially invoked until its repeal in 1923.[11] Still in 1913, the Christian Native Marriage Ordinance, 1912, was itself amended to allow magistrates holding District Native Courts to hear and determine applications for the removal of caveats with respect to marriages under the 1912 Ordinance.[12] Unlike this latter amendment, the amendment to the Divorce Ordinance did not automatically extend jurisdiction to magistrates. Yet some of the magistrates seem to have assumed that such was the case. The enactment of the Native Marriage (Christian Rites) Registration Ordinance, 1923, probably compounded this confusion. Marriages solemnised under the 1912 Ordinance could have been confused with those contracted under the 1923 Ordinance. That some magistrates mistakenly exercised jurisdiction with respect to marriages contracted under the 1912 Ordinance is clearly shown by the court records.[13]

The relevant judgements of the District Courts do not contain sufficient detail as to fact or law. Thus, it is generally difficult to tell how scrupulously the provisions of the Divorce Ordinance, 1905, had been observed. The pronounce-

ment of decree nisi in most of the cases (instead of immediate dissolutions of marriages) would suggest some adherence to the provisions of the Divorce Ordinance. In one case,[14] a Mzimba District Court refused to hear a petition for divorce brought by a wife in the absence of her husband or in the absence of proof that the latter had been served with notice of the petition. The husband was away and the petition had been brought against his father. This was acceptable practice under customary law, but the relevant marriage had been contracted under the 1912 Ordinance. Even the grounds upon which the decrees had been made seemed to meet the requirements of the Divorce Ordinance. On the other hand, however, the relevant cases would seem to have been decided with the minimum of formality. The parties were never legally represented. Elaborate technicalities and procedures were never insisted upon. The judgements themselves were spare, devoid of any elaborate reasoning. Indeed, it is interesting that records of the relevant cases were not even kept separately, but in the same books as those used for recording cases arising from customary-law marriages.

It may be noted in general that the legal position under the Divorce Act is drastically different from that obtaining under traditional customary law. Divorce can only be granted if the petitioner proves the existence of at least one of an exclusive list of grounds.[15] Even on proof of any of the prescribed grounds, a decree for divorce may still be refused for various reasons specified by the Act.[16] Further, the jurisdiction of the High Court under the Divorce Act must be exercised

in accordance with the law in matrimonial proceedings in the High Court of Justice in England. The Matrimonial Causes Rules, 1950, as amended by the Matrimonial Causes (Amendment) Rules of 1951 of England have been specifically adopted in Malawi by subsidiary legislation.[17] The implication of this is that, to obtain divorce under the Act, highly formalised and relatively complex procedures have to be followed. Legal representation is practically indispensable. Worth noting is the fact that the decided cases, few as they are, clearly show that the High Court has scrupulously applied the provisions contained in, or imported under, the Divorce Act. The provisions of the Act have been applied without any allowance being made for the different social circumstances of African litigants. The mores and standards prevailing in African communities have not been allowed to influence the interpretation of the Divorce Act. English precedents[18] have been used practically as the sole guide in the interpretation of the law.

2. Conflicting Mission Attitudes to Divorce Among African Christians

As already observed, the views of the non-episcopal missions at the Blantyre conference of 1920 were embodied in "Bill B". Like its rival "Bill A" or the 1923 Ordinance, the general principle of "Bill B" was to remove African Christian marriages from the regime of the Marriage Ordinance, 1902, and the Divorce Ordinance, 1905, and to place them under the regime of customary law. "Bill B", however, departed from this general principle partly by excluding the application of customary law insofar as the grounds for divorce were concerned.

The Bill expressly specified the grounds upon which divorce could be obtained. These grounds, as already noted, were adultery on the part of the respondent and desertion for a period of three years or more.[19]

Under the Divorce Ordinance, 1905, as it stood at the time of the 1920 conference, a husband could apply for divorce on the ground of the wife's adultery simpliciter.[20] This was the only ground available to the husband. The wife was not entitled to petition for divorce on the mere ground that her husband had committed adultery. To constitute a ground for divorce, the husband's adultery had to be coupled with incest, bigamy, marriage with another woman, cruelty or desertion for two years or upwards. The wife could also petition for divorce if the husband was guilty of rape, sodomy or bestiality. Further, the wife could petition for divorce if her husband had changed his profession of Christianity for the profession of some other religion and had gone through a ceremony of marriage with another woman.

The practical differences between "Bill B" and the law under the Divorce Ordinance, 1905, can be underestimated. Although providing for only two grounds for divorce, the proposed law under "Bill B" would have significantly widened the scope for divorce. For the husband and wife, an additional ground - desertion - would be available. Under the Divorce Ordinance, the ground of desertion was not available to the husband. It was not available to the wife either, unless it was coupled with adultery. Under the law proposed in "Bill B", the wife

would be placed on the same footing as the husband as regards the offence of adultery. Like the husband, she would be able to petition for divorce on the ground of adultery simpliciter. For the wife, the law under the Divorce Ordinance seemed to provide a wider scope for divorce in that there were additional grounds (of sodomy, bestiality, rape and the abandonment of Christianity coupled with marriage to another woman) upon which divorce could be obtained. Although actual figures do not exist, it is clear from court records, however, that it was adultery and desertion which ranked among the most common matrimonial offences. Sodomy, bestiality and rape, on the other hand, were hardly heard of in the courts. In practice, it is thus the law under "Bill B" which would have been less restrictive. It must be noted in this connection that indirectly, an offence such as rape would probably have been available as a ground for divorce under "Bill B", as the ground of adultery could easily have been interpreted to include rape.

However, it was not the primary aim of the proponents of "Bill B" to widen the scope for divorce. The relevant clause in "Bill B" does not seem to have been suggested with the law under the Divorce Ordinance particularly in mind. The concern was mainly with the position under customary law. The primary aim of the clause was to restrict the operation of customary law, under which there was virtually no limit to the grounds upon which divorce could be granted.

The Native Marriage (Christian Rites) Registration Ordinance, 1923, reflected the terms of "Bill A". Like the 1923 Ordinance, "Bill A" provided for the application of customary

law to relevant marriages without qualification. However, the disagreement between the episcopal missions, who had supported "Bill A", and the non-episcopal missions, who had supported "Bill B", did not essentially arise from any differences in the way they viewed the law of divorce under customary law. The disagreement largely reflected differences in their conceptions of the nature of "Christian marriage" in general.

The Catholic and Anglican missions were opposed to divorce regardless of the circumstances. The following quotation from an address by the Anglican Bishop of Nyasaland in 1926 contains a vigorous affirmation of the opposition to divorce. He stated:

> ....Although divorce in law does allow re-marriage, and such marriages are perfectly legal,[21] yet we cannot regard a divorce decree as having any canonical effect whatever. The man, as we believe, in the sight of God remains bound in marriage to his wife till death, however she may have sinned against him, and the man cannot put asunder what God has joined. If he marries another, she is not his wife from the Christian standpoint, and neither he nor the new wife, whatever her legal status, can be in Christian communion. It follows from this that the circumstances which led to the divorce have nothing whatever to do with the matter. A man or woman may have been grievously wronged, have been entirely innocent of any sort of provocation, and if he remains single he may and should seek the help which he will assuredly receive in regular communion, but however sorry one may be for him, and however much one may wish to help him, his complete innocence of all cause of complaint cannot make a second union a real marriage if the first continues to exist, or justify his living in such union.[22]

The rigours of the doctrine of indissolubility would in some cases legitimately be avoided by invoking the rather elaborate doctrine of nullity or other ecclesiastical variations of it. As one writer put it in relation to the canon law in early England, the doctrine of nullity was essentially that:

> ....The church was unwilling to end a marriage. It was [however] willing to say that a marriage had never began. In the words of the Common Prayer - 'Those whom God hath joined together let no man put asunder'. But curiously enough it was permissible to say that God should never have joined them together in the first place.[23]

The grounds for nullity recognised by the churches[24] tended to be far wider than those specified under the Divorce Ordinance.[25] With a minimum of ingenuity, it was possible to extend the grounds for nullity in such a way as would easily have made the dissolution of marriage under ecclesiastical practice a far easier task than under the Marriage Ordinance. Under church practice, for example, a marriage could be annulled if it was found that at the time of the celebration of it one party had not understood the nature of marriage as a life-long union with the other partner to the exclusion of others. In fact, the finding of ignorance as to the nature of marriage would often be deduced from conduct subsequent to the celebration of marriage, for example, wanton adultery or taking another wife.[26] This was more readily done in marriages between baptised Christians and non-Christians or non-baptised converts. Indeed this ground for nullity could even be abused to enable a married Christian to abandon his or her unconverted partner for a fellow Christian.[27] Still, in principle, the episcopal missions were totally opposed to divorce. They, thus, eschewed and sought to steer clear of any legislative measure which could compromise their stand on divorce. Both "Bill B" and the 1912 Ordinance were considered to constitute such measures.

Of course, these missions opposed any kind of divorce, including divorce granted under customary law. However, the

generalised terms of "Bill A" with its reference to customary law were not in themselves offensive to these missions, unlike the specific references to divorce appearing in "Bill B" and in the 1912 Ordinance. The main attraction of "Bill A" to these missions was its omission of any specific reference to divorce. It is important to note that according to Catholic and Anglican doctrines, marriage was essentially a religious sacrament and not a civil contract.[28] The relevant missions did not go to the extreme of denying any role to the state in the regulation of marriage. Still, they were in favour of limiting state involvement in matters of marriage to the minimum. Marriage to them essentially belonged to the sphere of the church and not the state. In the event of any conflict, the view of the episcopal missions was that the law of the church was supreme. In theory, customary law was more likely to lead to conflict than the law under either the existing Ordinances or "Bill B". On the other hand, however, customary law lacked the authoritative rigidity of statutory regulation. Although customary law was regarded as an impediment to Christian married life, the missionaries were already used to the idea of ignoring or supplanting it whenever it conflicted with their teaching. It would be more difficult to ignore or supplant any specific rules or principles embodied in legislation.

In contrast, the non-episcopal missions did not regard marriage as a religious sacrament. The religious ceremony was viewed merely as attaching the implications and obligations of a Christian marriage to what was otherwise a civil contract.[29]

Thus, the non-episcopal missions tended to be more concerned about the content of secular law than their episcopal counterparts. Ideally, even the non-episcopal missions accepted the principle that marriage was a lifelong union. Divorce was, however, admitted in certain circumstances. In fact, any divorce properly granted in a court of law would be regarded as valid by the church. A member was expected to adhere to the regulations of his church governing divorce, but a divorce obtained against the rules of the church would, strictly, still be regarded as valid. The party contravening the rules would, however, be subject to discipline. Obviously, it would have been ideal for the missions if the courts granted divorces only in cases where those involved would not be exposed thereby to church discipline.

3. The Question of Divorce and the Proposals to Repeal the 1923 Ordinance

The question of divorce was no doubt the most significant of the issues raised in connection with the proposals to repeal the 1923 Ordinance. Two interrelated matters were involved, namely: which body of law should be applied to, and which courts should exercise jurisdiction over, marriages between African Christians. For convenience, details of the proposals relating to the two matters will be presented separately. There can be no question, however, that the underlying policy considerations in relation to these matters were the same. Discussion of the policy issues will follow the presentation of the actual proposals.

a) The Law Governing Divorce

The solemnisation of marriage under the 1923 Ordinance entailed no legal consequences whatever.[30] Thus the Christian ceremony would not affect the grounds - determined solely by customary law - upon which divorce could be granted.[31]

It is difficult to tell how, in the period between 1923 and 1933, the courts had actually interpreted Section 3 of the 1923 Ordinance. Available official correspondence suggests that there was a measure of confusion among district magistrates as to the import of the section. It is clear that not all the magistrates were sure as to whether customary law was applicable to the relevant marriages or whether some other law was applicable.[32] The Committee of the Synod of the Church of Central Africa, Presbyterian at its meeting of 5th October, 1933, as already seen, also complained of a lack of uniformity between the courts in dealing with cases referred to them.[33] In the absence of relevant court records for this period, and the cases could not have been all that many, one cannot be sure how serious this "lack of uniformity" had become.

The non-episcopal missions were already opposed to the formula of the 1923 Ordinance and whatever experience they had had of its actual working seems only to have hardened their opposition. As already noted, the issue of divorce was paramount. The Committee of the CCAP Synod noted how, in cases involving Christians:

> ...divorce is often granted for reasons of which the church cannot approve and which are repugnant to Christian conscience.[34]

In the letter addressed to the Chief Secretary in 1936, the Synod underlined the need for new legislation by stressing the fact:

> ...cases still continued to occur in the courts and decisions given which were at variance with Christian principles.[35]

This was reiterated at the 1936 conference of missionary and government officials.[36] The Rev. J.F. Alexander commented that "any trifling reason from the Christian standpoint [was] sufficient" to enable a person to obtain a divorce. In another statement at the same conference, he observed that:

> ...the great trouble is that divorces are given for different reasons and also for reasons which are not valid in our own eyes such as failing to produce children.[37]

It was at the same time clear that "Bill B" of 1920 could not be revived in its entirety. The full support of the episcopal missions was a necessary condition for any chance of success in the anticipated reforms. A clause in any measure specifically providing for the grounds upon which divorce could be obtained was bound to alienate the episcopal missions who, at least before 1936, seemed bent on continuing with the 1923 Ordinance. On the question of divorce, a new formula was necessary, not so much to bridge as to bypass the doctrinal gulf between the episcopal and non-episcopal missions.

At the meeting of the Committee of the CCAP Synod, the idea was mooted that instead of enacting one piece of legislation specifying the grounds for divorce, the Government could draw up a parent Ordinance under which rules could be made for

separate denominations.[38] Auspiciously, a suggestion on almost identical lines was made by a member of the Roman Catholic mission in 1934. In a letter to the Chief Secretary, Father Paradis of the White Fathers Mission suggested as an improvement on the proposals of "Bill B", that:

> ...questions concerning the severance of the marriage tie [should] be decided in accordance with the Rules or Usages of the church or other religious body to which the parties belong.[39]

He continued:

> ....The consequence of [this] ought to be that churches or religious bodies allowing for divorce could obtain a decree at their own request, and that churches or religious bodies which do not allow the practice of divorce would also have an Ordinance which would suit their tenets on the marriage question.[40]

There can be little doubt that this rather accommodating idea helped to secure the support of the episcopal missions for the proposed repeal of the 1923 Ordinance at the 1936 conference. At this conference, a resolution was unanimously adopted which called for the repeal of the 1923 Ordinance and the enactment of another Ordinance on the lines of "Bill B" of 1920. The latter would, inter alia, include a provision under which the governing bodies of the various religious denominations would, with the approval of the Governor-in-Council, make Rules for the divorce of Africans married in accordance with their respective religions.[41] The Committee appointed to consider the question of African Christian marriages adopted this formula in its preliminary draft Bill that was submitted in 1945. The relevant clause provided that:

> No marriage celebrated under the provisions of this [Ordinance] may be dissolved except in accordance with the tenets and rules of the church in which the parties to the marriage were married....[42]

The above formula was satisfactory to all the mainstream missions. The formula was, however, unacceptable to many Africans and the opinion of most administrative officials was also highly critical.[43] The Committee was ultimately compelled to drop the proposal. In the final report to the Acting Governor, submitted in 1948, it was stated:

> ....Your Committee's greatest problem has been to decide what recommendations to make as to the dissolution of marriages between African Christians. Some of us are wholly opposed on religious grounds to the dissolution of Christian marriage validly [contracted]. But we recognise that, as other Christians are legally entitled to seek dissolution of their marriages in the courts, any measure which deprived African Christians of a similar remedy could only be regarded as discriminatory, that consequently Your Excellency would be precluded from giving your assent to such a measure ... and that there could be no prospect of the secretary of state advising His Majesty not to disallow it.[44]

The report here was simply echoing the criticisms which many Africans and administrative officials had voiced against the 1945 preliminary proposals. The final recommendation on the question under discussion was closely tied to the recommendation on the question of jurisdiction and these matters will be considered presently.

b) <u>The Question of Jurisdiction</u>

Prior to 1933, disputes arising from marriages contracted under the 1923 Ordinance fell under the jurisdiction of District (or Subordinate) Courts. The same courts had also exercised jurisdiction over marriages contracted purely under

customary law. Although never expressly stated in the Ordinance itself, that these courts would exercise jurisdiction over marriages under the 1923 Ordinance was tacitly understood by those involved at the 1920 conference. The creation of Native Authority courts, with jurisdiction over customary marriages, in 1933 introduced a new element into the whole subject of African Christian marriages. It must be noted that even those who had endorsed "Bill A", and were therefore in support of the principle of Section 3 of the 1923 Ordinance, had not envisaged the assumption of jurisdiction by Native Authority courts. At the time of the 1920 conference the only alternative to giving jurisdiction to the Subordinate Courts was to reserve jurisdiction to the High Court. As already seen, the very reservation of jurisdiction to the High Court had constituted one cause for complaint against the working of the 1902 and 1912 Ordinances.[45]

Section 3 of the 1923 Ordinance stated that:

> ...the celebration of marriage under this Ordinance shall not as regards the parties thereto alter or affect their status or the consequences of any prior marriage entered into by either party according to native law or custom or involve any legal consequences whatever.

This left little doubt that the Native Authority courts would exercise jurisdiction over marriages celebrated under the 1923 Ordinance. This was, indeed, the interpretation officially adopted by the administration. The interpretation is not confined to Native Authority courts, but also holds true with respect to the later "African" or traditional-law courts.[46] On the other hand, officials within the lower hierarchy of the

judiciary have not always been ready to apply the jurisdiction of customary-law courts to marriages which have been celebrated in Christian churches. Hence sometimes "African" courts have refused to entertain divorce petitions brought by Christian parties.[47] In one case which came before the Zomba District Commissioner, a judgement of Native Authority Chikowi was quashed on the (erroneous) ground that the latter had no jurisdiction over a marriage which had been celebrated under the 1923 Ordinance.[48] In the early 1930's it was also the belief of some missionaries, especially those of the episcopal churches, that the Native Authorities had no jurisdiction over African Christian marriages celebrated under the 1923 Ordinance.[49]

The debate about the possible repeal of the 1923 Ordinance proceeded on the correct assumption that the Native Authority courts had jurisdiction over marriages celebrated under this Ordinance. The unanimous view of the mission was that Native Authority courts were not competent to adjudicate on matters concerning the interpretation of Christian law.[50] As already seen, the missionaries, expressed the belief that African chiefs were either "pagans" or "mahommedans" and had no experience or knowledge of Christian marriage.[51] A suggestion to the effect that, in cases involving marriages of African Christians, the Native Authorities could sit with African church elders[52] never found its way into any concrete proposal. Thus, the missions were agreed that Native Authority courts should be denied jurisdiction over African Christian marriages. In fact the very introduction of Native Authority courts was a

major reason for the proposed repeal of the 1923 Ordinance. In the preliminary report of 1945, it was recommended that first- and second-class Subordinate Courts should have exclusive (first instance) jurisdiction over marriages contracted in accordance with the proposed Ordinance.

Again the proposal to exclude the Native Authorities from exercising jurisdiction over African Christian marriages was bitterly contested by most Africans and administrative officials. The Committee was forced to drop the 1945 recommendation in its final report of 1948. Instead, it was recommended that Native Authorities and Subordinate Courts should exercise concurrent jurisdiction under the proposed Ordinance. The idea was that the parties themselves would choose whether to take their dispute before a Subordinate Court or a Native Authority. The proposal was nothing short of an admission by the Committee that it had failed to agree upon a formula that would satisfy the various viewpoints on the matter.

The final proposals as to which law of divorce would apply, and which courts would exercise jurisdiction, with respect to marriages of African Christians were not reduced into any specific clauses, and were not included in the final draft Bill. The Committee merely recommended, firstly, that the Divorce Ordinance, 1905, should be amended so as to allow first- and second-class Subordinate Courts to exercise jurisdiction in cases of divorce of Africans married not only under the proposed African Christian Marriage Ordinance, but also under the 1902 Marriage Ordinance.[53] Secondly, the relevant section of the Native Courts Ordinance, 1947,[54] would

also be amended "to make it clear that Native Courts might exercise jurisdiction in cases of marriages" contracted under the proposed African Christian Marriage Ordinance. The intention was to extend the application of the provisions of the Divorce Ordinance to all African Christians married under the proposed law. When hearing cases involving Africans married under this law the Native Authority courts would also be required to apply the provisions of the Divorce Ordinance.

As already noted,[55] even the final report of 1948 did not provide an acceptable alternative to the 1923 Ordinance. The Ordinance was left to stand and is still law today. On the particular questions of divorce and jurisdiction the Government found no justification for the proposal to confer the powers under the Divorce Ordinance on any court other than the High Court, let alone on the Native Authorities.[56]

It is rather puzzling how a process which had been initiated partly because the missionaries believed that the Native Authorities were not competent to deal with Christian marriages should end with a recommendation enabling the Native Authorities to exercise jurisdiction under the Divorce Ordinance.

Of course, the Committee could not recommend that the Native Authorities be excluded from jurisdiction over African Christians, because this idea had already been rejected by most Africans and administrative officials. It was widely pointed out, and the Committee accepted this, that many Christian Africans still adhered very closely to African

customs despite their conversion.[57] There was not much wisdom, therefore, in ousting the jurisdiction of Native Authorities as these were the people most familiar with the customs. However, it could be pointed out in counter argument that Christians were adhering to African customs because under the existing law this was inevitable.[58] Under the proposed law, Christians would have no need to adhere closely to customary law. Admittedly, it might have been realised that there would have been no difference in practice even had marriage under the 1923 Ordinance entailed enforceable legal consequences. Experience has shown that even those Africans who marry under the Marriage Act also tend to adhere to customary law. For example, where it is the custom, men pay malobolo even though they intend to solemnise their marriages under the Marriage Act. This has been recognised by legislation defining the powers of "African" courts. Although these courts have been denied jurisdiction over people married under the Act, they have been allowed to entertain claims arising purely from the customary-law contract - for example, claims for the return of malobolo.[59]

It was pointed out in the report of the Committee that the Native Authorities had already been handling divorces involving Christians and therefore that they would not have much difficulty in applying the provisions of the Divorce Ordinance. This was a non sequitur. The marriages handled by the Native Authorities were customary-law marriages and the divorce law applied was customary divorce law, not Christian or any other foreign law. It must be pointed out that, even

by people opposed to the repeal of the 1923 Ordinance, it was generally admitted that the Native Authorities could not administer Christian or other foreign law. In fact it was partly because of this that the whole issue of reform had been raised by the missions.

One of the fears expressed by the administration, in its rejection of the proposal under consideration, was of the danger that the Native Authorities would seriously depart from the principles of statutory law, which they would theoretically be expected to apply. In reply to this objection, the Report of the Committee presented an ingenious, although perhaps fallacious, argument. In 1947, an amendment to the Divorce Ordinance had brought the law regarding the grounds for divorce to what it is at present. The distinction between husband and wife was removed and either spouse could petition for divorce on the basis of any of the following grounds: adultery, desertion for at least three years, cruelty or incurable unsoundness of mind.[60] According to the Report of the Committee, these grounds of divorce had made the law under the Divorce Ordinance identical to that obtaining under customary law, so that there was little fear of a Native Authority court granting a remedy which would not be available in the High Court or before a magistrate.[61] A further safeguard had been recommended, namely, that Native Authority courts should not entertain cases between Christians until the authorities of the church or denomination to which the parties belonged had first had an opportunity of settling the differences between the parties.

True, in practice divorces under customary law were normally granted on grounds similar to those appearing in the Divorce Ordinance. As already seen in a previous chapter, however, a court under customary law is not confined to any exclusive list of grounds in granting a divorce. More importantly, however, the grounds of adultery, desertion and cruelty under the Divorce Ordinance were highly technical in character, to such an extent that their legal content could hardly be equated with that of corresponding grounds under customary law. The equally technical defences, rules of evidence and procedure further distinguished the grounds under the Divorce Ordinance from those available under customary law. Moreover, the Divorce Ordinance not only provided for divorce, but also for other remedies such as judicial separation, which had no parallel under customary law. There was no sufficient basis for the supposition that Native Authorities would be able to handle applications under the Divorce Ordinance without seriously undermining the principles of that Ordinance.

Of course there were even more serious objections to the initial proposals of 1945, apart from the fact that they were strongly opposed by many Africans and government officials. The proposal whereby the law governing divorce would be determined in accordance with the various bodies of religious law was, to say the least, rather unrealistic. In theory, the rules enacted pursuant to the relevant proposal would have taken on the character of subordinate legislation and would have been considered as part of the civil law. In reality, however, the proposal would have led to the direct involvement

of secular courts in the implementation of Christian morality and church discipline. Even in England, the law did not go that far. The passing of the proposed law would have made divorce for African Christians more difficult than for European Christians married under either the Marriage Ordinance or the law in England. Only faith and conscience would prevent a convinced English Christian from having recourse to the remedies of secular law. The state did not step in to compel a professed Christian to adhere to the teachings of his or her religion. Clearly to implement the proposed reform would have been incongruous as English law had itself evolved in the very opposite direction, from a law solely concerned with the preservation of ecclesiastical values to a law reflective of social reality.[62] Under the proposed law not only would divorce have been made difficult, but, in some cases, it would have been made legally impossible altogether. In addition, the proposals of 1945 would have led to further social divisions and subdivisions in the application of divorce law and therefore to greater complexity and confusion.

The exclusion of Native Authority courts from exercising jurisdiction would clearly have been necessitated by the application of church laws to marriages of African Christians. The Native Authorities might have been not only unable, but perhaps also unwilling to apply Christian rules where the latter clearly conflicted with African custom. Even the ability of the Subordinate Courts to administer church law ought not perhaps to have been taken for granted. Especially in relation to the episcopal missions, church doctrines relating to

divorce were complex and usually a subject of much controversy. Their interpretation was never a straightforward matter. It must be pointed out that even were the law under the 1923 Ordinance to apply, the missions would have preferred the subordinate courts to the Native Authorities. This preference was not and could not have been, based on any objective experience on the part of the missions. The campaign against the Native Authority courts by the missions had started as early as 1933, too early for any objective assessment of the strengths and weaknesses of those courts. In fact the impression conveyed by the court records is that the Native Authorities spent more time on divorce cases and made a greater effort to reconcile the parties than the Subordinate Courts had done. Indeed, the practice is now well established, whereby "African" courts refuse to dissolve marriages involving Christians until church authorities have had the opportunity, and have failed, to reconcile the parties. Of course, there is no legal obligation that Christian parties should consult their churches before seeking divorce. The obligation is purely an ecclesiastical one. However, this fact is not always readily appreciated by those involved and Christians who seek divorce are sometimes greatly inconvenienced thereby.[63]

4. General Basic Viewpoints and Arguments Relating to the 1923 Ordinance

It is essential further to clarify and comment on some of the main viewpoints regarding the Native Marriage (Christian Rites) Registration Ordinance, 1923.

a) The Position of the Episcopal Missions

As already explained, the episcopal missions were initially in agreement with the principle embodied in the 1923 Ordinance. Their initial stand was influenced by the belief that the relevant principle would foster a complete separation of the religious aspects of marriage from the legal aspects. Ideally, these missions would have preferred to disassociate themselves from the secular/legal implications of marriage. Indeed, in the eyes of many of its advocates, it was this supposedly clear separation of law from religion which made the 1923 Ordinance an attractive formula.[64]

In fact, the 1923 Ordinance did more than merely separate the religious ceremony or sacrament from the legal contract. It completely subordinated the religious aspects or obligations of marriage to the customary-law rights and obligations. The subsequent position of the episcopal missions in favour of the repeal of the 1923 Ordinance was primarily a reaction to some of the practical implications of the subordination of the religious contract to the customary-law contract - particularly on issues relating to divorce. Unlike their non-episcopal counterparts, who tended to see the problem of marriage legislation in a broader context,[65] the episcopal missions viewed the problem in purely theological or religious terms. Their sole concern was to preserve the integrity of religious teaching. Thus, their objections to the 1923 Ordinance were mainly directed to ensuring that the operation of the law did not hamper or disadvantage parties who had a desire to uphold the teaching of the church.

To take a typical case, a man and a woman would solemnise their marriage in a Catholic church in accordance with the provisions of the 1923 Ordinance. Under the law of the church the man was not allowed to take a second wife and neither party was allowed to divorce the other. Under customary law, however, the man was entitled to take additional wives and divorce could be obtained for a variety of reasons. The man would take advantage of customary law and take a second wife. A conscientious wife would refuse to cohabit with such a husband. Her refusal would of course not be justified under customary law and the husband would be entitled to divorce or he would be absolved from the obligation to maintain her. The wife could not seek divorce because this would violate the tenets of her church. She would thus be in a dilemma. It was with reference to problems of this type that the episcopal missions sought a change in the law.

The position of these missions was, for example, stated in the following extract from a letter (undated) of the Catholic Archbishop, Mathew, to the Chief Secretary:

> ....In our view provision should be made to enable the Christian wife to retain her status in the community after her husband's re-marriage. The custody of children should be accorded to the innocent party or by the use of discretionary powers to the party upholding the Christian marriage. The question of payment for continued maintenance should be examined, nor do we forget the situation in certain parts of Nyasaland in which the Christian husband is left in a weak position in the event of the dissolution of his marriage.[66]

The letter went on to express doubts as to the ability of Native Authorities to afford the requisite protection to the parties who had been faithful to the Christian teaching. A

similar stance as the one above was taken by officials of the Universities Mission.[67]

The changes sought by these missions were of a practical type. It can be seen, however, that the suggested changes amounted to a suggestion that secular law should be employed as an instrument of church policy. State law would have been utilised to penalise those who had disobeyed, and to reward those who obeyed, church law. This perhaps could not have been a commendable role for the law. Even from the viewpoint of the church, the use of state law to reinforce moral teaching could have been counterproductive.[68]

b) The Arguments of the Non-Episcopal Missions

A basic assumption in the arguments in favour of retaining the 1923 Ordinance was that African Christians would continue to behave in a way which accorded with the general practices of other Africans, rather than in a way which would reflect their conversion to Christianity. In their arguments against the 1923 Ordinance, the non-episcopal missions seemed clearly to reject this assumption. The arguments of these missions underlined the view that African Christians constituted a subcultural group distinct from the rest of African society. According to these missions there was an analogy between the position of African Christians and that of non-Christian Asians. Under the Asiatics (Marriage, Divorce and Succession) Ordinance, 1929, the law had accorded recognition to non-Christian Asians as constituting distinct social groups, by allowing their marital relations to be regulated by the laws of their respective religions. According to the view of these

missions, the 1923 Ordinance constituted an enforced integration of two distinct social groups. Dr Turner of the CCAP Synod observed:

> ...we have as you might say two communities, we have the pagans and the Christians, and they have different social relationships. Now if you demand that Christian Natives who marry must do so under the pagan customs, you are withdrawing them from the social relationships and consequences of their own community and insisting that they should be married under the relationships of another community.[69]

He continued:

> ...when dealing with something so intimate as marriage the fact remains that if you insist that Christians should for all time have the social relationships of their marriages determined by the native relationships of the community out of which they have come, you are withholding from them the possibility of progressing in the direction which they desire to go. If there is no legal difficulty, I cannot see why the demand of the natives for such a legal recognition of the Christian marriage as a binding contract should be withheld.[70]

This was a rather ingenious argument tending as it did to anticipate any charge that the missions' proposals were an attempt to enlist the aid of secular authority to impose Christian moral values on Africans. It could be argued that it was under the 1923 Ordinance that the law was being used to impose social values which African Christians had already renounced. Customary law, according to the above argument, did not reflect the social reality of African Christians. The proposed change would bring the law closer to such reality.

As already stated, there was no evidence that African Christian congregations had actually asked for the proposed reforms. The expatriate missions were clearly acting on their

own initiative. However, whether or not it had really become imperative for different legal standards to be applied to the relations of African Christians was largely not affected by the question as to who had initiated the proposed reforms. Of course there could be no doubt that customary law did not meet with the expectations of the missions themselves as to how African Christians should conduct their marital affairs. There were various marriage practices under customary law of which the church disapproved. Africans who were to remain Christians had to give up, for example, such practices as polygyny, widow inheritance, and in some cases, divorce. This in itself, however, did not necessarily warrant the bold assertion that African Christians had been transplanted into a radically different social sphere from that of their unconverted counterparts.

The argument that African Christians had somehow outstripped other Africans on the ladder of social progress seemed to assume that there was a clear distinction between Christians and non-Africans. In fact the distinction was very blurred. Between a core of individuals who were clearly "Christian" in the formal sense and the unconverted masses, there was a grey area of "converts" whose commitment was not at all clear. Was a "Christian" anyone who had enrolled with a church, a catechumen or only someone who had been baptised? More importantly, however, whatever formal criterion was used to define them, African Christians did not live in physical or social seclusion from the rest of African society. This was indeed one of the main obstacles in the work of Christian

missions. Formal conversion to Christianity did not usually mean a rejection of African modes of life. This was shown time and again particularly in marriage matters. The practice of fulfilling customary-law requirements before solemnising marriage in church was not necessitated by the terms of the 1923 Ordinance. This happened even in relation to marriages under the Marriage Ordinance. The concept of marriage for the Africans was still grounded in African traditions, rather than in the formal teachings of the missions. Even for African Christians, marriage was not just a set of a few formalised rules regulating the relationship of one man and one woman. It was a whole series of relationships without which the mere celebration of marriage in church or before a civil registrar would have made little sense to most Africans. Christianity merely added a new dimension to the relationships of the people involved, it was not a substitute for the traditional networks of relationships.

Christianity did not have such a total transforming effect on individual Africans as the missionaries claimed it had, or hoped it would have. The emerging elite forged by missionary teaching still had its roots in African traditions. On the other hand, the impact of missionary activities was more extensive than the missionaries seemed to realise. The argument of the missions under discussion conveys the wrong impression that the rest of African society was insulated from the forces of social change of which forces the very activities of the missions constituted a main ingredient. Even in terms of specific missionary teachings on marriage,

the impact was not confined to a select group who had formally declared their allegiance to Christianity. The values embedded in Christian teachings constituted one basis for critical self-evaluation on the part of African authorities and African communities in general and in the development of customary law.

Admittedly, there was some ambivalence in the status and activities of African Christians. They were, in a sense, children of two worlds - the new world of European culture and the old world of African traditions. With the advent of European colonialism and European culture, on the other hand, all Africans in a sense became children of two worlds. The special position which seems to attach to African Christians was to an important extent merely symbolic of a wider duality. On the whole, it is submitted that a rigid legal distinction between African Christians and the so-called heathen or pagan Africans would not have been fully justified.

c) The African Viewpoint on the Position of African Christians

The statement of Chief Chimombo of Port Herald District,[71] that "many people who [called] themselves Christians [did] not really understand what this [meant]",[72] expressed a typical reaction of many Africans and officials of the administration to the proposals of the missions regarding African Christian marriage legislation.[73] As already noted, the range of people who could be regarded as "Christians" was not clearly defined. The phrase "African Christian" could indeed have

included even persons who were only minimally acquainted with the teachings of the church. The view that many professed Christians were in fact ignorant of what Christian marriage really entailed partly underlined what has already been said, namely that the distinction drawn by the missions between the positions of Christian, and non-Christian Africans was not entirely born out by factual evidence. However, this reaction in a way obscured another important point which was raised in connection with the proposals to repeal the 1923 Ordinance.

It was generally taken for granted by the missions that the establishment of a separate legal regime for African Christian marriages would be socially beneficial. Many Africans, on the other hand, questioned and rejected the idea of legally segregating the people on any pretext other than on the bases of differences already existing between the different traditional systems. The letter of the Blantyre Native Association to the Southern Province Commissioner, dated 15th October, 1936, contains one example of this attitude. The letter explained that two systems existed under customary law, namely the patrilineal and the matrilineal systems. As to the proposals to establish another legal regime for Christians, the letter stated that:

> ...any change of native marriage legislation should not be legislated for the benefit of the Christian minority only, but for the benefit of all natives generally.[74]

Native Authority Kaphuka and Chief Kachele in Dedza District were to echo this view in 1946, during discussions relating to the legislative proposals of 1945. With reference to the

proposal to oust Native Authorities from jurisdiction over African Christian marriages, Kaphuka simply stated:

> ...we want all cases which come from all Africans [to] be tried by native courts, we do not want our people to be divided into two parts.[75]

Chief Kachele stated:

> ...we do not want to be divided into three parts, i.e. the Boma, the missions and the Native Authorities.[76]

As one District Commissioner observed, the proposals of the missions could be perceived as an "attempt to make Christian Africans into a favoured status class".[77] The Africans were raising a fundamental objection to the creation of elitist groups within their ranks. Customary law and the Native Courts should be there for all Africans. If in some way these institutions were found wanting, there was no justifiable basis for effecting any reforms for Christians alone. Even those Africans who were in support of the proposed changes did not specifically endorse the idea of separate development for African Christians. They criticised African law and African-based institutions in general terms and not with specific reference to Christians. Indeed, they tended to express the hope that certain African customs could be abandoned by all Africans and not just by Christians.[78]

The observation that many Africans who called themselves Christians did not really understand what it meant to be a Christian, tended to obscure an important point which was well grasped by many Africans, but which was apparently missed or overlooked by the missions : Marriage was not a simple matter

of legal formulae. Marriage was the matrix of complex social institutions and relationships. It was part and parcel of African social structure. Unless Christians were to abandon completely many other aspects of African social life, many matters relating to their marriages would continue to be peculiarly African in character. Christians were not normally the urban type of people who had been completely "detribalised". They were people whose ways were still very much rooted in traditional social relationships. Thus, the mere fact that one was able to understand the meaning of "Christianity" or "Christian marriage" did not provide a sufficient basis for exclusion from customary law and from the Native Authority jurisdiction. The position taken by people like Rev. Charles Chinula more clearly underlined this point. As already seen elsewhere in this study,[79] Chinula and other spokesmen of independent African churches believed that Christianity and Christian values, however sincerely embraced by Africans, could only flourish on the foundations of African customs and traditions. A faith had to be built on what people already had and knew. One did not have to lose his "Africaness" in order to become a Christian.

Even were it true that in fact African Christians were beginning to evolve along their own separate path, traditionalists like Chinula would have deplored such a development rather than seen it as a justification for the introduction of a special legal regime. Such a development could only serve to undermine traditional law and authority. Even from a general practical viewpoint, rather than merely from the view-

point of African traditionalists, there was no obvious social or administrative utility in fragmentation. It must be noted in this respect that the ultimate objective of the missions themselves was not to create divisions within the African community. They too sought the creation of a universal social order, namely one based on Christian values. Their methods and short-term objectives, however, were divisive. One of the ways they sought to influence social developments in Africa was by example. The select group of African Christians, though not meant to stand alone forever, would be used as an example, and the individual Christians as ambassadors, to the rest of African society.

d) The 1923 Ordinance and Colonial Administrative Policy

The Native Marriage (Christian Rites) Registration Ordinance, 1923, was not enacted in pursuance of any specific administrative policy. Mainly, it was merely[80] an aspect of the practical prudence of the colonial administration which had initially led to the "preservation" of African customs, subject to the "repugnancy clause". The general preservation of customary law as such was never seriously challenged, at least within the Protectorate. As to the specific question concerning the application of African marriage customs to African Christians, the enactment of the 1923 Ordinance was, as already seen, influenced by certain beliefs as to the mental and temperamental capabilities of Africans to understand and participate in European social institutions.[81] More importantly, at the time of its enactment, the Ordinance was regarded not as reflecting any firm policy, but merely as a temporary

measure while efforts continued to find a satisfactory formula.

Subsequently, however, the 1923 Ordinance came to be seen as providing the ideal formula for integrating the laws of marriage into the administrative policy of indirect rule. Generally associated with the ideas of Lord Lugard,[82] but more specifically as elaborated by other British colonial administrators such as Donald Cameron in Tanganyika,[83] the policy of indirect rule was first inaugurated in Nyasaland in 1933 with the enactment of the Native Courts and the Native Authority Ordinances. Its general declared aim was "to ensure the political development of the Africans as a steady and continuous process".[84] One aspect of the policy was the utilisation, as far as possible, of existing African social and political institutions. In the words of Morris:

> ....One of the fundamental premises upon which this policy rested was that customary society should, as far as practicable, be shielded from alien institutions and concepts likely to undermine it and should be controlled through the customary law operative in the native courts. To those who held these views, there was no justification for subjecting an African, just because he became a Christian and had his marriage celebrated by Christian rites, to the English law in matters so fundamental to the preservation of traditional society as family relations.[85]

It was in the writings of Martin Parr, once Governor of the Equatorial Province of the Sudan, that the legislative formula which was embodied in the 1923 Ordinance was first clearly linked to the administrative policy of indirect rule.[86] Parr was highly critical of the approval by the British Government in African colonies:

> ...of 'practically standardized ordinances' (which ignored the existing civil laws of the tribes) to regulate the matrimonial laws of such members of hundreds of African tribes as are Christians.[87]

Some of the ordinances were not, in principle, restricted to Christians. Still, it was with specific reference to Christians that the application of the ordinances to Africans were approved.

The case of Nyasaland was excepted by Parr, as offering a different, and the more acceptable, approach.[88] This, of course, was because of the 1923 Ordinance. Before its enactment, the law in Nyasaland was like that in other territories and as deplored by Parr. Even after 1923, the law in Nyasaland was not entirely exempt from Parr's criticism. The Marriage Ordinance, 1902, was still available to Africans with the same consequences as those deplored by Parr. Nevertheless, there was a clear option after 1923 to solemnise marriage in accordance with Christian rites without a commitment to alien legal consequences, for example, as regards divorce. Parr's criticism was, however, even more relevant in relation to the proposals of the missions in Nyasaland for the repeal of the 1923 Ordinance. The view of Martin Parr was that:

> ....There [was] no justification on administrative grounds or even on religious grounds, for selecting certain individuals who profess themselves Christians out of African communities and compelling them to have their matrimonial affairs regulated by an alien state law and depriving them of access to the civil law and the courts of the community to which they and their relatives belong. (N.B. The relations who are deeply concerned in marriage and divorce of individuals are probably not themselves Christians.)[89]

He noted that in England a person professing to be a Christian was not subjected to a law of marriage and divorce quite different from that which his non-Christian brother or sister is bound. No special reason, according to Parr, had been shown why a different policy was being pursued in Africa.

One possible answer to this would have been that in England, even though there were some differences between church and state law on marriage, the two were basically the same in the sense that they reflected one and the same cultural heritage. Thus there was not the same mutual incompatibility between the two as was the case in Africa between church law and customary law. In fact the view of the missions would have been that customary law was repugnant to Christian conscience. Actually, acceptance of the extension of the principle of indirect rule to the law of marriage also tended to involve a rejection of the ethnocentric assumptions of the missions that European social systems were superior to thoe of African societies. The argument that there was no justification in excluding African Christians from the operation of their own indigenous laws also underlined the assumption that customary marriage law was not a "primitive relic of the barbaric past".[90] Government officials in Nyasaland clearly recognised that the repeal of the 1923 Ordinance and its replacement by a law on the lines suggested by the missions would amount to a reversal (on a limited scale) of the policy that had been inaugurated in 1933.[91] The impression given by comments of many district administrators, however, is that the main concern was not so much with ideological consistency as

with the fact that the implementation of the proposals of the missions would bring more work to already overburdened officers.[92]

Another aspect of the policy of indirect rule received even greater emphasis from officials in Nyasaland in connection with the proposed repeal of the 1923 Ordinance. Indirect rule also implied the need for fuller consultation of African interests and viewpoints on all important matters concerning them.[93] The general disregard for this aspect of the policy of indirect rule on many important matters in the administration of the country greatly contrasted with the emphasis it received on the issue of African Christian marriage legislation. A typical comment on the proposed Bill of 1945 was by a District Commissioner in Cholo [Thyolo] District, who stated that:

> ...the form and fate of this Bill should no longer rest on the result of argument or agreement between representatives of religious bodies, and others such as administrative officers, but that the African population themselves should now be allowed to comment on the Bill, and to decide whether it should be introduced or not, either in its present or amended form. I think that if they are not in favour of its introduction it should not be brought before Legco [legislative council] at all because they will not be in a position directly to contest it there. I therefore reiterate my ... recommendation that the Bill should be presented in the vernacular and freely distributed, so as to enable adequate consideration to be given to it by the Protectorate Councils of chiefs, the African congress and all other Native Associations.[94]

One reason for emphasising African opinion in this matter has already been alluded to in another chapter, namely that African opinion was expected to confirm, rather than contradict, the view taken by many of the administrative officials. More

importantly, however, it must have been clear that on a matter so intimately close to people's lives as marriage, no legislative measure would be successful without the consent of the people involved.

One point of criticism on the arguments against direct interference with customary marriage laws and institutions was that these arguments tended to ignore the fact that African society was itself rapidly changing, under forces over which noone in particular had any control. The question whether African customs and social institutions could readily adapt themselves to the changing environment was never adequately addressed. Would the Native Authorities be equal to the task of adapting customary law to the changing needs of the African people; or would they be so tradition-bound as to stultify any real development in the law? Was there not the danger of artificially sustaining rules or institutions which had all but ceased to serve any useful social function?

On the other hand, the relevant arguments were also underlined by the rather naive assumption that preceding decades of colonial occupation had left intact traditional African social and political institutions. In fact, as Cuttrufelli states:

> ....In retrospect, it is hard to justify the enthusiasm of those early anthropologists who, as they carried out their field research came to regard African societies as 'intact', that is unaffected by European influence. In fact, since 1500, well before the colonial conquest, even though the European presence was confined to short coastal tracts, it fostered profound political and economic changes; slavery had either directly or indirectly caused the breakdown of the old societies : through slave trade the Western economy had

> made itself felt in the remotest areas of Africa, even before the tribes of the interior had met a single white man.[95]

To this must be added the social upheavals which caused the pre-colonial mass movements of the African peoples themselves. People with very different social systems had suddenly been thrown together, leaving in the process systems that were highly eclectic.[96]

The actual advent of colonial rule had a decisive impact. In many cases, traditional African authority was severely undermined, if not completely destroyed, with the further consequence that many social institutions were undermined as well. The very Native Authority courts which were being so staunchly "defended" had only just been introduced after three decades of "African justice" being dispensed directly by expatriate magistrates. These officials continued to wield much power over the development of customary law both in their appallate jurisdiction and in their role as advisers to the Native Authorities. Both in form and content traditional social institutions had been radically transformed by the sheer weight and pervasiveness of the European-based administrative structure superimposed upon them.

The foregoing observations on the arguments against interference with African social institutions do not, on the other hand, in any way constitute a justification for the direct transplantations of European marriage systems, as embodied in the Marriage Ordinances of the colonial administration or as proposed by Christian missionaries into African communities.

e) An Alternative Theological Approach

In concluding this chapter it may be useful to consider whether there could be any valid alternative approaches to the fundamental theological issues raised in connection with African marriage.

The case for rejecting the proposals of the missions for the introduction of a separate legal regime for African Christian marriages has been further underlined by the views of a growing number of theologians who have come to reject the ethnocentricism and cultural obtuseness which once characterised the missionary movement in Africa. Principally, it has come to be understood that Christianity alone does not create the whole social and cultural complex. In the course of history Christianity "should take on the cultural flesh of one new people after another".[97] As Father Hillman argues:

> ...the church cannot improve the moral life of a people by issuing decrees from the outside, by importing ready-made ethical rules, or by importing extrinsic modifications that have been borrowed from some foreign culture, some profoundly different historico-cultural experience....[98]

According to this view, it is a mistake to project Christianity as a distinct new set of values or rules. Christianity must be projected as merely serving to give a new perspective to old values and traditions.

Christian missions generally operated on the assumption that they had to destroy in order to build. The basis of their attitude to African customs and culture is well reflected

in the following quotation from a statement of Hendrik Kraemer (1938):

> ....The missionary is a revolutionary and he has to be so, for to preach and plant Christianity means to make a frontal attack on the beliefs, customs, the apprehensions of life and the world, and by implication ... on the social structure and basis of ... society.[99]

African social institutions were seen as obstacles and not as bases upon which the Christian faith could rest. What they did not realise was that in the process of undermining African traditional social institutions, they could be creating a vacuum in social relationships with consequences that were contrary to Christianity itself. Particularly in urban areas, the emergence of prostitution, the weakening of the marriage bond, and the increasing incidence of irregular unions, can all in varying degrees be related to the weakening or total disappearance of traditional forms of social control.

Some recognition by Christian missions and theologians that African traditions and social institutions could complement Christianity could have pointed to an altogether different approach to the question of African Christian marriage law. It is indeed illuminating in this respect to cite some of the conclusions of the All-African Seminar on The Christian Home and Family Life held at Mindolo in Kitwe, Northern Rhodesia, between February and April, 1963.[100] This was an ecumenical seminar and had been sponsored by the All African Church Conference in collaboration with the World Council of Churches. Some of the issues discussed concerned the questions what should be the attitude of the church towards customary marriage

and whether there was any basis for combining customary marriage with Christian marriage. The conclusions of the seminar on these questions were, firstly, that any marriage was "God's Ordinance". It was asserted:

> ...that a union properly entered into, with full consent, by a man and a woman competent to marry one another, and publicly recognised in the society in which they live, is a valid marriage in its own right.101

So long as the above minimum conditions had been fulfilled, there was a marriage which the church should not automatically refuse to recognise. The fact that under customary law such a marriage was potentially polygynous and that under the civil law the marriage could be dissolved should not render the marriage any less valid even in the eyes of the church. Secondly, it was emphasised that substance rather than form should establish whether or not a marriage was "Christian". A marriage should be considered to be "Christian" not necessarily because it was solemnised in church, but because the parties thereto were Christians and intended to lead Christian lives. It was pointed out that many of the qualities attributed by the church only to "church marriages" were in fact universal ideals for any marriage. It was observed, for example, that:

> ...indissolubility is natural to marriage, to all marriage : it is not an extra strictness imposed by Christianity. Dissolution of marriage is regarded as an ill to be avoided in all human societies; and the Christians do no good or service either to humanity or to their faith by derogating from the integrity of customary or civil marriage - by elevating, so to speak, into a [distinguishing] mark or characteristic what is only a corruption due to sin.102

It would not reflect well on the church if the idea was encour-

aged that non-Christian customary marriages were easier to dissolve than Christian marriages. Were the Christian church to remain true to the Ordinance of God, it had to teach the indissolubility of all marriages, not of church marriages only.[103] There was a core of values to every marriage which the church had a duty to promote:

> ....In short, our notion of a choice between customary marriage and marriage in church is a false one; and as we have argued ... the task of today is for the church to devise some method of integrating these two elements both purged of their accretions, into one.[104]

The other theme underlining the resolutions of the Mindolo seminar was that the church's duty in society was not only owed to its professed converts, but to society as the whole. In the theological language of Father Hillman: "the salvation announced and accomplished in Christ is not the salvation of a favoured elite, but of humanity ...."[105] Thus, it was resolved at the Mindolo seminar that:

> ....The church will be in a strong position to help and advise [the state on matters of African marriage legislation] when it shows itself to be concerned (as it ought to be concerned) not with Christian marriages only, but with all marriage : with the fundamental dignity and rights of men and women and families as such.[106]

In other words, the church should be a voice for universal social justice.

NOTES

Chapter Nine

1. For a detailed treatment of the subject, see B.P. Wanda, Colonialism, Nationalism and Tradition, Vol.6.

2. Chapter 4.

3. 5 of 1905.

4. Section 2(1).

5. Section 3 of the Divorce Ordinance defined the term "Africa" merely to include the indigenous people of British, Italian and German colonies in Eastern Africa.

6. Section 56.

7. See Gray, "Marriage and Internal Conflict", p. 85, esp. note 41.

8. See Bolt, J., in Kamcaca v. Nkhota, ALR (Mal.), p. 518 at p. 529.

9. See Chap. 6.

10. See Chap. 6.

11. This is when the 1923 Ordinance was enacted. (See Chap. 6.)

12. 7 of 1913.

13. See e.g. Blantyre District Ct. civ. cases no. 278 of 1923, MNA BA1/2/1; no. 75 of 1923, MNA BA1/2/1; no. 41 of 1925, MNA BA1/2/8; no. 59 of 1925 and no. 62 of 192, also MNA BA1/2/8; no. 60 of 1931, MNA BA4/11/1. See also Ellen Banda v. Yobe Chipeta, Mzimba Dist., MNA BR1/1/4 (the year and the no. of the case are not shown).

14. Ellen Banda v. Yobe Chipeta (above).

15. The relevant part of Section 5 of the existing Act provides:

A petition for divorce may be presented to the Court either by the husband or the wife on the ground that the respondent -

(a) has since the celebration of the marriage committed adultery; or

(b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or

(c) has since the celebration of the marriage treated the petitioner with cruelty; or

(d) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition, and by the wife on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality....

16. Section 7.

17. G.N. 65 of 1953, Divorce Rules, enacted by the High Court of Nyasaland under Section 44 of the Divorce Ordinance, 1905.

18. These are precedents relating to the law as it existed before the passage of the Divorce Reform Act 1969 (now consolidated in the Matrimonial Causes Act 1973) in England.

19. Chapter 6.

20. Section 5(1).

21. Emphasis original.

22. Central Africa Vol. XLV (1927), p. 3.

23. David Morris, The End of Marriage (London : Caswell and Co. Ltd., 1971), pp. 6-7.

24. For details, see Adrian Hastings, op. cit., pp. 128-29.

25. Sections 12 and 13. These were basically six. There were about 15 grounds recognised by the churches in East Africa, but according to Adrian Hastings (ibid) the grounds recognised by the churches in Central Africa tended to be even more extensive.

26. See UMCA cases of
Kanyele and Alene (1929)
Belo and Merrilees (1929)
Mtemang'ombe and Judith (1929)
Andrea Yohane and Emily Maria (1929)
Samson and Judith (1929)
All these were cases submitted by various priests on behalf of converts who sought to contract fresh marriages. In all the above cases, nullity was granted on the basis that the other parties did not intend to contract life-long unions. See MNA UN1/1/3/6/2.

27. See case no. 3 of 1936 before NA Machinjili and later Blantyre District Commissioner. The woman in this case complained that her husband had been encouraged by a Roman Catholic priest to abandon her and marry a fellow Christian. The issue was not specifically dealt with by the court.

28. See Harries, Survey, pp. 393-402.

29. Harries, ibid, p. 399.

30. Section 3.

31. See below for official views.

32. See e.g. an enquiry by the DC Nkhota-Kota to the Attorney-General, 21st Dec., 1925, MNA L3/30/6. DC Kasungu to the Judge of the High Court, 7th Aug., 1925, MNA L3/30/6. Replies of Att.-Gen. (L. Lloyd-Blood) to DC Kasungu, 26th Aug., 1925, and to DC Nkhota-Kota, 30th Dec., 1925, MNA L3/30/6. Both replies were to the effect that customary law applied.

33. See Chap. 6.

34. Documents of Nkhoma Synod, MNA in "Box I".

35. Alexander to the Chief Secretary, 25th Jan., 1936, see above.

36. Transcript of verbatim report, MNA NS2/1/2.

37. Ibid. It may be noted that under traditional African practice this was one of the most serious reasons for seeking divorce. The tendency in the courts has been to view childlessness as a less serious ground.

38. Transcript of report.

39. Fr. Paradis to the Chief Sec., 26th Sept., 1934, MNA L3/30/6.

40. Ibid.

41. Transcript of report.

42. Section 9 of the draft African Christian Marriage Bill, MNA NS1/21/6.

43. See discussion on monogamy, Chap. 6.

44. Final Report of the Committee Appointed to Consider Questions Affecting Native Christian Marriage - addressed to the Agt. Governor, F.C. Brown, 28th Feb., 1948, MNA NS2/1/2.

45. See Chap. 6 above.

46. See e.g. the opinion of the Att.-Gen., J. Gregg, in a letter to the PC (N.P.), 27th May, 1938, MNA L3/30/1; Att.-Gen. to the Chief Secretary, March, 1942, MNA L3/30/6; Circular letter from DC (Dedz) to all the missions in the district, 22nd July, 1944, MNA L3/30/7. See also Gombera v. Kumwembe Rhd. and Ny. Law Report, 1956, p. 849 esp. pp. 852-53. All

these were to the same effect, that the "African" courts had jurisdiction. See also Kandoje v. Mtengerenji (supra) and a circular letter from the Senior Local Courts Commissioner, Zomba, to the Local Courts Commissioners, Officers and Presidents, 31st May, 1966, MNA 5.13.2.F./19602. See also Section 11(b) of the Local Courts and Traditional Courts Acts (also same section of the Native Courts Ordinance, 1947).

47. See the DC (Dedza)'s circular to the missions and the circular of the Senior Local Courts Commissioner, above.

48. Piyo v. Alini, civ. app. case no. 5 of 1939, MNA BI3/5/1.

49. See e.g. views expressed by Fr. Paradis at the 1936 conference.

50. See above letter of Fr. Paradis to the Chief Sec. and his statement at the 1936 conference. Also preliminary report of the 1945 Marriage Committee.

51. See note 50, and discussion under Chap. 6 above.

52. Minutes of the CCAP Synod, Chap. 6.

53. Minutes of meeting of the Committee at Zomba, held on 6th Dec., 1947, MNA NS2/1/2. Also final report.

54. Section 11(b).

55. Chapter 6.

56. See circular of Chief Sec., to PC's, 13th June, 1950, MNA NS2/1/2. (He was in turn quoting from a passage in a letter from the Colonial Office.)

57. Report of the Committee, 1948.

58. Without following customary law, there would be no marriage, according to Section 3 of the 1923 Ordinance.

59. Section 11(b) of the Local/Traditional Courts Act.

60. Section 5 of the Divorce Act as amended by 32 of 1947.

61. Report.

62. See David Morris' account of the history of the law in The End of Marriage.

63. The student has personal knowledge of a number of cases where people have been unable to obtain divorce because the church authorities have refused to furnish the parties with the necessary authorisation. There are many people, including court officials, who labour under the erroneous belief

that a court could not legally grant divorce to Christian parties without a "letter of authorisation" from church officials. This was the main problem addressed by the Dedza District Commissioner in the letter cited above, note 46.

64. See Martin Parr, "Marriage Ordinances for Africans", p. 1.

65. See below.

66. Extract from an undated letter in files at Edinburgh House, quoted by Harries, Survey, p. 424.

67. See DC Nkhota-Kota to Att.-Gen., 21st Dec., 1925, MNA L3/30/6. Also discussed above in relation to monogamy.

68. See the comments of certain Africans cited in the discussion on monogamy, in Chap. 8.

69. Report of the 1936 conference.

70. Ibid.

71. Now Nsanje.

72. Port Herald meeting of Chiefs and Africans held on 30th Nov., 1945. Report of the proceedings encl. in DC (Port Herald) to Barnes (Chairman of the 1945 Committee), MNA NS1/21/6.

73. See Chaps. 6 and 8 for further details on reactions.

74. MNA NS1/21/6. See also Chap. 6 as to the views of the B.N.A. on other matters.

75. Report of proceedings of a meeting held on 9th Jan., 1946, encl. in DC Dedza to Barnes, 23rd Jan., 1946, MNA NS2/1/2.

76. Report of proceedings of a meeting held on 14th Jan., 1946, encl. in DC Dedza to Barnes (note 75 above).

77. DC Fort Johnston (Mangoche) to Barnes, 3rd Dec., 1946, MNA NS1/21/6.

78. See e.g. the view expressed by Rev. Stephen Kundecha at the 1936 conference, supra.

79. Chapter 8 above.

80. Admittedly, the 1923 Ordinance was the only one of its kind in British colonial Africa. Its uniqueness lay in the way it expressly provided for the application of customary law to, and excluded the application of the imported English law from, African Christian marriages. In Northern Rhodesia, a practice with the same effect as the 1923 Ordinance had

officially been allowed to continue. In that territory, however, there was no statute on the matter. Moreover, Africans in Northern Rhodesia had in any case been excluded altogether from the application of the relevant Marriage Ordinance until 1963.

81. See Chaps. 6 and 8.

82. The Dual Mandate For British Tropical Africa (London : Frank and Cass Co. Ltd., 1965 ed.).

83. See D. Cameron, My Tanganyika Service and Nigeria (London : George Allen and Unwin, 1939). See esp. the discussions of H. Morris and J. Read, Indirect Rule and the Search for Justice.

84. See Memorandum on Native Policy (Zomba : Nyasaland Govt. Printer, 1939) prepared by the Native Welfare Committee under the Chairmanship of K.L. Hall (Chief Sec.).

85. "Development of Statutory Marriage Law," p. 60. Also relevant discussions in Indirect Rule.

86. In 1938 Martin Parr prepared an official "Memorandum on the Marriage and Divorce of Native Christian Members of African Tribal Communities", (E.S.A. D. 177/1, D.S.A. 25040). The Memorandum was based on information on the law in Uganda, Tanganyika and Nyasaland. The Memorandum was widely discussed in colonial official and missionary circles. (See Morris, Indirect Rule, pp. 224-227). Parr's article, "Marriage Ordinances for Africans" published in 1947 was largely based on material contained in the Memorandum.

87. "Marriage Ordinances for Africans," p. 2.

88. Morris states that there was a general sympathy among East African administrators for the Nyasaland formula. Actual attempts to change the law in Tanganyika did not, however, materialise. Ibid, p. 62.

89. "Memorandum."

90. See Morris, Indirect Rule and the Search for Justice, p. 221.

91. See Ellis, PC (S.P.), to Barnes, 25th Nov., 1945, MNA NS1/21/6. Ellis described the proposals of the missions as "retrogressive". See also DC Chintheche, to Barnes, 4th Jan., 1946, MNA NS1/21/6. The latter DC was one of very few officials who seemed sympathetic to the proposals. Yet he saw them as a reversal of Govt. policy. See also generally the Final Report of the Committee on Native Christian Marriage, 1948.

92. Final report.

93. Memorandum on Native Policy (above).

94. DC Thyolo to Barnes, 25th Nov., 1946, MNA NS1/21/6.

95. Women of Africa - Roots of Oppression, p. 15.

96. See introductory Chap. 1.

97. Hillman, op. cit., p. 67.

98. Ibid, p. 72.

99. The Church Message in A Non-Christian World (London: 1938), quoted by Felix Ekechi, op. cit., p. 333.

100. "Report of the Mindolo Seminar." The copy used here was found among documents of the Nkhoma Synod (Dutch Reformed Church), MNA "Box I".

101. Ibid.

102. Ibid.

103. Ibid.

104. Ibid.

105. Op. cit., p. 67.

106. Op. cit.

P A R T IV

CONCLUSION

CHAPTER TEN

CONCLUSION : A GENERAL OVERVIEW OF THE EVOLUTION OF AFRICAN MARRIAGE LAWS IN MALAWI

This study has surveyed various aspects of the customary laws of marriage and the key issues relating to the introduction of marriage legislation in Malawi. The broad aim of the discussions has been to highlight the impact on, and the implications for, African marriage law and practice of the advent of British colonialism and Western European influences in general. This concluding chapter seeks to identify the main elements and themes in the evolution of African marriage law.

1. Colonialism, Social Change and African Marriage

It can be seen that even had European colonial authorities, secular as well as missionary, left family matters to be determined solely by the African people themselves, the nature of African marriage would still have undergone significant transformation as a result of the colonial experience. The mere establishment of a European presence, especially in terms of economic activity, provoked radical change in African societies.

Change and adjustments in response to the stimulus of external forces were not, of course, a novel phenomena to the majority of the African peoples in the area. As described in the introductory chapter, in the period immediately preceding the establishment of the British administration, the area had been thrown into political and social

turmoil as slaving activities, warfare and migrations intensified. These convulsive interactions had caused major changes in the life patterns of the people involved. The clash between patrilineal and matrilineal groups, for example, often resulted in major adjustments in the social practices of one group or the other.

It was the advent of European colonisation, however, which triggered off the most radical and fundamental changes, which are still underway even today. The growth of a market-orientated economy and wage labour, resulting in labour migration and urbanization, provided the main thrust for social change. Simple pastoral or agricultural communities began to be drawn into the industrial and commercial spheres of the Western world. Even in basically rural areas, an urban-orientated culture started to emerge as small "trading centres" - usually consisting of a few shops, an open-air "market", a grinding mill and even a school - mushroomed. In the process, familiar patterns of life and established values began to be threatened. The result was often the spread of instability in the indigenous social systems. Contradictions and tensions began to characterise African familial structures. These structures had been inextricably linked to the traditional economic systems which were being replaced by new systems. Marriage was a key mechanism for the maintenance of traditional socio-economic systems. Any dislocation in these systems was bound to have significant implications for the institution of marriage itself.

Obviously, the process of social change has never been uniform throughout the country. Some areas have been affected more than others. Such heavily modernised places as Blantyre (the main commercial and industrial city) or Lilongwe (the capital city) are characterised by greater social stress and dislocation than the rural areas. Indeed, for purposes of marriage-law policy, a distinction between the highly urbanized areas and the rural areas might be a useful one. It would seem that the social structures of matrilineal communities have tended to be more vulnerable to the advance of the Western capitalist systems than those of patrilineal communities. Yet, it may be noted that the greater part of the areas occupied by matrilineal communities also coincide with areas of high colonial economic activity. The almost-exclusively patrilineal Northern Region of Malawi even used to be dubbed the "Dead North", on account of the low level of economic development in the area during the colonial era.

2. The Missionary Intervention in African Marriage

It is submitted that the direct involvement of colonial institutions in African family matters constituted the single most important ingredient in the evolution of African marriage law as we know it today. This is obviously true with respect to the development of the statutory part of African marriage law. There can be little doubt, however, that this is equally true in relation to the evolution of customary marriage law. In fact, it was within the sphere of customary law that the activities of colonial institutions affected African social relationships in a really practical way.

Christian missionaries were the first outsiders to intervene directly in African marriage matters. Firstly, however, it must be observed that the missions played the most vital role of introducing literacy to the African communities. They provided a major catalyst to the process of social change in general. Secondly, the missions also played an active part in the formulation of existing marriage legislation. This aspect of the missionary contribution is addressed later on. Presently, the point to be noted is that the missionaries purposely sought to impose an entirely new set of values and patterns of social life on the African people. The main ingredient of these values was the Christian teaching regarding marriage.

As Martin Chanock puts it, the "Christian missions in Central Africa saw themselves as fighting a dramatic and intensely important battle on the marriage front".[1] The discussion of the question of monogamy in this study best illustrates the context in which the missions addressed themselves to the question of African traditional social practices. Polygyny was not, however, the only aspect of African marriage which the missionaries condemned. Their censure extended to many other aspects, including : the greater extent to which individual initiative (particularly in the case of women) was subordinated to the will of the kin; the payment of malobolo (which the missions at first construed as a commercial transaction); and generally what the missions saw as a looseness in marriage ties. In fact, the missionaries had initially viewed the whole African traditional institution of marriage as totally incompatible with any kind of

civilised society. They thus set about, in effect, to subvert African traditional values and customs, in the belief that they were contributing to African civilisation and African moral and social advancement. Clearly, what the missions insisted upon as the virtues of a Christian marriage were in some cases merely the cultural and social traditions of the industrialised societies of Western Europe.

The various denominations, through their respective systems of maintaining ecclesiastical discipline, introduced what may indeed be characterised as another set of marriage "laws".[2] Church laws of course applied only to those Africans who had been admitted to church membership and whose marriages had been blessed by the church. It was the position of African Christians that became problematic with regard to the actual working of the marriage laws. Marriages between Christians in effect came to be regulated by two largely incompatible codes of moral and social behaviour. The theoretical distinction between the legal and the religious consequences of marriage involving Christian parties has not been an easy one to maintain. In fact such a distinction has been of little help in resolving the practical dilemma of the individuals concerned. Conformity to the demands of church law has many times brought individual parties (especially women) into conflict with traditional authority. On the other hand, adherence to the mores of traditional communities has attracted ecclesiastical censure or even expulsion from the church.

The implications of the efforts of the missions to introduce new values and ideas regarding marital relationships must, however, also be viewed in a wider context than merely that of African Christians. There is a sense in which the larger part of the African society can be said to have been "Christianised". In the first place, the mere presence of missionary stations in the midst of African communities tended to alter the balance of power, especially in favour of the traditionally subordinate sections, the women and the young. This had some effect on the way people began to conceive their social relationships. Secondly, the Christian message attacking African traditional customs was heard by an audience which extended beyond the formal or official church congregations. Many other Africans were aware of what the missions were teaching. It was simply a question of refusing to respond positively to the Christian message. Africans themselves did not live in isolation, but remained within their established African communities, living alongside their relatives who did not necessarily adopt Christianity. The marriages and marriage problems of African Christians were not simply a matter between themselves and the missions. Other people, including those outside the church, would also be involved. Thus, even the "outsiders" were daily exposed to the views of the missions on the question of marriage.

The mere knowledge of what the missionaries considered as the ideal form of marriage was bound to have an effect on the way Africans would view their own traditions. In varying

degrees, many of the views advocated by the missions came to be accepted as part of African marriage practices. The teachings of the missions, of course, have constituted only one of the many factors that have contributed to the changes in the social attitudes of the African people. Thus, the general trends in customary marriage law on such matters as the age of marriage, the consent of the parties, widow inheritance, polygyny, and divorce owe as much to the teachings of the missions as to the growth of new economic systems and to the involvement of colonial officials in African marriage disputes. On the other hand, there are still many features of African marriage which are fundamentally at variance with Western European Christian doctrines. On the whole, what have tended to emerge are African communities with highly ambivalent characteristics, reflecting the dual and basically contradictory heritage of the people.

3. Colonialism and the Development of Customary Law

There can be no doubt that the intervention of the British colonial officials in African family affairs was the most important factor in the development of existing customary marriage law. In fact, the intervention of British colonialism was a crucial factor in the development of customary law in general. The significance of the British intervention may be underlined by contrasting some features of traditional law with those of contemporary law. Of course, it is impossible at the present day to ascertain the precise nature of the social systems of pre-colonial African communities. However, as Professor Read observes (with respect to East Africa), "some features of the old traditional laws may be

beyond question".[3] Read mentions the following as one of such features:

> Clearly the realm of law was not articulated, defined, or formalized: it was an element of social life inextricably entwined in the religious, political, social and moral structures of traditional societies.[4]

There was nothing which was specifically a "system of law".[5] Law was based and existed in the day-to-day community interactions. Indeed, under some schools of jurisprudence (now widely rejected in favour of more encompassing analyses) the term "law" would even be inappropriate to describe the traditional processes of social regulation or control.[6]

It is obvious that the kind of customary law which the courts have been applying, or indeed the kind of marriage law whose main aspects have been examined in Part I of this study, is hardly a mirror of the traditional law. Naturally, the British authorities could not administer customary law in its undifferentiated form, as part of general community interaction. It was not possible for the British authorities to be involved in the processes of social regulation without at the same time fundamentally altering the nature of those processes. They had to resort to an "articulated, defined, or formalized" law. The ideological rationale for such intervention and for the choice of customary law rather than any other body of law is a matter that may be postponed for reference later. What is more relevant presently is that the institutional framework fostered under the colonial regime led to the emergence of a customary law whose essence lay in the existence of a definable body of rules.

The "customary law" applied by the courts during and after the colonial period is something of a conceptual construct. In the words of Bennett, "rules which were originally the product of a community-based interaction have been abstracted from their social setting and applied in new contexts and new ways".[7]

Some observers have gone further and maintained that customary law was peculiarly a product of the colonial period, something which had no real link with the structures and institutions of pre-colonial communities. Martin Chanock, for example, argues that "customary law" (in what is now Malawi and Zambia) emerged through the very processes of the interaction of British colonial institutions, concepts and strategies with African communities caught in novel social and economic circumstances.[8] According to this thesis, what had happened was not that customary law had survived in spite of the major transformations wrought through European penetration, but that customary law had emerged because of the very transformations that were taking place. The customary law that was recognised and applied in the courts was, according to the argument, a new "invention" used as an instrument of power in the hands of both the colonial authorities and the Africans themselves.

In Chanock's own words:

> The law was a cutting edge of colonialism, an instrument of the power of an alien state and part of the process of coercion. And it also came to be a new way and a weapon within African communities which were undergoing basic economic changes, many of which were interpreted and fought over by those involved in moral terms. The customary law, far from being a survival,

> was created by these changes and conflicts. It cannot be understood outside of the impact of the new economy on African communities. Nor can it be understood outside the peculiar institutional setting in which its creation takes place.[9]

Put very briefly, one central point in Chanock's argument is that, at the time of the intervention of the colonial regime, the various aspects of customary law were "matters of the most intense conflict". His view of the half century which immediately preceded the advent of European rule is that it had been characterised by drastic changes within which very little by way of systems of such institutions as marriage, "law" etc. could be regarded as having been established. Thus, according to this view, African evidence about customary law must not be taken at face value, as descriptions of historical fact. Such evidence was more about the circumstances and changes the Africans were facing and about how they sought to cope with them. Statements about custom were "competitive" rather than "descriptive"; they were arguments for a particular kind of social order.

There can be little doubt that the extent to which "long-standing indigenous institutions had been there in the first place and then survived"[10] has sometimes been greatly exaggerated. The discussions of customary marriage law carried out in Part I of this study offer many examples of how "customary law" had started to change in both content and form as a result of colonial intervention. However, Chanock goes beyond asserting that the law had changed in content and form; the claim he makes is that the whole phenomenon of customary law had emerged as part of the colonial process.

The argument is rather difficult to sustain. It is difficult to see how "customary law" could have commanded so much authority and acceptance among the African people if it was merely a new creation. As Simon Roberts observes:

> The very strength of customary law, the source of its supposedly coercive power, lies in the links it can claim with a past, established, approved state of affairs. Foreign novelties do not lay claim through existing commitments; yet that is what custom does if it does anything.11

The possibility that both the colonial and the African authorities utilised "customary law" for certain coercive purposes cannot be ruled out. To go further and argue that "customary law" had in fact been "invented" specifically for such purposes, however, seems to be stretching the point and the evidence rather too far. Any possible use of "customary law" for coercive ends would be a question more of exploiting already-existing social institutions. In the process, of course, the nature of these institutions would undergo a radical transformation.

There is an extent to which traditional customs (if not "customary laws"), with all their implications of "continuity, cultural identity and orderly existence"[12] must have been established before the colonial era. The various groups of people, later to be identified with the different "shades" of customary law, were not entirely creations of the colonial era. True, there had been a great deal of migrations, invasions and mingling of people. Still, in many cases, a measure of group identity had been maintained to a sufficient degree as to allow, for example, the continued existence of linguistic

divisions. If different languages or dialects could be maintained, so too could other cultural identifications such as the modes of social relationships. The division between the matrilineal and patrilinal communities seems to underline this.

What must be beyond doubt is that the intervention of the colonial institutions greatly altered the nature of "customary law". Firstly, the law became more abstract; it came to be associated more with the courts than with the actual interactions within the communities. To all intents and purposes, the courts became the ultimate authority for customary law. This point is not always readily appreciated as can perhaps be seen, for example, whenever the question of codifying customary law is mooted. A familiar argument against codification is that such codification would fossilize, destroy the adaptive character of, the law. The assumption is that customary law continues to operate within a basically traditional context where any changes within the law would occur simultaneously with changes in actual social practice. In such a context there could be no question of a lag between law and social change, because the two phenomena would be a manifestation of one and the same process. Codification in this case could seem to render the law less adaptive. Yet it can be seen that it is not so much the fact that the law has been committed to writing which makes it less adaptive to new circumstances. What makes the law less adaptive is the fact that it has been abstracted from its social context. Thus, even without actual codification, once the law assumes an existence of its

own, independent of the social context, it becomes less responsive to social change. The reverse is also true; social practice may lag behind the norms or standards imposed from the outside. The various rules associated with the matrilineal principle, for example, have continued to be insisted upon by the courts when actual social practice would seem to have changed significantly. On the other hand, the courts began to reject most customs relating to the levirate and sororate institutions at a time when such practices were still widely accepted (at least by the men).

Secondly, the law began to be conceived in more generalised terms so that the numerous divisions in the systems of customary law became less relevant. It must be noted in parenthesis that the classification of "systems" of customary law in Malawi today is somewhat problematic. How should systems of customary law be identified?

Pre-colonial systems are likely to have been confined to small diverse jural communities. At the same time, it is unlikely that there were any clear-cut boundaries between these units. At present, the two most common ways of identifying systems of customary law are by traditional (or tribal) groupings and by district administrative areas. The two ways to some extent coincide, but this is not true in every case. Indeed, without proper care, a great deal of confusion can arise. Some administrative districts encompass more than one distinct cultural group, while on the other hand, certain traditional groups are split into different districts.

Ibik's Restatement provides one example of how this state of affairs can lead to confusion. The Restatement basically classifies the systems of customary law in accordance with traditional groupings such as the Chewa, Nyanja, Yao, Tumbuka or Ngoni. Yet his "panels" of advisors would seem to have been organised, at least partly, along administrative district divisions. Thus, for example, in gathering the evidence on Ngoni law, Ibik relies mainly on the panel in either Dowa, Lilongwe, Dedza, Ncheu, Blantyre, or (what was) Fort Manning District. In each of these districts there are "immigrant" Ngoni communities, but most of these have adopted the matrilineal customs of their host communities. Thus, when Ibik purports to describe Ngoni law, he ends up describing what is basically Chewa or Nyanja matrilineal marriage law. He refers to the patrilineal practices of the Ngoni of Mzimba as a "local variation". Yet it is the practices in Mzimba which basically represent Ngoni law, which is of the patrilineal type.

Another example of the problem of classifying systems of customary law can be found in the Wills and Inheritance Act which implicitly defines the systems of customary law along district lines. The communities in Nsanje District, for example, are treated as though they were all following patrilineal customs.[13] Yet, the Mang'anja communities in the district are matrilineal. The higher courts, mostly the National Traditional Appeal Court, also usually identify the different laws along district lines. It is not possible, with the evidence available, to determine whether [District] Traditional Appeal Courts ever draw any distinc-

tions between the various communities within the districts.

At least with respect to marriage, there is no evidence in general of any real conflict today between the various systems of customary law. Many significant differences between the various systems have either disappeared or been suppressed. The only real distinction which the courts have maintained is that between matrilineal and patrilineal systems. Even the differences between these two systems have narrowed down to a few basic issues. Indeed, the different characteristics of each system have tended to be attached not so much to particular groups of people as to particular types of marriage. A marriage is characterised either as a "lobola marriage" or a "chikamwini marriage". In matrimonial causes, the tendency, particularly in the higher or urban courts, is to ask what procedure had been followed by the parties in contracting a particular marriage and not where they come from or which group they belong to. In this sense, customary laws may be seen to be losing their character as "personal laws" and developing into one general pool of rules, principles and concepts - a kind of "local" or "indigenous" common law. Clearly, as communities become even more integrated, the characteristic features of customary marriage law will to an even greater extent be linked more to the legislative and judicial framework within which it operates than to any particular social grouping.

In short, the intervention of colonial institutions can be seen to have started a process whereby customary law in-

creasingly began to share the characteristics of Western law. This was true not only in terms of the form the law began to take and the mode of its administration, but also, and more importantly, in terms of its content. It is obvious that the character and attitudes of the courts which applied the law was a major determinant of the ultimate content of the law. At least up to 1962, when the Local Courts were introduced, European expatriates were the dominant force even in the administration of African customary law. These expatriates acquired their knowledge of customary laws through various sources including personal observations, missionary accounts and from African assessors; some of the officials would later pass on their knowledge to others in official "notes" or memoranda, although this was rather rare in Nyasaland. It is also likely that some of the officials relied on knowledge they had acquired through experiences in, or from texts based on peoples of, other African countries. Clearly, these officials did not share the social outlook of the people to whom they were suppossed to dispense justice; they had their own notions or prejudices about social justice, law, marriage and even about African social institutions.

Yet, it is difficult at the present day to pass judgement on the European expatriates, regarding their understanding of African customs. It is useful to remember that much of the existing evidence of particular rules or concepts of customary law has been handed down through the writings, observations and, more importantly, the court decisions of

these same expatriates. One of the assumptions behind the 1969-70 reforms of the court system of Malawi, reforms which inaugurated the present system of Traditional Courts, was that European judges did not fully understand or appreciate indigenous African notions of justice. It must be pointed out, however, that this view was influenced mainly by a few notorious criminal cases and not by any painstaking analysis of the available court records. From the numerous cases discussed in this study, it does not appear that the present Traditional Courts have added any especially "traditional" quality to the law. In the National Traditional Appeal Court, the tendency to incorporate English-law notions into customary law is as pronounced as it was in the High Court, and is certainly more pronounced than it was in the courts manned by the European District Commissioners.[14]

4. The Development of Customary Marriage Law

It is evident that the major features in the evolution of customary marriage law are rooted in the impact of colonial, capitalist economic systems on traditional African societies and in the intervention of colonial judicial and administrative structures into African family disputes. The break-up of the traditional extended family and the ensuing emergence of the modern nuclear family; the trend towards individualism as opposed to the profoundly anti-individualistic weltanschauung of pre-colonial and pre-industrial communities; the dislocation of traditional social hierarchy and all that this implied with respect to relationships between elderly kin and the young and between men and women respectively; the growing importance of interests in property;

all these are some of the key aspects of the impact of the colonial economic systems on African societies.

One of the features which have been noted to have typified marriage under traditional African practice was the private nature of the institution. Marriage was essentially an inter-family social arrangement. It is hard to tell to what degree, in the arrangement of marriage, some conformity with the norms of the community was necessary. There were, perhaps, some normative constraints within which marriages would have been arranged and, obviously, some procedures which would habitually have been followed. Yet the intervention of a state organ or official was not required to validate the marriage or its dissolution. In the final analysis, the creation and termination of marriage depended upon the wishes of, and agreement between, the two families. Hence it is possible that any existing norms of the community did not operate as conditions for the validity of marriage or its dissolution. The implication of this is that marriage is likely to have been less a matter of rules and procedures than a matter of social interaction and manipulation.

The intervention of state-created courts into African family disputes began to alter the nature of customary marriage as a private institution. This can be seen, for example, in the powers assumed by the courts to deny legal validity to marriages entered into under certain circumstances - for example, where a party is under age, has not consented to a marriage, or where the parties fall within the prohibited degrees of consanguinity or affinity. The position is

as though the validity of customary marriages were potentially subject to state approval, through the courts. The private nature of marriage under customary law can be seen to be even more dramatically undermined with the development and virtual domination of judicial divorce. Attitudes, both lay and judicial, would seem to have swung so much in favour of judicial divorce that the very validity of a "private" divorce within the lineages has become rather doubtful. This has made customary marriage increasingly look like a public as opposed to a private institution.

The transition of the customary marriage from the private to the public sphere has also involved a process whereby legal regulation begins to replace other, kin-based and manipulative, processes of social control. It is with the intervention of the courts that the need arises for more articulated and formalised rules, defining the conditions for a valid marriage, the modes of its dissolution and the respective rights and obligations of the parties.

Customary marriage was a matter between the families, not only in the sense that it excluded state regulation, but also in the way the families as corporate units tended to be the subjects of the marriage transaction. From the standpoint of the spouses themselves, marriage could thus be seen to have been less private a matter. The shift from the wider families to the individual spouses as the basis of the marriage contract and of marital rights and obligations can easily be detected in the decisions of the courts. This is another important element in the development of

customary marriage law. It is a development which mainly reflects the changing patterns of economic relationships in African communities. However, it also reflects the direct imposition of European conceptions of social relationships by the courts.

It was not just the intervention of the colonial courts in African family affairs that was crucial, but also the fact that the relevant courts were either manned or controlled by British officials with their own deep-seated preconceptions of legal relationships and social justice. Chanock demonstrates how initial European judgements of African "morality" had an important effect in Central Africa. It was such judgements, according to Chanock, which led to a willingness to intervene in African marriage.[15] It is submitted that European judgements and attitudes as well as legal and social preconceptions were also important in the way they helped actually to mould African customary marriage law. The fact that such African practices as polygyny were never abolished by the colonial administration may lead to an exaggerated view of the extent to which the traditional African ideas about marriage were recognised and allowed to continue. In fact, the European officials re-shaped African marriage law to a far greater extent than may readily be recognised.

Colonial officials were usually torn between two considerations in their involvement in African family disputes. On the one hand, they, correctly, perceived a correlation between social stability and the traditional authority of the kin over the individual, between social and moral anarchy

and the diminishing authority of elderly kin over the young. On the other hand, traditional authority seemed to be grossly authoritarian. The officials were thus also concerned to use their authority to promote individual liberty and initiative.

Chanock points out, and he makes a similar point with regard to the missionary approach, that the officials were at first more concerned with the liberation of women, but that later the emphasis shifted to the need to check marital breakdown and sexual indiscipline or anarchy.[16] It is submitted that the supposed concern for the liberation of women was in fact broader in scope, covering matters in relation to the liberty of the individual in general. Admittedly most of such matters tended to involve women : forced or slave marriages, the pledging of girls of tender years to older men, widow inheritance etc. Yet there was also concern, for example, about the weak position of husbands vis-a-vis the wife's kin in matrilineal systems.

From the generalised pronouncements occasionally made by the officials, the impression may be created that British colonial administrations were more concerned with the preservation of the traditional African social order than with the promotion of individual liberties. This impression emerges, for example, from official statements during the 1930's in relation to allegations about forced marriages in British African Protectorates. A typical observation was made by the Governor of the Gambia, T.W. Southorn, who warned that:

> It should be realised that this progress [in the liberation of women] is causing some consternation in a society founded for centuries on patriarchal authority and having all the deep-rooted conservatism characteristic of an agricultural people. Administrative officers in the Protectorate[s] are receiving with increasing frequency expressions of alarm from the older members of the society concerning the liberties being demanded and taken by their women, and in the present transitional stage any artificial interference by legislation or otherwise in order to hasten the change might have the most disruptive effects.[17]

Such pronouncements must, however, be weighed against the actual decisions of colonial magistrates when confronted with concrete disputes. It is useful to bear in mind that the officials were not usually specifically concerned with the broad questions of policy in deciding cases. Still, underlying their judgements on a wide range of issues was a distinct antipathy to what was seen as an irrational authoritarianism of the kin. "Child" and "forced" marriages were the earliest victims of the new ideas about personal liberties. Enforced "widow inheritance" was another. In matrilineal societies, the right of the matrikin that the husband should settle in their village began to be interpreted very narrowly. The initiation of divorce, its prosecution and consequent rights and obligations or "penalties" began to depend almost solely on the wishes, interests and behaviour of the individual spouses. In short, the notion that marriage was a social pact between two families began to be emptied of its substantive content. Of course, changes in African patterns of personal relationships were taking place independently of the courts, because of the changes in the social and economic circumstances. Nevertheless, it was the courts which provided the institutional framework within

which the individual could challenge the dictates of the kin and within which changes in patterns of relationships could be translated into legal norms.

With respect to the alleged change in emphasis on the part of the colonial officials, it would seem that most African practices which tended to limit the freedom of the individual, for example, forced marriages or child marriages, had been more successfully tackled by the officials than had been the problems of marital breakdown or sexual indiscipline. Cases of obvious coercion of children into marriages, for example, had steadily decreased within a relatively short time of colonial rule. Problems arising from marital breakdowns and sexual indiscipline, on the other hand, were unlikely to decrease. The very economic forces and influences unleashed by colonial rule tended to compound problems of this nature. It is thus not so much that there had been a shift in emphasis or ideological orientation on the part of the officials as simply that one problem had subsided whereas the other had persisted.

It is also useful to remember that in some cases where the law had changed to the apparent benefit of women, it was the interests of the men that were really being served. The obligations relating to widow inheritance can be cited as an example of this. The refusal of a widow to be inherited created an obligation against the widow's guardian towards the kin of the widow's deceased husband. The latter would be entitled to the return of malobolo paid by or on behalf of the deceased husband. The claim for the return of

malobolo would be against the guardian of the widow and not the widow herself. Thus, the "freedom" which the magistrates often conferred on the widows was in effect the freedom of the widows' male guardians from the obligation to return malobolo.

Indeed, there is sometimes a danger in taking a male-versus-female perspective when dealing with questions of customary marriage. Customary marriage conflicts, if closely analysed, were not usually conflicts between men and women, but between men regarding rights over women. Of course, this in itself was a comment on the weak or inferior position of women in society.

Another important development is that the steady erosion of the extended or collective nature of customary marriage has also led to the tendency to conceive the rights over children in terms of the interests between husband and wife. As noted in the relevant discussions, the law on this matter is especially unsatisfactory and typifies the rather haphazard manner in which principles of customary marriage law have tended to be developed. In patrilineal systems, the unsatisfactory state of the law on the issue can be seen also to represent a failure by the courts to address the question as how best to reconcile the traditional institution of lobola and the need to strengthen the social position of women. With respect to both the matrilineal and patrilineal systems, principles which would have made sense in the traditional setting of strong extended families can have disastrous implications,

particularly in urbanized communities. More specifically, while the principles applied in the courts underline a preoccupation with the competing rights of the parents over children, the obligations of either party after divorce is increasingly becoming the more critical issue. This arises from the fact that, in a money economy, children are not so much an asset as an economic liability. It is submitted that, more than any other aspect of marriage, the law regarding the duty of the parents to maintain their children, whether such children are born within or outside wedlock, calls for urgent reform. Society cannot afford a vague or ill-defined law when it comes to the welfare of children.

The study has also shown that, because of European influences, especially Christian missionary teaching, monogamy has tended to be viewed as the ideal form of marriage in many African communities. Thus, although customary marriages continue to be regarded as being potentially polygynous, the courts have tended to interpret the husband's power to take additional wives rather guardedly. There has been a movement to a position where the courts seem to reject the idea that a husband has an absolute right to take a second wife irrespective of the wishes of the first wife. Of course the courts have only gone to the extent of refusing to make adverse orders against women who divorce their husbands on account of the latter's polygyny. Still, the shift detected in court decisions may be said to constitute an important feature in the development of customary marriage law.

The shift may be seen as underlying judicial attempts to improve the social and legal position of women. Such attempts should, however, be considered alongside developments in other areas of the law where the courts would seem to re-inforce the traditionally inferior position of women. Claims relating to illicit sexual relations are a clear example of an area of the law which is strongly influenced by the notion that a woman, from her birth to her death, must perpetually be under the tutelage of some man. The right of the husband to recover compensation on account of the wife's adultery and the absence of a corresponding right on the part of the wife are examples of double standards in the law which the courts have done little to remedy. Yet any possible reform on this matter must be carried out cautiously. The law upon which liability for illicit sexual relations is based is clearly geared towards the protection of the quasi-proprietary interests which men seem to have in women. However, the same law can also be seen as providing a crude legal framework for the protection of women against sexual exploitation. Perhaps the existing law can be adjusted so that it can function more clearly and more directly as a protection against the women themselves and not as some kind of insurance in favour of the male guardians.

It has also been observed that the new economic opportunities have led to the accumulation of expensive items of property within families. Quarrels about property within families are thus beginning to constitute a major part of family litigation. The division of expensive modern property

marks one of the many new frontiers in customary marriage law. Together with many other topics (for example, the prevalence of marriages between people of different traditional groupings or between a Malawian and a foreign citizen), the subject regarding the division of family property raises the question whether the law can really be left to develop merely through judicial application, without some deliberate and direct attempt at reform.

5. The Development of Colonial Marriage Legislation

It is not only under customary law that African marriages may be contracted in Malawi. Like in many other parts of Africa, marriages between African parties can also be contracted in accordance with the imported English system of law, under statute. As shown in the study, the principles governing statutory marriages are in many respects radically different from those governing customary marriages. Jurisdiction is also exercised by different courts. Although the trend in customary law has been towards "Westernisation", the basic differences between the two types of marriages are still very much a problematic issue.

In this study, an attempt has been made to determine why the colonial administration made allowance for a dual system of marriage law. This has been done in the course of examining the history of the main legislative provisions on marriage. Clearly, the matter is not as straightforward as may seem at first sight. It has been observed in the study that the English system of marriage law was first

introduced in British Central Africa Protectorate in 1902 primarily to cater for non-African expatriates who sought to contract marriages locally. However, why the relevant law was introduced in the first place is not the only question. The really pertinent questions are why the relevant authorities deemed it necessary to extend the application of the imported law to members of the African population, and why the indigenous systems of marriage law continued to be recognised. For if there was any compelling reason for the extension of the application of the new law to Africans, that same reason should have served to justify the eradication of the indigenous systems. The matter is even less straightforward when it is realised that the English system of marriage law was not introduced at the behest of the missionaries seeking the support of legal sanction in their crusade against traditional African marriage practices.

The present framework of the laws governing African marriages in Malawi did not come about as a result of any single, clearly-formulated policy on the part of the British authorities. Taken as a whole, the law represents different and often contradictory philosophies, ideals and considerations. There is a sense in which the present structure of the marriage laws can be said to underline a failure to reconcile the conflicting points of view which characterised the long-running discussions and arguments, mainly involving the local colonial officials, the officials in Whitehall and the missionaries, relating to African marriage legislation policy.

A pervasive assumption among the people of the West involved in the "opening up" of Africa was that the areas they colonised were a kind of tabula rasa, a social and moral void, upon which the first principles of civilisation could be imprinted. African institutions, arts, customs and beliefs were viewed as belonging to a savage and chaotic past and did not appear worthy of any permanent place in the kind of society the Europeans intended to establish. It was generally assumed that the death of autochthonous cultures, and their replacement by Western European institutions and ideas, could only be to the good of the colonised people. "Civilisation" or "progress" on the part of the African people tended to be viewed exclusively in terms of the adoption of Western European mores and standards. However, as to how to translate these assumptions into concrete policies, there were different and contradictory views and approaches. Practical considerations also sometimes weighed against any attempt at a complete displacement of indigenous systems or institutions.

British colonial policy in Africa is usually contrasted with the French and Portuguese policies of "assimilation". The latter may be said to have been more brusque in their dismissal of indigenous customs and institutions. The African citizens were expected to abandon their old laws and adopt European laws, even in such intimate matters as marriage. A characteristic feature of the colonial history of the relevant countries is the way legislation was often employed to discourage African traditional practices, for example, polygyny. The British, on the other hand, recognised

the practical need to work through "traditional" institutions. They were also less inclined to resort to legislative measures as a means of fostering social change in African communities. The policy of "indirect rule", as the British approach came to be known, must, however, be seen as providing only a rough guide to British thinking when it comes to the question of marriage legislation in [Malawi]. This study has shown that the main assumptions leading to the enactment of existing marriage legislation had little in common with the philosophy of indirect rule. In this respect, it is useful to recall that all the principle statutes on marriage had been passed before the policy of indirect rule was even formally introduced in the country.

It will be seen that on a continuum of approaches between one approach which fully incorporated the indirect rule concept and the other which completely embraced the assimilation concept, the assumptions underlying the enactment of the British Central Africa Marriage Ordinance, 1902, tended to be closer to the latter end of the continuum. The underlying assumptions of the provisions of the Ordinance were assimilative in character. This was the case despite the fact that the Ordinance was not imposed upon the territory as part of any formulated policy to replace indigenous systems of marriage law.

As was noted at the end of Chapter Five, implicit in the provisions of the Marriage Ordinance, and in the related official exchanges, was the belief that, eventually, customary marriage would disappear under the weight of European

influences. At least during the early period of colonial rule, there was seldom any dispute among European officials that the traditional African systems of marriage were inherently inferior and incompatible with "civilised" social relations. The English system of marriage was viewed as being intrinsically superior. It was assumed that the adoption of such system of marriage by the Africans could only be to the latter's benefit. At least initially, there was no conscious policy on the part of the British administration to develop African marriage law from the existing African social institutions. The long-term development of African marriage law was not seen as a matter of improving on the indigenous institutions, but was viewed almost exclusively in terms of the African people adopting the European system.

The continued recognition of indigenous marriage systems was necessitated mainly by practical, as opposed to any ideological or philosophical, considerations. The shortage of staff and other resources meant that "English law" could not be administered on a large scale. There was also some apprehension that any attempt to impose the new law on African communities would poison relations with the people. The need to consolidate British rule was more urgent than any desire to promote the ideals of Western civilisation. However, the main justification for the preservation of customary marriage systems was the supposed mental and moral backwardness of the African people. The view of many officials was that most Africans were still too primitive to understand or appreciate European social systems

and standards. The implication of this was that, as Africans became more "progressive", the indigenous systems of marriage would fade away. It can be seen therefore that the dualistic system of marriage law was not really intended to be a permanent feature of the law of the land. It was intended mainly as a stop-gap measure, necessitated by what were seen as temporary circumstances.

The enactment of the Native Marriage (Christian Rites) Registration Ordinance, 1923, constituted a significant departure from some of the key assumptions underlying the provisions of the Marriage Ordinance. The analysis of certain provisions of the 1902 Ordinance indicates, and the accompanying official exchanges confirm, that the architects of the 1902 Ordinance did not envisage any marriage of African Christians outside the framework of statutory law. It was assumed that the statutory marriage would be the only suitable type of marriage for African Christians. This assumption was an aspect of the whole attitude towards customary marriage, namely, that such marriage was incompatible with civilised standards. Conversion to Christianity or church membership was assumed to confer a new, "civilised", status on the Africans involved. It has been shown that the resident colonial officials in British Central Africa did not subscribe to this view. The local officials were evidently not enthusiastic about the extension of the Western system of marriage law to members of the indigenous population. (Even less enthusiastic were their counterparts in the neighbouring territory of Northern Rhodesia where, for the greater part of the colonial period, Africans were altogether

excluded from the application of the imported statutory marriage law.) This lack of enthusiasm, it must be emphasised, did not emanate from any sanguine view that the customary marriage was a noble institution, deserving of respect. These officials were simply less optimistic about the social progress which had been made in African communities. Thus, they did not see the minority African Christian converts as being any more "civilised" than the non-Christian masses. The officials simply did not believe that the African people were ready for the kind of grand "innovations" as those contained in the Marriage Ordinance. It was this view which led to the administration's endorsement of the formula embodied in the Native Marriage (Christian Rites) Registration Ordinance, 1923. It will be recalled that this was the formula whereby it became possible for marriages celebrated in accordance with Christian rites to remain under the regime of customary law.

The conflicting attitudes between the episcopal and non-episcopal missions towards the formula of the 1923 Ordinance have been fully surveyed in the course of this study. It has been shown that the differences between these missions tended to narrow after the inauguration of the system of indirect rule, when it became clear that Native Authorities would exercise jurisdiction on all customary marriages, including those contracted between Christians. The episcopal missions, particularly the UMCA, had been the most outspoken critics of the legal framework fostered under the Marriage Ordinance, 1902, and the supplementary Christian Native Marriage Ordinance, 1912. They had allied with the

administration in the support for the 1923 formula. Again, this does not mean that the episcopal missions had a more liberal attitude towards customary law than the non-episcopal missions, who had opposed the enactment of the 1923 Ordinance.

The attitude of the episcopal missions on the question of African marriage legislation was influenced mainly by two related factors. Firstly, and more importantly, was their view that marriage was primarily a religious sacrament. The implication of this was that these missions tended to be less concerned about the secular or legal aspects of marriage. Their main concern was to minimise government interference with ecclesiastical regulation of marriage. The missionaries could ignore the requirements of customary law with impunity. With customary law they were able to act as though they were operating in a legal vacuum. Things were different with regard to statutory marriage law. Deviations from the requirements of the law amounted to criminal offences and exposed the missionaries involved or their converts to threats of prosecution and severe penalties. The second factor was the identification of the Catholic and Anglican bodies with the kind of education programmes which sought merely to make Africans better Christians and better citizens, without radically altering their social, political and even economic environment. Statutory marriage tended to carry with it the implication that the Africans affected had ceased to be part of their indigenous communities, an idea often eschewed by the missionaries in

question. It has been explained how the practical difficulties of maintaining the stance taken by the episcopal missions became more apparent with the introduction of the system of Native Authority courts and how the position of these missions drew closer to that of the other missions.

In contrast, the non-episcopal missions' conception of marriage was that it was primarily a civil contract. The church ceremony was intended merely to bless the marriage and not to convert it into a religious sacrament. Thus, these missions were concerned to ensure that the obligations arising from the civil contract coincided with the teaching of the church. In addition, the non-episcopal missions, especially the Scottish ones, espoused a broader view of their role in Africa. What they advocated was practically the total Westernisation of those Africans who came under their influence. Their desire to "create a purified Chicago in Central Africa" was not confined to "industrial" matters, but also to the social aspects of life. While admitting that the consequences entailed by marriage under the Marriage Ordinance, 1902, were too onerous, the relevant missionaries regarded it as a slur on their work and on the African Christians for the Government to pass legislation under which "Christian marriages" were accorded the same status as customary marriages. The efforts of the missionaries to have the 1923 Ordinance repealed and replaced by another Ordinance, the criticism which these efforts attracted, and ultimately the failure of the administration to reconcile the various conflicting views, have all been fully discussed in the foregoing study.

The Native Marriage (Christian Rites) Registration Ordinance, 1923, was a unique piece of legislation in Commonwealth Africa. The only other country where an arrangement similar to the one provided for under the 1923 Ordinance of Nyasaland had been officially, albeit informally, approved was in Northern Rhodesia. However, the situation in the latter country was rather different because the imported English law did not in any case apply to Africans. The 1923 Ordinance was seen by some commentators as a vindication of customary marriage, as an extension of the policy of indirect rule under which traditional social and political institutions came to be regarded as the preferable ones to the alien institutions imported from Europe. The philosophy of indirect rule contrasted with earlier assumptions under which African social and political progress was conceived exclusively in terms of the adoption of Western European systems. Indeed, it was on the basis of such a view of the 1923 Ordinance that many Africans expressed opposition to the attempts of the missions to have the Ordinance repealed.

There is little doubt that the 1923 Ordinance dovetailed into the structure of indirect rule when the latter was formally introduced in 1933. It can be seen that the new formula proposed by the missions would have taken African Christians outside the jurisdiction of the Native Authority courts and, on many aspects of marriage, outside the operation of customary law. As has been shown, the implication of the 1923 Ordinance was to preserve both the jurisdiction of the Native Authority courts and the operation of

customary law in its entirety. However, it is also clear that the 1923 Ordinance was enacted on the basis of very different assumptions from those which informed the principle of indirect rule. From the viewpoint of the administrative officials involved, the enactment of the Ordinance was more of a pejorative comment about the nature of African Christianity than a complementary appraisal of customary marriage. The officials continued to regard marriage under the Marriage Ordinance, 1902, as being intrinsically superior to customary marriages. This latter Ordinance continued to be available to Africans and it was widely assumed that the more "progressive" Africans would make use of it.

The historical importance of the 1923 Ordinance perhaps lies more in the sphere of Christian missionary theology than in the field of colonial administrative policy. The central principle of the Ordinance, the possible implication that a customary marriage could co-exist with the Christian status, could have been utilised to underline a new and more liberal pastoral approach towards African marriage. The Ordinance clearly accords with the views of those theologians, like Fr. Hillman, who call for a healthier attitude towards indigenous African institutions and for a Christianity that is shorn of the Western cultural ethnocentricism. It can be observed, however, that the missionaries involved in the formulation of marriage legislation policy were themselves not quite ready for any such new approach.

It is submitted that the colonial legislative activities in the field of marriage have not had the same great impact on the social relationships of the African people in Malawi as those colonial activities which have impinged upon the development of customary marriage law. The whole process of colonial marriage legislation is open to the criticism of sheer irrelevancy, as far as the majority of the African people were concerned. The African people themselves were treated more as objects than as subjects of the controversies over the question of marriage legislation. The relevant discussions were geared more towards resolving the ideological differences amongst the various groups of Europeans involved than towards the real developmental issues in African marriage law. The focus on the narrower issue of African Christian marriages serves to underline the fact that the people involved were not principally concerned with the development of African marriage law as such. In the whole process, there was no reference to the actual state of customary marriage law and the problems it presented, save in vague and generalised terms. The assumption of some legislative powers by the Native Authorities did not have any significant impact either on the marriage-law scene. The laws providing for the registration of customary marriages and divorce - the only noticeable legislative contribution by the Native Authorities - failed to address the really urgent issues about customary marriages in the changing society. This failure well reflected the parochial concerns of the Native Authorities in introducing the relevant laws.

6. Basic Current Problems of Marriage Law and the Question of Reform

The marriage laws currently operating in Malawi are still those which had existed during the colonial period. It may be noted that analogous bodies of law in a number of other African countries have come under much criticism from the new African governments. Since the early 1960's, there has been a movement towards the reform of the laws of marriage.[18] Even in Malawi, the continuing existence of the colonial structure of marriage law is largely a result of legislative inertia. The law can hardly be said to be working satisfactorily. The enactment of the Wills and Inheritance Act in Malawi in 1967 underlines the general perception that the bodies of family law inherited from the colonial period are unsuitable for modern African societies. What the 1967 Act has introduced in the field of succession are the same kind of features which governments in other African countries have been attempting to introduce in the field of marriage law. Basically, these features are the modernisation and unification of the laws. It is not within the scope of this study, which is mainly concerned only with the broad aspects in the development of law, to deal comprehensively with the specific current problems of marriage law. This is clearly a matter on which further research is necessary.

Most of the practical problems of marriage law in its present state relate to customary law. The customary law of marriage is in need of a major overhaul and modernisation. Despite the transformation which has taken place,

customary marriage law has retained many features which render it unsuited to the needs of the modern, complex, society. The law is generally fluid, uncertain and indefinite. Its actual operation is characterised by many contradictions and inconsistencies. The outcome of many disputes depend largely on the arbitrary views of the individuals deciding the cases. Many of the substantive rules and forms of customary marriage law are outdated and require modification. The many innovations made by the courts have not been synchronised or properly co-ordinated. The absence of legal representation in the courts where customary-law disputes are held has also meant that relevant judicial innovations have been made without the benefit of considered arguments. Often, customary-law rules have been changed or "invented" without any attention being paid to the implications of the relevant changes on other existing principles or on the whole conceptual framework of the law. Thus, many of the rules or principles which the courts have adopted and applied to customary marriages can be seen to be conceptually contradictory, with some underlining the African traditional conception of marriage as a social pact between two families and others reflecting the Western European notion of marriage as a state-sanctioned contract between man and woman. If left to develop in this manner, the customary law of marriage is likely to degenerate into an unwieldly and chaotic body of rules.

The existing statutory marriage law has not provided a viable alternative to customary law. For various reasons, some of which have nothing to do with the nature of

the law itself, only a negligible number of Africans have actually made use of the provisions of the Marriage [Act]. The law under this Act, and under the accompanying Divorce Act, could also be improved - the procedures for contracting marriage could be simplified and the number of Marriage registrars increased; such unsuitable provisions as those which make polygyny and related conduct criminal offences could be modified or altogether removed; and the grounds and procedures for divorce could be simplified and adjusted to the local social environment. Indeed, with respect to divorce, it may be noted that the English law upon which the present Malawi Divorce Act was based has long since been changed.

It is submitted, however, that any scheme for the reform of marriage law in Malawi must first address the question of devising a single system of marriage law, replacing the different types of marriage which now exist. The availability of the imported European system of marriage to African communities, which have their own indigenous marriage laws, is potentially one of the most problematic aspects of marriage law in Malawi. Indeed, in those African countries where there have been post-colonial attempts to reform the laws of marriage, the unification of the laws, as far as this has been deemed to be possible, has constituted a vital aspect of the reform programmes.

The absence of a unified system of marriage law can be a source of various complications and confusion in the administration of marriage law. All kinds of conflict may

arise, not only as to which set of rules should be applied in a particular instance, but also as to which court should exercise jurisdiction. Even more intractable are the problems associated with the phenomenon of so-called "double marriage" or "combined marriage". This arises when two people who are already married under one type of law go through a second marriage under another system. It is useful to highlight this problem a little bit more, because this would illustrate the inherent defectiveness of the existing structure of marriage law.

Strictly, the question of a "double marriage" can arise only where the customary marriage precedes the statutory marriage ceremony. Parties whose marriage has been validated under the provisions of the Marriage Act cannot validly contract a subsequent marriage under customary law, even with each other. Any attempt to do so is in fact a criminal offence carrying a maximum penalty of five years imprisonment. Thus, the question of "double marriage" should arise only when the customary marriage precedes the statutory one. It must be noted, however, that even the latter type of situation is not expressly provided for under the Marriage Act or any other statutory provision. That a statutory marriage may be validly contracted between parties who are already married under customary law is merely implicit in the provision of the Act which prohibits anyone from contracting marriage under the Act while ...

> being at the same time married in accordance with [customary law] to any person other than the person with whom such marriage is being had.[19]

In practice, the volume of litigation involving problems of "double marriage" is negligible, largely owing to the fact that only a small number of Africans have contracted marriage under the Marriage Act. Even in the West African countries of Ghana and Nigeria, in relation to which countries there have been particularly heated debates on the subject,[20] the type of cases under discussion do not seem to have been that frequent. The interest in the subject of "double marriage" with respect to these countries has tended to be generated by cases where a customary marriage has been followed by a ceremony of marriage under some foreign law, more often English law.[21] The phenomenon of "double marriage" either in Ghana or Nigeria has thus tended to be discussed merely as an aspect of the endeavours to understand a wider problem of private international law. However, with specific reference to Malawi, the number of Africans contracting marriage under the Marriage Act is bound to increase. Should the law continue in its present form, "double marriage" will perhaps become a more common phenomenon in the courts. This will of course depend upon whether any increase in the popularity of statutory marriage is not at the same time accompanied by a decrease in the popularity of customary marriage.

The courts have never really been able to deal with the phenomenon of "double marriages" satisfactorily. The basic problem lies in determining the legal effect of the subsequent statutory marriage on the prior customary marriage. The Marriage Act is silent on the matter. It is

expressly provided in the Act that nothing contained therein shall affect the validity of any marriage contracted in accordance with customary law "or in any manner apply to marriage so contracted".[22] This seems to be a reference only to customary marriages between parties who have not also gone through a ceremony of marriage under the Act. The clause in question is therefore irrelevant insofar as the question of "double marriage" is concerned.

The only statutory provision which comes close to shedding some light on the matter is Section 11(b), at first of the Native Courts Ordinance, 1947, and now of the Traditional Courts Act. The Section has operated to exclude African courts from exercising jurisdiction over

> ...any proceedings concerning marriage or divorce regulated by the Marriage Ordinance [Act], or the Divorce Ordinance [Act], unless it is a claim arising only in regard to bride-price or adultery and founded only on native law and custom.

The reference here must necessarily be to cases where the same parties have gone through both a customary and a statutory marriage. More significantly, the Section seems to imply that a prior customary marriage is not necessarily completely extinguished or obliterated by a subsequent statutory marriage.

One possible view of the phenomenon of "double marriage" would be that the customary marriage is, for all intents and purposes, superseded by the statutory marriage. Customary rights and obligations could thus no longer be enforced between the parties. Early colonial courts, at

least in relation to analogous laws in West Africa, may indeed have been inclined to this view.[23] It is submitted that this is a view which accords with what the architects of the relevant statutes are likely to have intended.[24] The subsequent history of the Marriage Ordinance, 1902, (and the subsequent history of corresponding statutes in other African countries) can be seen in terms of a movement away from the above old approach. Section 11(b) of the [Native Courts Ordinance] can be regarded as an aspect of this movement. Yet it is still difficult to determine the exact implications of this provision.

In G-A-B Khondiwa v. Evelyn Mtambalika (1965),[25] Cram, J., cited Section 11(b) (then of the Local Courts Ordinance, 1962) to support the view that, in the situation under consideration, there is a status of co-existence between the customary and statutory marriages. In this case the parties had been married under customary law for two years. Then they went through a ceremony of marriage at a licensed place of worship. The High Court found as a matter of fact that this subsequent ceremony was a marriage under the terms of the Marriage Ordinance, 1902. Later the respondent commenced proceedings in a Local Court, complaining that the appellant had in effect divorced her. What had actually happened was that the appellant had chased the respondent from the matrimonial home and had purported to marry another woman under customary law. The Local Court in effect agreed with the view that the appellant had "divorced" the respondent. The former was ordered to pay £75 to the respondent and to build a brick house for her. He was also ordered to

pay maintenance for the children of the marriage. On appeal to the High Court, Cram, J., presiding, it was observed that the lower court had no jurisdiction to dissolve the statutory marriage. It was also further observed that the husband could not effectively dissolve the customary marriage by a unilateral act of repudiation. His purported marriage to the other woman was held to be null and void.

The High Court declared that the statutory marriage still subsisted, "prohibiting either spouse during its subsistence from contracting a second polygamous marriage". The customary marriage was declared dissolved "by decree of divorce on the ground of total incompatibility". It is not clear whether the customary marriage was being dissolved by the High Court itself or whether the High Court was merely inferring a decree of divorce from the judgement of the lower court. Whatever the view of the court on this matter, on the basis of the dissolution of the customary marriage, the High Court dismissed the appellant's appeal against the award of £75 compensation and the orders regarding the house and maintenance.

The analysis of the phenomenon of "double marriage" in Khondiwa v. Mtambalika reflects the same view as that underlined by the decision in the English case of Ohuchuku v. Ohuchuku (1960). In this latter case, the parties, who had contracted a customary marriage under Nigerian law, subsequently contracted a monogamous marriage under English law. Wrangham, J., held that he could dissolve the English-law marriage but not the Nigerian-law marriage. The view

fostered by these cases is that two parallel marriages are created between the same parties, that a decree of divorce granted in respect of one marriage does not dissolve the other. This way of viewing the situation is clearly unsatisfactory. The contradiction in the status of the parties, as being divorced and married at one and the same time, is inherently problematical. In a case like Khondiwa v. Mtambalika - what would happen if it has been decided to dissolve the statutory marriage? Could the High Court make further, or even different, orders as regards maintenance, custody of children etc.? Could it be a ground for divorce if, after the dissolution of the customary marriage, the wife stayed away in the house built for her by the husband in pursuance of the previous court order?

In fact, Cram, J., was not altogether consistent in Khondiwa v. Mtambalika. When considering the question whether the parties could validly have contracted a second marriage, he observed that the 1902 Ordinance had provided for the "conversion of a customary marriage into a monogamous one". If what the statutory ceremony does is to convert the nature of the pre-existing customary marriage, then really there can only be one marriage, rather than two.

The view that the statutory marriage converts the customary one may not easily be reconciled with Section 11(b) of the [Native Courts Ordinance]. If the customary marriage is converted, then there cannot possibly be any question of a claim arising "in regard to bride-price or adultery and founded on native law and custom". To say, without

qualification, that a customary marriage is converted into a monogamous statutory one amounts to saying that the subsequent statutory marriage ceremony obliterates the customary marriage altogether. While this view represents what might well have been the original intention of the architects of the Marriage Ordinance, it has become less acceptable ideologically. A better understanding of a customary marriage, in its ideal form, is that it is not just an agreement between two people, but a social pact between two families which entails complex structural rearrangements. In the social context of most African people, the unilateral act of the spouses (of entering into a statutory marriage contract) should not readily be interpreted as an attempt to jettison the complex relationships arising from the customary marriage contract. This is unlikely to be the intention of the parties. People who subsequently contract statutory monogamous marriages do so to build upon, and not to destroy, pre-existing customary arrangements.

It is perhaps more accurate to view the situation of "double marriage" in terms of the fusion of the two marriages into one, hybrid, marriage. Clearly customary law cannot operate to defeat the express prescriptions of the Marriage Act. With respect, Khondiwa v. Mtambalika must be regarded as unsatisfactory insofar as it suggests that two different types of decrees, one under customary law and the other under the Divorce Act, are required to dissolve a "double marriage".[26] The status of the parties, as a married couple, should be capable of dissolution only by a decree of the High Court under the Divorce Act. Similarly,

a husband cannot invoke customary law to take a second wife, and this was underlined by Khondiwa v. Mtambalika itself. Before 1967, the Marriage Act also expressly provided for the devolution of intestate property on the death of Africans married under its provisions. Customary law was thus excluded from matters of succession. Even today, succession upon the death of those married under the Marriage Act is governed by different provisions of the Wills and Inheritance Act from those applicable to people whose marriages are governed solely by customary law.

The really difficult question is which law should apply on matters which have not been expressly provided for in the Marriage Act. It must be noted that this question is not confined to the situation of "double marriage". It can also arise with respect to Africans who contract marriage solely under the Marriage Act, since customary law is primarily regarded as the personal law for Africans. It is not within the scope of this study to go into this matter in much detail. The leading Malawian case on the subject is Kamcaca v. Nkhota, decided by Bolt, J., in 1968.

The question in this case was which law should apply to decide who should be given guardianship of children, between the petitioner, Grace Kamcaca, and the relatives of her deceased husband, the respondents. Grace Kamcaca and her deceased husband, Milton Kamcaca, had met in Southern Rhodesia. Sometime in 1962, they began to live together as husband and wife, following what seemed to be a ceremony of marriage under Southern Rhodesian customary law. In

1964, the parties entered into another marriage under the Malawi Marriage Ordinance, 1902. The first ceremony did not constitute a valid customary marriage as it had not been registered in accordance with the requirements of the Rhodesian Native Marriages Act, 1950.[27] However, although there was no valid marriage in terms of this Act, it was held that there was a "customary union" which, for the purposes of customary law regarding guardianship, would be regarded as a valid marriage.[28] The marriage ceremony of 1964 was held to constitute a valid marriage under the Marriage Ordinance, 1902. The specific question before the court was whether Rhodesian (Ndebele) customary law or English law should apply to determine the issue of guardianship.

Bolt, J., applied Rhodesian customary law and ordered the respondents to deliver the children they had been holding to the petitioner.[29] There was no doubt on the part of the court that a subsequent marriage under the provisions of the Marriage Ordinance brought about a change in the status of the parties. It was noted in particular that such marriage would change the law regarding the distribution of intestate property. It would also affect the status of the parties regarding divorce, for example, "they [would] no longer be able to obtain divorce on grounds recognized by ... customary law". However, it was held that such change in status did not affect the law regarding guardianship. Bolt, J., was of the view that the maxim expressio unius, exclusio alterius (the express

mention of one thing is the exclusion of another) applied in this matter. Thus, it was held in effect that where Africans subject to customary law contract marriage under statutory law, customary law would still apply except on those matters which have been expressly provided for under the statute and except on matters where the customary law was repugnant to natural justice or morality.

The decision in Kamcaca v. Nkhota can hardly be said to be a satisfactory one. At the same time, however, it is unlikely whether there could be any satisfactory answer to the relevant problem. In a note on the case, Franz Von Benda-Beckmann argues that English law ought to have been applied to the dispute in Kamcaca v. Nkhota.[30] One of the points he raises is that the relationship between parties married under the Marriage Ordinance and their children would be governed by English law during the marriage and after divorce. It is thus difficult to see why a different law should be applied after the death of one spouse. Although Benda-Beckmann convincingly demonstrates the difficulties of accepting a contrary view, his observation that English law would apply during the marriage and after divorce is still in the nature of an ipse dixit. There is no clear authority one way or the other.

Nevertheless, Bolt's application of the maxim expressio unius, exclusio alterius in the case would seem to place a totally unwarranted restriction on the application of English law to people married under the Marriage Ordinance. The approach would reduce the marriage into a mere series of

statutory conditions operating within the substratum of customary law. The Marriage Ordinance was introduced with the clear aim of providing a whole new system of marriage relationships. The Ordinance was not introduced simply to provide a limited number of terms and conditions for people who contract marriage under it. Admittedly, Africans who contract statutory marriage may do so because they desire to be bound by certain specific legal consequences entailed by such marriage. Yet, the mere intentions of the parties cannot in themselves serve as a basis for determining the legal implications of a statute of such general nature as the Marriage Ordinance. The approach fostered by Bolt, J., in Kamcaca v. Nkhota cannot also easily be reconciled with Section 11(b) of the [Native Courts Ordinance]. Indeed, the maxim in question could more appropriately be invoked to interpret Section 11(b) with the opposite result from that reached in Kamcaca v. Nkhota. The Section seems to imply that the only aspects of customary marriage which survive a subsequent statutory marriage are those about claims relating to "bride price" and adultery. It is interesting that these are aspects of marriage for which there are no rival principles either under the Marriage Act or under the English common law. This may point to yet another way of resolving the problems of "double marriage". It can be argued that in most matters, the principles of English law should prevail and that customary law should be applied only in respect of matters about which there are no similar or analogous remedies to those available under customary law.

Even this last approach cannot altogether eliminate the problem of conflict between the respective principles of English law and customary law. For example, a court cannot realistically entertain a claim arising from "bride price" as envisaged under Section 11(b) (above) without addressing itself to other aspects of marriage. A claim for "bride price" does not arise in vacuo, but is related to other claims, especially as regards children. A determination of a claim in regard to "bride price" is usually linked to the determination of claims about children or even about the merits of a divorce. The question of "bride price" cannot realistically be relegated into a mere private contractual claim.

What seems to be clear here is that the problems relating to the phenomenon of so-called "double marriage" cannot be resolved simply by tinkering with "rules" of "internal conflict of laws". These are problems which call for fundamental policy decisions about the whole structure of marriage laws. As already noted, the volume of litigation involving such type of marriages is negligible. What is important, however, is that the few cases that have arisen do illustrate a basic flaw in the structure of the laws. However, even in the absence of the practical problems associated with "double marriages", there must be a fundamental objection to a system of law which furnishes one and the same community of people with two different and often contradictory standards of social and moral behaviour. If the social values fostered under the imported English law are in any way better for society in general than those

which are embodied in customary law, then the enforcement of the former should not be confined to one small group of people who happen to contract their marriages in a certain way. Thus, for example, if there is anything socially harmful about polygyny, there can be no logical justification to allow it among Africans who contract marriage under customary law and to penalise only those Africans who happen to celebrate their marriages under the Marriage Act. It might be argued that the law as it is today gives people a choice between different types of arrangement - but what is the social utility of such a choice? It is submitted that one of the main purposes for the involvement of the law in people's marital arrangements should be to ensure that certain generally-recognised social standards are maintained. This is not to deny that there are many matters of marriage which should properly fall within the discretion of the people involved. However, there are also matters about which the law should set common standards. Examples include : the minimum requirements for marriage (for example, with respect to age, consents etc.), the minimum requirements for divorce, and the determination of the question of custody and maintenance of children upon divorce.

7. General Concluding Observations

It is evident that the whole evolution of the laws governing African marriages in Malawi must be understood primarily as an aspect of the processes of British colonialism in the country. The main features of the law characterise the uneasy meeting of varied traditions and the contra-

dictions in the moral and social concerns, not only between Europeans and Africans, and between the various factions of European officials, but also between different groups of Africans as the latter reacted to new social and economic stimuli. The development of African marriage law has not been a simple matter of new wine being put into old wineskins, with one definite result; rather it has been a question of different kinds of new wine being put into different kinds of old wineskins, with mixed results. The direction of development in the law has been ambivalent; although, overall, there can be little doubt that the trend has been towards "Westernisation". The greatest challenge for those who will undertake the task of reforming the laws of marriage will be that of identifying a clear philosophical base upon which the law should stand.

NOTES

Chapter Ten

1. Law, Custom and Social Order, p. 150.

2. Op. cit., pp. 155-56.

3. Indirect Rule, p. 169.

4. Ibid.

5. See H.L. Hart, The Concept of Law (Oxford : Clarendon Press, 1961), Chaps. 5-6 (pp. 77-120), where an attempt is made to define a "legal system".

6. This was mostly the 19th and early 20th centuries positivist school. See John Austin, The Province of Jurisprudence Determined (1832) Lecture VI (1954 ed.).

7. T.W. Bennett, Application of Customary Law in Southern Africa (Cape Town : Juta & Co. Ltd., 1985), p. 63.

8. Law, Custom and Social Order, generally.

9. Op. cit., p. 4.

10. See Simon Roberts, "Notes on African Customary Law", Vol.28 J.A.L. (1984), p. 1 at p. 3.

11. Op. cit., p. 4.

12. According to Chanock these are merely ideological qualities implied in the concept of "traditional law".

13. See Sections 16-17.

14. The composition of the NTAC includes a legally trained magistrate. The influence of the magistrate is underlined in all the judgements of the Court.

15. Op. cit., pp. 146.

16. Ibid.

17. Despatch of 6th Nov., 1936, to the Colonial Office, MNN S1/998/31.

18. The most notable examples are : Ghana : see White Paper, Marriage, Divorce and Inheritance (Accra, 1961). Uganda : see Report of the Commission on Marriage, Divorce and the Status of Women (Govt. Print., Entebbe, 1965). Tanzania : see White Paper, Government's Proposals on Uniform Law of Marriage (Govt. Print., Dar es Salaam, 1969). A new law was enacted in Tanzania in 1971 - see The Law of

Marriage Act, no. 5 of 1971. For a review of the developments, see H.F. Moris, "Review of Developments in African Marriage Law Since 1950", in Arthur Phillips and Henry Morris, Marriage Law in Africa (London : Oxford University Press, 1971), p. 37. For detailed comment on the Tanzania Act, see J. Read, "A Milestone in the Integration of Personal Laws : The New Law of Marriage and Divorce in Tanzania", in Vol.16 J.A.L. (1972), p. 19.

19. See Section 51 of the 1902 Ordinance (now Section 54). This reading of the law is underlined by the absence of any prohibition of the statutory marriage between parties already married under customary law - a customary marriage following a statutory one is expressly forbidden.

20. See I.O. Agbede, "Recognition of Double Marriage in Nigerian Law" (1968) 17 ICLQ, 735. Two seminar papers by A.N. Allott - "West African Double Marriage and its Recognition in English Law" and J. Read - "Double Marriage Revisited", at the Africa Law Seminar, Friday 15th June, 1984 also deal with this subject in detail.

21. See e.g. Ohuchuku v. Ohuchuku [1960] 1 All E.R. 253 and discussion by Allott in the paper cited above.

22. Supra, Chap. 5.

23. See e.g. Ackah v. Arinta (1893) Sarbah F.L.R. 79, where it was observed that a "Christian marriage" conferred such a status on the parties as to render the husband incapable of claiming damages for adultery under customary law.

24. See discussions in Chap. 5.

25. H.C. of Malawi, Civ. App. Case No. 17 of 1965 (see Chap. 4).

26. See Kamcaca v. Nkhota 1966-68 ALR (Mal.), 509.

27. No. 23 of 1950, Section 3.

28. Section 3(3) of the above Act.

29. It is very doubtful whether Bolt's interpretation of the customary law of guardianship was correct, but the matter is not quite relevant here.

30. J.A.L. (1968), pp. 173-78. Benda-Beckmann questions the value of most of the Rhodesian decisions relied on by Bolt, J. Most of these were based on a different factual situation and the relevant legislation in S. Rhodesia was materially different from the law in Malawi.