

FAMILY LAW
IN SOME ENGLISH-SPEAKING AFRICAN STATES

Robert Stibich

I. Introduction

The study of African family law provides one of the best introductions to the problematic nature of African legal systems. Most of the difficulties of legal interpretation and application in Africa result from the mixing of colonial and indigenous laws, but there are few areas where these difficulties are so magnified as in those laws relating to marriage and divorce.

In this paper I have tried to present the important laws as well as some of the basic conflicts in the matrimonial causes of eleven African states: Gambia, Ghana, Kenya, Liberia, Malawi, Nigeria, Sierra Leone, the Sudan, Tanzania, Uganda, and Zambia. All of these states are English-speaking, all owe part of their system of law to English common and statute law, and all suffer the inevitable conflicts that result in the application of such law to a citizen widely separated from his English counterpart in customs, languages, traditions, and temperament. Although in Uganda (Judicature Act, 1962) the continuance of English law was made a precondition to the nation's independence, in most of these states the continuance persists as though by force of habit. In none of these states has there been any large scale effort to produce a cohesive jurisprudence based on native and customary law, and there have been only scattered attempts, and then only on a local level, to record those laws that have existed until now within an oral tradition. As a consequence of this lack, as well as limitations of space, I have restricted myself largely to a discussion of the civil ordinances of the individual states.

Despite the problems involved, there is a kind of regularity in what can be called the "African marriage law," and these states exhibit an overall similarity in the practice, if not the letter, of the law. The widespread

influence of English, Moslem, and Christian traditions explains in large part these similarities, but the African himself is responsible for having absorbed these influences, selecting and adapting those rules and regulations that were closest to his own customs. Moslem law, for example, plays an important role in Nigerian family law, yet in Northern Nigeria the Hausa have influenced and re-arranged Moslem law to suit their own needs. In the end, this is what every African must do if he is to live in harmony with his law.

II. Matrimonial Laws

A. States Under English Law

Certain African states maintain a general dependence on English common and statute law in regard to matters of marriage and divorce, these being Gambia, Ghana, Liberia, Nigeria, and Zambia. (Of course, the other states included in this study are guided to some extent by the English models, but there the similarities are more structural than substantive, and in any case these states allow a variety of other systems to operate in relative equality to the civil courts.) The applicable law in Nigeria (Cap. 177, s. 4) provides a good example of this dependence:

The jurisdiction of the High Court of a Region in relation to marriages, and the annulment and dissolution of marriages and in relation to other matrimonial causes shall, subject to the provisions of any laws of a Region so far as practice and procedure are concerned, be exercised by the court in conformity with the law and practice for the time being in force in England.

The operable laws in Ghana and Zambia (Cap. 4 and Cap. 11, respectively) are almost identical, except that "substantial conformity" is substituted for "conformity." Gambia, under the Revised Edition of the Laws (Amendment) Act (1966), provides that the law of England as it was before February 18, 1965, shall apply in divorce, probate, and matrimonial causes. The Gambian law is extraordinary in placing a limitation upon the continuance of the English

law, since in most other states with similar provisions the applicability is contained in the phrase "for the time being in force in England."¹ In Liberia, specific English legislation is cited (G.N. 65/67): "The practice and procedure for all causes or matters under the Divorce Ordinance shall be the practice and procedure provided in the Matrimonial Causes Rules, 1950, as amended by the Matrimonial Causes (Amendment) Rules, 1951, of England."

In Nigeria, there is a great deal of confusion in the entire area of matrimonial causes. For example, the parliament is not entitled to legislate regarding divorce, judicial separation, or any related matters.² Yet High Court rules provide that "no person normally subject to customary law shall be deprived of its benefits, unless there is an agreement that English law shall govern."³ It seems that English law will be operable whenever strong reasons for the application of customary law are lacking, and the court's ruling on the latter will govern. As conditions prevail for the moment in Nigeria, native or customary courts on the local level have general jurisdiction over all marriage actions, and it is in such courts that decisions are usually reached. But appeals can always be made to the High Court, although, as can be seen from the above, the application of the law is never a matter of certainty.

In the Zambia law (Cap. 132, s. 32B), a marriage is considered invalid if either of the parties to a marriage under the ordinance at the time of the celebration of the marriage is already married by native law or custom to someone other than the person in the present marriage contract. Such a provision is common throughout the states we are considering here, and reflects the essential monogamous

¹In Ghana (Cap. 4, s. 83), in contrast, it is "the law and practice in force in England" from July 24, 1874, to the present.

²See Kasunmu and Salacuse, Nigerian Family Law, p. 7.

³Ibid., p. 26ff. for a discussion.

bias of English law and the attempted resolution, or compromise, of this bias. In effect, under such a provision polygamous situations are allowed and recognized insofar as they are not contracted under statute law. The same is true in reverse, i.e., once married under statute law, additional marriages under customary law are disallowed. Gambia (Cap. 120) includes such a provision, for example, but recently (Act no. 18/67) has provided for the dissolution of a marriage when one spouse undergoes conversion to a religion permitting polygamy. In essence, these and similar laws describe a certain situation which for a Moslem or native is legal but for a Christian is bigamous--a permutation on the old colonialist sentiment that Englishmen are civilized while natives can always be forgiven. This sort of duality will be discussed later, concerning those states with their own matrimonial causes laws.

Each of these states under its ordinance requires certain preliminaries to marriage, including banns, registration, proof of residence or domicile, witnesses, proper form (i.e., a form virtually identical to that used in any English civil marriage), and so forth. In addition, there must be no impediments, such as consanguinity, affinity, impotence, impersonation, lack of consent, or insufficient age, which would after the celebration be grounds for nullification.

B. States with Their Own Causes Laws.

For various reasons--depending largely on the peculiarities of tradition and legal evolution in each state--Kenya, Malawi, Sierra Leone, the Sudan, Tanzania, and Uganda enjoy a greater independence from English law than the states already considered. Each of these states has a diversified set of laws, providing for Christians, Atheists, Copts, Moslems, Hind, as well as allowing for the numerous customary laws of the tribes. A listing of some of these laws would be helpful:

Kenya

African Christian Marriage and Divorce Ordinance (Cap. 151)

Matrimonial Causes Ordinance (Cap. 152)

Mohammedan Marriage and Divorce Registration Ordinance (Cap. 155)

Hindu Marriage and Divorce Ordinance (Cap. 157)

Malawi

Marriage Ordinance (Cap. 102)

Marriage (Removal of Doubts) Ordinance (Cap. 103)

African Marriage (Christian Rights) Ordinance
(Cap. 104)

Asiatics (Marriage, Divorce, Succession) Ordinance
(Cap. 105)

Divorce Ordinance (Cap. 106)

Sierra Leone

Christian Marriage Ordinance (Cap. 95)

Mohammedan Marriage Ordinance (Cap. 96)

Civil Marriage Ordinance (Cap. 97)

Foreign Marriage Ordinance (Cap. 98)

Marriage of British Subjects Ordinance (Cap. 99)

Married Women's Maintenance Ordinance (Cap. 100)

Matrimonial Causes Ordinance (Cap. 102)

Evidential (Marital Intercourse) Ordinance (Cap. 103)

Uganda

Marriage Act (Cap. 211)

Marriage of Africans Act (Cap. 212)

Marriage and Divorce of Mohammedans Act (Cap. 213)

Hindu Marriage and Divorce Act (Cap. 214)

Divorce Act (Cap. 215)

Tanzania is the only one without extensive legislation, but in the Sudan there are so many laws, regulations, procedures, and customs regarding so many different types and classes of religions and communities that it would be too exhaustive a task within this paper to list all of these and attempt to describe which courts hold jurisdiction.

Indeed, the Sudan exemplifies the confusion attendant in the attempt to legislate and adjudicate for a variety of groups having widely divergent marriage customs. The basic rule on procedure and practice, under section 5 of the Civil Justice Ordinance, states that all questions regarding marriage and divorce shall be decided by "any custom applicable to the parties concerned, which

is not contrary to justice, equity, or good conscience. . . ."4 In addition, section 38 of the Civil Justice Code states: "Civil Courts shall not be competent to decide, in a suit to which all parties are Mohammedans, except with the consent of all the parties, any questions regarding . . . marriage, divorce, family relations...."5 As a result, marriages under the Non-Mohammedan Marriage Ordinance (Tit. XXVII) are under the jurisdiction of civil courts, while Moslem law is the province of the Shari'a courts (as long as both parties to the suit are Mohammedans). There are also the Chief's courts,⁶ which administer "the native law and custom prevailing in the area over which the court exercises its jurisdiction, provided that such native law and custom is not contrary to justice, morality, or order." Finally there are the Native courts⁷ which, as with the Chief's courts, are to administer "the native law and custom prevailing in the area or in the tribe over which the Court exercises jurisdiction provided that such native law and custom is not contrary to justice, morality, and order."⁸ It should be noted that the Chief's court (s. 7(1)b) and the Native court (s. 9(1)b) are empowered to adjudicate according to the provisions of "any ordinance" where the court has been authorized by warrant or regulations to administer such provisions. The result is a quadruple judicial system--the Civil, the Shari'a, the Chief's and the Native--each court presiding over a more or less definite area of law and separated from the jurisdiction of the other courts (except in regard to appeals).

I say "more or less" because in practice such delineation of jurisprudence does not always apply--in fact,

⁴The phrase "not contrary to justice, equity or good conscience" is the so-called indirect rule. See Farran, Matrimonial Laws of the Sudan, p. 16ff.

⁵But not if one of the parties is not Mohammedan.

⁶Chief's Court Ordinance, s. 7(1).

⁷Native courts have jurisdiction in all but the three southern provinces, where the Chief's courts have jurisdiction.

⁸Native Courts Ordinance s. 9(1)

cannot. What is the jurisdiction in matrimonial actions when, for example, a Moslem is married to a Christian, a pagan to a Moslem, or a Jew to a Hindu? The Chief's and Native courts are allowed to use Moslem or Civil ordinances whenever customary law is insufficient, but in certain cases there are no provisions in either Moslem, Civil, or customary law which can be applied. In such a circumstance, section 9 of the Civil Justice Ordinance would govern, providing that:

In cases not provided for by this or any other enactment for the time being in force, the court (Civil Court) shall act according to justice, equity and good conscience.

This section has been cited as a basis for the application of English law in all matrimonial actions for which there are no provisions in the Sudan. In Bamboulis v. Bamboulis, Chief Justice Lindsay, citing the above section, declared that although there is no express provision in Sudanese statutory law regarding the choice of law in marriage actions beyond the phrase "justice, equity, and good conscience," "the most equitable and sensible approach would lie in the application of the principles of English Law."⁹

A large part of Sudanese legislation is devoted to another subject: polygamy. The Non-Mohammedan Marriage Ordinance, for example, provides (under s. 6) that:

A marriage under this Ordinance shall be null and void if either of the parties thereto at the time of the celebration of such marriage is validly married whether under this Ordinance or by Mohammedan law or by any valid pagan law or custom or otherwise to any person with whom such marriage is had.

This provision, which in effect acts as a bar to polygamous marriages that are contracted out of a monogamous tradition, is reflected in similar sections of the civil ordinances of Kenya, Malawi, Nigeria, Sierra Leone, Uganda, and Zambia. At the same time, by precedent, Sudanese polygamous

⁹Farran, op. cit., pp. 6-7.

marriages have been recognized as a bar to monogamous unions.¹⁰ Moreover, appeals in marriage actions from lower (inferior) courts to the High Court of the Sudan can be made only when the marriage in question is monogamous. Legal polygamous marriages are entirely under the jurisdiction of Shari'a, Native, or Chief's courts.

A comprehensive statement of even a part of the customary laws in the Sudan or any of the other states is outside the scope of this paper, but Tanzania provides (G.N. 222/67) a statement of Mohammedan law in regard to marriage which is very thorough and can be taken as a standard representation. Accordingly, only those of sound mind, having reached puberty, and having consented, may marry, with affinity, consanguinity, fraud, and fosterage considered as impediments. (It should be noted that degrees of affinity or consanguinity are not identical for Moslem English, and customary laws.) A man is limited to four wives, although he may contract any number of temporary marriages, while a woman may have only one husband at a time. Questions of dowry, divorce, and so on, are likewise treated.¹¹

In Kenya, matters are somewhat less confusing. The Marriage Ordinance (Cap. 150) provides, as in the Sudanese provisions, that one marrying under the Ordinance cannot marry under customary law, that once married under "native law or custom or Mohammedan law" (the implication being that Mohammedan law can be equated with native or customary law) one cannot marry under the Ordinance, and that one cannot already be married if one is contracting a marriage to another person under the Ordinance without penalty. But the additional ordinances regarding African, Christian, Hindu, and Mohammedan marriages and divorces create a much more lucid, although more complicated, system of law than exists in the Sudan. The laws of Malawi and Sierra Leone are equally comprehensive.

In Uganda the situation is quite different--unique is a better description. Morris and Read, in Uganda: The

¹⁰ Ibid., Baindail v. Baindail and Srini Vasan v. Srini Vasan, pp. 192-93.

¹¹ Tanzania's G.N. 222/67 is reprinted in full in the African Law Digest, Vol. III, Item 1 (1967).

Development of Its Laws and Constitution, describe the situation succinctly:

For the vast majority of the inhabitants of Uganda, it is the customary law on family matters, and not the statute law, which primarily effect their domestic relations. An African of Uganda will almost certainly contract a marriage by customary law and if he later wishes for a divorce he will seek this again under customary law. He may, indeed, contract a registered marriage under one of the Marriage Acts in addition to a customary marriage contract, but in such cases it is, for practical purposes, the rights and duties under customary law arising from the customary marriage, and not those under territorial law arising from the registered marriage, which alone will affect his married life.¹²

In an interesting poll of certain Ugandan tribesmen, it was discovered that, of those polled, 71% would consult the involved parents in any marriage dispute rather than go to court, 74% would prefer a Native to an English Court if such adjudication were necessary, and 84% would prefer their Chief or an African judge to an English judge.¹³ In the study cited, it is argued that a "general disrespect for law" exists in present-day Uganda because of the conflicts between imported English laws and indigenous customs.¹⁴ One problem is the Judicature Act of 1962, passed just before Uganda's gaining independence, which stipulated that English law would continue to be the basis of Ugandan law even after independence. But, although in colonial Uganda the High Court could apply only English law, it seems from recent decisions that the High Court can apply in independent Uganda the native and customary laws, since "the common law shall be in force only so far

¹²Morris and Read, op. cit., p. 360.

¹³Frank Mwine, Thesis: A Study of Uganda Customary Law, Appendix I, pp. 16-17.

¹⁴Ibid., p. 22ff. for a discussion.

as the circumstances of Uganda and its inhabitants permit."¹⁵ This controversy remains unsettled, however, and statute law is still largely ignored in marriage matters.

Jurisdiction in Uganda is determined under section 4 of the African Courts Act (1957), which states that:

no native court shall have jurisdiction in any proceeding concerning marriage or divorce regulated by the Marriage Act, the Marriage of Africans Act or the Divorce Act, unless it is a claim arising only in regard to bride-price or adultery and founded only on customary law.

This does not leave very much to the Native courts, since adultery is not a ground for divorce under customary law (desertion by the wife is the only ground), and by-laws have been passed in most districts since the Local Government Ordinances (1949) in an attempt to fix the marriage consideration (bride-price).¹⁶ Moreover, the Divorce Act dates from 1904, and has remained practically untouched since then. The result is an unequal treatment under the law of wives of polygamous marriages--that is, polygamy being illegal under the Marriage Act, a wife of such a marriage may or may not be considered legally married by the courts, and would never be accepted as polygamously married. This remains the law and practice of the land, despite the fact that polygamy is widespread in Uganda.

III. Dissolution of Marriage

Most of the divorce actions, as described in the annexed Table, include grounds substantially the same from state to state. All of the states provide similar restrictions on petitions--hardship and depravity, and the requirement that three years have passed since the marital offense--except for Liberia and Uganda which have no provisions, and Nigeria which adds "misconduct contrary to grounds" as a restriction. Bars to petitions are also largely

¹⁵Morris and Read, op. cit., p. 242.

¹⁶E.S. Haydon, Law and Justice in Buganda, p. 107ff., for a discussion of customary marriage laws in Uganda.

the same--Nigeria, the Sudan, and Uganda include various other provisions, such as unreasonable delay, adultery on the part of the petitioner, or desertion by the petitioner (Uganda only).

The grounds for a petition of divorce in Kenya (Cap. 152, s. 8), which provide the best example, require 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 petition.

In addition, the wife may petition on the grounds that her husband since the celebration of the marriage has been guilty of rape, sodomy, or bestiality.

In Uganda provisions are somewhat more complicated. The husband may petition for divorce only in the instance of his wife's adultery. A wife, on the other hand, may petition for the following reasons (Cap. 215, s.5):

That since the solemnization of her marriage her husband has changed his profession of Christianity for the profession of some other religion and gone through a form of marriage with another woman, or has been guilty of incestuous adultery; or of marriage with another woman with adultery; or rape, sodomy, or bestiality; or of adultery coupled with cruelty; or of adultery coupled with desertion without reasonable excuse for two years or upwards.

Clearly, in Uganda the wife cannot petition for divorce on grounds of adultery, cruelty, or desertion alone. The adultery must be coupled with some other matrimonial offense, or the desertion coupled with adultery, and so on.

In Uganda, as has been noted, there is a widespread reliance on customary law and the native courts, especially in divorce actions. Under customary law, adultery is not a ground for divorce in any case--desertion of the husband by the wife is the only recognized ground. In effect, this means that a wife can obtain a divorce at any time (although she will have to return the marriage consideration), while the husband is powerless to initiate an action until the wife has deserted.

In Liberia, the provisions under the Domestic Relations Law are similar to those under the Kenya law, except for section 70(e), which states that a divorce may be obtained if the respondent has been found guilty of a crime and has been sentenced to at least five years in prison.

In Nigeria, a petition for divorce when made against a statutory marriage will be granted for the same grounds as in Kenya. In customary law, several other means exist, including both non-judicial and judicial dissolutions. Non-judicial dissolutions, which are common especially among Moslems, can be had for various matrimonial offenses or by mutual agreement. Certain such offenses involve late payment (or non-payment) of the bride-price, as among the Ibo. In respect to Moslem law, the husband may divorce his wife by repudiation, which can be temporary or final, according to the formula (talaq). A judicial separation by the native or customary court, on the other hand, requires a statement of reasons, although there exist no formal grounds for divorce. The reasons given may have local significance, e.g., local laws may disallow or require return of the bride-price, but such divorces are usually granted for whatever reasons stated, the philosophy being that a couple who can no longer live together should not be forced to by the courts.

Nigerian customary law shares with Sudanese customary law a provision allowing a petition for divorce in the native courts after the death of a spouse, since death under several such laws does not automatically dissolve the marriage. Interestingly enough, and at the other extreme, certain Sudanese tribes (the Nuer and Ngork Dinka, for example) permit marriage with the dead, a circumstance in

which the brother or son of a man who has died childless or unmarried will marry in the dead man's name in order to provide male offspring who will carry the dead man's name and estate. Moslem and English laws have no clauses to deal with such instances.¹⁷

In the Sudan, the received English law regarding divorce, nullity, and judicial separation (Non-Mohammedan Marriage Ordinance) is the same as in Kenya. Mohammedan laws of divorce are valid for Moslems, with jurisdiction given to the Shari'a Courts. Grounds under Mohammedan law are various, since there are various schools of interpretation, but divorce can usually be had by the husband's repudiation, through mutual agreement, or by application by the wife to the Kadi in cases of gross misconduct by the husband (e.g., neglect, cruelty, desertion) or when the husband has contracted some grave physical or mental disease. Adultery is not a ground. These laws are the same for Moslems in any of the other states under consideration.

Customary and pagan laws in the Sudan are complicated and cannot be dealt with in depth. Tribal laws are usually unwritten, and divorce (if applied for--in many cases it is simply by mutual agreement) often remains a matter of the chief's discretion. The same is true in Nigeria and Uganda. Generally, section 5 of the Civil Justice Ordinance regulates petitions of divorce to the courts, serving to protect individuals subject to customary laws, as do the High Court rules in Nigeria.

In Gambia, Ghana, and Zambia, rules relating to divorce derive from English law in force for the time being, with grounds for divorce much the same as the Kenya ordinance cited as an example. In Sierra Leone, the principal Ordinance (Cap. 97) is also nearly identical to the Kenya ordinance. Ghana, Gambia, and Sierra Leone also have operative ordinances for the marriage and divorce of Mohammedans, which is why polygamy in certain instances is not a ground for divorce (see annexed Table).

¹⁷Farran, op. cit., pp. 78-79.

Nullity actions are much the same in all states. In the Sudan, the causes for nullity listed in the Table make a marriage voidable but not necessarily null and void-- again, a result of the conflicting judicial systems. Except for Liberia, the other states do not distinguish between void and voidable marriages, but provide that for stipulated reasons nullity proceedings cannot be commenced, or if already commenced can be set aside, if the petitioner's insincerity is shown to be "approbation."

Grounds for nullity actions in most states agree with the provisions in Malawi (Cap. 106, s. 12), which require:

- (a) that the respondent was permanently impotent at the time of the marriage; or
- (b) that the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity; or
- (c) that either party was a lunatic or idiot at the time of the marriage; or
- (d) that the former husband or wife of either party was living at the time of the marriage, and the marriage with such previous husband or wife was then in force; or
- (e) that the consent of either party to the marriage was obtained by force or fraud in any case in which the marriage might be annulled on this ground by the law of England; or
- (f) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage; or
- (g) that the respondent was at the time of the marriage suffering from venereal disease in a communicable form; or
- (h) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

The first ground, impotence, can apply equally to the respondent or the petitioner in Kenya and Tanganyika. Uganda provides for only the first five grounds (a to e). Sierra Leone provides for only three grounds (f, g, and h), which are described as "in addition to any other grounds on which a marriage is by law void or voidable." No explanation is offered as to what these "other" grounds may be. Liberia provides for nullity on the grounds of insufficient

age, impotence, or mental/physical incompetence.

Grounds for judicial separation are usually the same as for divorce, involving adultery, desertion, basic conjugal rights, and in some cases drunkenness or incompatibility (Liberia) or informalities in the marriage ceremony (the Sudan).

The ordinances of the states give the courts power to grant several ancillary matrimonial reliefs, the most important of these being damages and maintenance (alimony). In such actions, the courts may order a co-respondent to divorce or separation proceedings to pay the whole or any part of the cost of the proceedings if adultery with the petitioner's wife has been established against him. Also, the whole or any part of the wife's property may be settled for the benefit of the husband and/or the children of the marriage on pronouncement of a decree of dissolution of marriage or judicial separation by reason of the wife's adultery where the wife is entitled to any property.

In regard to damages, Malawi, Tanzania, Kenya, Sierra Leone, and Uganda have an identical provision:

A husband may, on a petition for divorce or for judicial separation or for damages only, claim damages from any person on the ground of adultery with the wife of the petitioner.¹⁸

It is mandatory in such cases that the courts assess the amount of such damages and determine in what manner damages will be paid or applied. No definite guidelines are set for the courts regarding the ascertainment of damages except in Tanzania, where it is provided:

that in respect of an African marriage (i.e., to which both parties are Africans), damages shall as far as possible be assessed in accordance with native law and custom and may be awarded in kind or money and

¹⁸Malawi (Cap. 106, s. 23); Tanzania (Cap. 364, s. 23); Kenya (Cap. 152, s. 23); Sierra Leone (Cap. 102, s. 20); and Uganda (Cap. 215, s. 22).

further provided that the said native law and custom shall, where both parties are of the same tribe, be the custom of that tribe and where the parties are of different tribes shall be that of the tribe of the petitioner.¹⁹

The duty of maintaining a spouse may arise in either dissolution or separation proceedings, and may be the result of an independent action or an ancillary relief. Only Kenya, Liberia, and Tanzania award maintenance for an independent action unconnected to any matrimonial cause. Maintenance as an ancillary relief is granted in the form of alimony, usually a financial relief to the wife. Such alimony may be granted either pendente lite or on a permanent basis. In the former case, alimony can be awarded on the wife's petition for divorce, nullity, judicial separation, or restitution of conjugal rights. Under the chapters already cited (see footnotes 18 and 19, supra), Kenya (s. 25), Malawi (s. 25), Tanzania (s. 27), and Uganda (s. 24) provide:

In any suit under this ordinance the wife . . . may apply to the court for alimony pending the suit and the court may thereupon make such order as it may deem just.

Alimony pending suit rarely exceeds one-fifth the husband's average income for three years after the date of the order, and continues in case of a decree nisi or dissolution or nullity until the decree is made absolute. Liberia and Sierra Leone contain no provisions for alimony pendente lite.

Permanent alimony is awarded on a decree of judicial separation or dissolution, after the determination of the issue before the court. Under the chapters cited, Malawi (s. 26), Tanzania (2. 28), and Uganda (2. 25) provide:

On a decree absolute declaring a marriage to be dissolved or on a decree of judicial separation obtained

¹⁹Tanzania (Cap. 364, s. 25). See Cole and Denison, Tanganyika, pp. 203-10.

by a wife, the court may order the husband to secure to the wife such sum of money . . . it thinks reasonable.

while in Sierra Leone (s. 21) and Kenya (s. 25) it is provided that:

the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum or money for any term, not exceeding her life . . . that the court may deem to be reasonable.

Liberia provides for permanent alimony only on a decree of judicial separation.

In Gambia, Ghana, Nigeria, the Sudan, and Zambia, damages and maintenance actions depend upon whether English, Moslem, or customary laws are applied. When English law is applied, practice and procedure is virtually identical to the ordinances of the states just cited, since these latter ordinances are based largely on English law. Moslem and customary laws vary extensively, however, and cannot be gone into in detail. Usually, however, settlements under Moslem and customary law, if any, are connected to the original dowry or bride-price.²⁰

IV. Conclusion

Certain recent developments--such as Ghana's White Paper (No. 3/61) on Marriage, Divorce, and Inheritance; the Report of the Commission on Marriage, Divorce and the Status of Women (1965) in Uganda; and Tanzania's authoritative statement of Moslem marriage law (G.N. 222/67)--have directed Africans to the basic conflicts between received and indigenous marriage laws and have proposed solutions that amount to more than compromises. Legislation in the states under discussion over the last twenty years has generally recognized the status and authority

²⁰For a summary of Moslem law in this respect, see Tanzania's G.N. 222/67. Also: Kenya's Mohammedan Marriage and Divorce Registration Order, Sierra Leone's Mohammedan Marriage Ordinance, Uganda's Marriage and Divorce of Mohammedan's Act, etc.

of Moslem, tribal, customary, native, and various other marriage laws, which has meant greater freedom for the individual African, although, perhaps, greater confusion in the courts. In any case, much remains to be done to end the more glaring inequities and dualisms that do exist in matrimonial causes laws.

In African Customary Law, Frank Mwine investigates the marriage laws of his home country, Uganda, and asks two vital questions: (1) Can the new African states survive while attempting to rule their people with western laws? (2) Can African traditional laws be salvaged, unified, and codified so as to be adaptable to modern conditions? I believe that these questions reflect the essential difficulties of the marriage laws discussed, and suggest the only possible solution: indigenous African law.

Mwine argues, regarding the English influence on African marriage customs, that:

the [English] laws that were designed to unify African tribes were not introduced for the sake of Africans. They were mainly created in the interests of imperial powers which were struggling not only to acquire territories but also to administer them sufficiently so as to justify their presence in them. This did not mean that these laws were always bad laws but it meant that the people writing these laws were largely ignorant of the African ways of living-- African values and African laws.²¹

I believe that it would be fair to describe most instances of English marriage law applied to the African as simply incongruous. This is most obvious in actions involving bigamy, of course. All English laws include a monogamous bias. Although polygamous marriages are common in every state, these are non-statute, non-civil marriages, and none of the states allow polygamous contracts under received English ordinances. Indeed, as in Kenya, Malawi, Sierra Leone, Uganda, and Zambia, penalties for bigamy of up to seven years imprisonment exist under statute law. Furthermore, the clause that exists in many marriage ordinances and civil codes--usually referred to

²¹Op. cit., p. 1.

as a case of "indirect rule"--which states that customary or traditional African laws will apply unless they are "contrary to justice, equity, or good conscience," has not only contributed to confusion by its vagueness, but has made most African law subject to the pre-judgement of English legal sentiment.

The African states themselves, however, are responsible for a part of this confusion. Most provisions relating to jurisdiction, for example, direct the courts to apply the practice and procedure of English law, but do not stipulate that English substantive law be applied in matrimonial causes. The courts have, however, interpreted these provisions in almost every instance to mean that such substantive law will be applied. Another problem is the question as to which English laws will be applied: should/do civil courts apply specific English statutes? common law? new English legislation? And will decisions under such laws effect only the spouses, or their successors and relatives as well? The implications reach beyond matrimonial causes to problems of intestate succession, inheritance, legitimacy, and so on. "The law for the time being in force in England" can be interpreted to mean current law or the law as it existed when the statute was enacted. If the interpretation is "current law," then the state's law changes whenever English law does. Since only Gambia and Liberia disallow such a continuance (see *supra*, p. 51), an attachment to "current" English law is the rule in many states, although it is difficult to understand why legislators should voluntarily surrender their powers to another state's parliament.

Other areas of the laws must be clarified as well: If a Nigerian Ibo marries a Moslem Hausa, for example, which law applies? Or if a Ugandan marries a native from the south of the Sudan, which court will apply what law? Do the wives of a polygamous marriage have equal rights or not?²² How much should the bride-price be? Must the parents consent, and, if so, both sets or only one? Obviously such problems will disappear only by a concerted and, perhaps, international effort to standardize and codify all African family law, a project which seems ultimately necessary but which is only barely under way.

²²This question is dealt with more directly in Islamic than tribal law.

TABLE: MATRIMONIAL CAUSES

COUNTRY	LEGISLATION	JURISDICTION	GROUNDS FOR DIVORCE	RESTRICTIONS ON PETITIONS	BARS TO PETITIONS	ANCILLARY RELIEFS	GROUNDS FOR NULLITY
GAMBIA	English law before 2/18/65 Caps. 103 and 119 (1966)	Supreme Court	adultery, desertion, cruelty, rsb*, polyg- amy in some cases	hardship, depravity, 3 yrs. elapsed	connivance, collusion, condonation	maintenance	consang., affinity, under age
GHANA	English law Caps. 127 and 129 (1962) (W.P. no. 3/61)	High Court	adultery, cruelty, desertion, rsb, polyg- amy in some cases	same as Gambia	same as Gambia	same as Gambia	same as Gambia
KENYA	Has own causes law Caps. 150 to 157 (1962)	First Class and Supreme Courts	adultery, cruelty, desertion, insanity, rsb	same as Gambia	same as Gambia	damages and maintenance (as independ- ent action also)	impotence, consang., affinity, fraud, etc.
LIBERIA	Domestic Rela- tions Law (Title 10)(1956)	Circuit Courts	same as Kenya plus conviction on criminal offense	none	recrimination condonation, procurement	maintenance (as independ- ent action also)	impotence, incompati- bility, under age
MALAWI	Has own causes law Caps 102 to 106 (1957)	High Court	same as Kenya	same as Gambia	same as Gambia	damages and maintenance for divorce or separation	same as Kenya
NIGERIA (Fed.)	Present English law Caps. 115 and 117 (1958)	Native and High Courts	same as Kenya	same as Gambia, plus misconduct contrary to grounds	various	maintenance	consang., fraud, insanity, impotence, etc.
SIPRRA LEONE	Has own causes law Caps. 95 to 103 (1960)	High Court	same as Kenya	same as Gambia	same as Gambia	damages and maintenance	impotence, disease, previous pregnancy

*RSB = Rape, sodomy, and bestiality

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COUNTRY	LEGISLATION	JURISTITION	GROUND FOR DIVORCE	RESTRICTIONS ON PETITIONS	BARS TO PETITIONS	ANCILLARY RELIEFS	GROUND FOR NULLITY
SUDAN	Mohammedan, English, and Customary law Tits. XXVII-XXVIII (1954) Act no. 28/67, LRO 40/57, 30/61	High, Shari'a, Native, or Chief's Courts	adultery, conversion to Islam, cruelty, laziness, etc.	various	various	various	various- no consent fraud, consang., etc.
TANZANIA	Has own causes law Cap. 112, 109, 364, 274 (1960) G.N. 56/56, G.N. 222/67 Act no. 78/62	First Class and High Court	same as Kenya plus Islamic law	same as Gambia	same as Gambia	damages and maintenance for divorce or separation (independent action also)	same as Kenya
UGANDA	Has own causes law Caps. 211 to 215 (1951)	First Class or High Courts	<u>Husband:</u> adultery <u>Wife:</u> adult., polygamy, sodomy, desertion	none	various	damages and maintenance	same as Kenya
ZAMBIA	English law Cap. 132 (1964) G.N. 369/53	High Court	adultery, desertion, cruelty, rsb, polygamy in some cases	same as Gambia	same as Gambia	maintenance	affinity consang., no consent