

NOTES AND NEWS

THE REJECTION OF THE MARRIAGE BILL IN KENYA

In 1967 the Kenya Government appointed a Commission

“to consider the existing law relating to marriage, divorce, and matters relating thereto; to make recommendations for a new law providing a comprehensive and, so far as practicable, uniform law of marriage and divorce applicable to all persons in Kenya, which will replace the existing law on the subject comprising customary law, Islamic law, Hindu law and the relevant Acts of Parliament and to prepare a draft of a new law; to pay particular attention to the status of women in relation to marriage and divorce in a free democratic society.”

In the following year the Commission published its Report which contained a draft Marriage Bill embodying its recommendations. Last August this Bill was rejected by the Kenya Parliament for the third time. In an interesting article published in the *Nairobi Times*¹ Mr. Justice Cotran,² who had been Secretary to the Commission, deplors this decision, explaining that a great opportunity for reform has been missed. The purpose of his article is, he states, in the first place, to show that nearly all the criticisms of the Bill are unfounded or based on a complete misunderstanding of the background and reasons for the measure. In the second place, he stresses that since becoming a Judge in Kenya it has become apparent to him that Kenyans are not satisfied with the existing position. People, he asserts, cannot understand why they should be subjected to all the incidents of the English law of marriage and divorce simply because they contract a monogamous form of marriage. Others fail to comprehend why they should still be subjected to the traditional customary law, suitable in a traditional society but unworkable in a modern Kenya.

Members of Parliament and others had criticised the Bill as being “un-African”, “copied from English law”, taking “no account of African customs and traditions”, and “giving too many rights to women” and as needing “further consultation and possibly a referendum”. The writer deals first with the last point and states:

“I think it is true to say that the Marriage Bill, unlike much of the other legislation in Kenya, was not simply drafted by a legal draftsman in the Attorney-General’s Chambers and then presented to Parliament. It is in fact the product of intense consultation with the *people, the wananchi*, ever since 1967. Mr. Njonjo, the Attorney-General, was at pains to explain this to Parliament but unfortunately it fell on deaf ears.

The truth of the matter is that the government realised way back in 1967 that the subject of marriage and divorce is one that touches the everyday life of all Kenyans. It is for this reason that the late President appointed a Commission in 1967.

The membership of the Commission was criticised at the time and more criticisms followed recently in Parliament. Without going into the question of personalities, it is clear, however, that the composition of the Commission did reflect, as far as possible, the different religious, racial and ethnic groups of which Kenya society is composed. The Chairman of the Commission was a very distinguished Judge who had been in East Africa for a long period. The members included one of the most senior African advocates in Kenya,

two African Members of Parliament, two of the most well known African ladies in the country who had devoted considerable services to Women's Organisations and Social Welfare and other lawyers and non-lawyers.

The Commission did not, as some people seem to think, sit behind closed doors and simply produce a report. They realised that one of their essential tasks was to get the views of the ordinary people on the subject, written and oral. They prepared a questionnaire of which 163 were returned and the replies analysed. They received 146 written memoranda. Further, for a period of one year, they visited every provincial and district headquarters in the country and were addressed by a great number of people, some of whom were representatives of ethnic, religious or social groups and others, spoke on behalf of themselves. Paragraph 4 of the Commission's Report which was presented to His Excellency, the late President, in August 1968 states:

"We should like to emphasize that in holding public meetings, distributing questionnaires and inviting memoranda, it was not our intention to conduct an opinion poll but merely to afford members of the public and interested associations the opportunity of putting their views forward in the manner they preferred. We are, therefore, not presenting the results in statistical form which might be seriously misleading. We have, however, derived great assistance from the views expressed to us, mainly in the broad impression they gave of the way people are thinking and feeling in Kenya, but also from suggestions on matters of detail. It would be impracticable to deal with these at length but many of them are reflected in this report."

The consultation process was of course not over with the presentation of the report. It was in fact only the beginning. The Report and its appended draft Bill naturally received the widest publicity, not only in Kenya, but in other countries, African and non-African. The Kenya newspapers were flooded with articles and letters for many months after the publication of the report. There were also commentaries in learned journals and periodicals by lawyers, sociologists and others. Then came Parliament's turn. On each of the three occasions when the Bill was debated in Parliament, it again received the widest publicity in the Press and elsewhere, so that in effect, although there has not been a referendum as such, the proposals contained in the Bill have been subjected to the closest possible scrutiny by every interested man and woman in Kenya. And indeed, the latest amendments which the Attorney-General was prepared to introduce to the original Draft did take into account all suggestions made in and outside Parliament."

In reply to the criticisms that the Bill was ~~too~~ African, was copied from English law and took no account of African customs and traditions, Mr. Justice Cotran refers to paragraphs 6-16 of the Commission's Report in order to show that such criticisms are completely unfounded. The paragraphs concerned state:

"6. Immediately after we had completed our public meetings we met to consider the general principles which we thought should govern our approach to our task.

7. We decided, in the first place, that changes in the law are necessary but that we could not recommend that marriage and divorce be treated as part of the ordinary civil law under a statute of national application, to the exclusion of personal law. We felt that we must look for some kind of compromise, with a uniform law regulating certain matters considered of national importance, while leaving the individual the choice of a civil, religious or customary marriage.

8. We thought that any such uniform law must be founded on the African way

of life,³ always bearing in mind, however, that that way of life is rapidly changing and that urban and rural conditions are widely different; for these reasons, we thought that traditional rites and customs should not be codified, as to do so would impede natural and gradual change. The law must also in our opinion cater for non-African citizens and for residents who are not citizens and must be such that Kenyan marriages and divorces receive general international recognition.

10. We thought that such a law must recognize the existence of different ethnic and religious groups in Kenya but should contribute towards national unity by ensuring as far as possible equal rights and responsibilities for everyone. It should take into account economic conditions and the requirements of a modern state.

11. We thought that there should be the minimum interference with religious and customary practices; in general, that no-one should be required by law to do anything which is forbidden by his religion or tribal custom; but we considered that the law may properly restrict or prohibit the doing of acts which religion or custom may allow,

12. We thought that the paramount consideration in all our deliberations should be the promotion of the stability of marriage and family life and therefore that divorce should not be encouraged. We thought that the law should always lean towards holding that a marriage is valid and that children are legitimate.

13. We thought that the law must be based on a recognition of human dignity, regardless of sex, and that matrimonial proceedings should be designed to cause the minimum of distress or humiliation.

14. We thought we should examine the laws of other countries, particularly African and Muslim countries, to see whether they contained ideas that could usefully be applied in Kenya.

15. Finally, we thought that it was our duty to give due weight to the opinions expressed by the public but not to consider ourselves bound by public opinion, since it might be in the national interest to propose measures which would be unpopular. At the same time, we thought it would be wrong to recommend measures which were unlikely to be observed and incapable of enforcement. In recognizing that what can be achieved now falls short of what we think ultimately desirable, we have tried to indicate the direction which we think future development should take.

16. We believe these principles to underlie the recommendations which follow."

"If one goes on to consider the detailed recommendations in the Report as reflected in the Draft Bill," Mr. Justice Cotran continues, "it becomes crystal clear that there is a real attempt to produce something African and not alien. A few examples will suffice:

1. The Bill preserves the right of people to marry under customary law or religious law as well as in civil form. There is no attempt whatever to abolish the customary form with its attendant ceremonies.

2. The Bill preserves polygamy for those who wish it. There is certainly nothing "English" or "European" about that.

3. The Bill retains the dowry system except that the validity of the marriage does not depend on its payment. Again there is nothing "English" about that.

4. On the subject of divorce, the Bill in fact seeks to adopt for all persons in Kenya the very sound principle which obtains in customary law that divorce should only be a last resort. To this end the Bill says that there should be conciliatory bodies to attempt to reconcile the parties before the parties go to Court. If they do not succeed, divorce under the Bill will turn on persuading the Court that the marriage has irretrievably broken down—

it will not be enough as hitherto, to show to the Court that there has been a matrimonial offence such as adultery or cruelty or desertion.

5. On the subject of children, the Bill again reinforces the African principle which was referred to by many M.P.'s in Parliament that there is no such concept as "illegitimacy" in African, customary law. The Bill says that a child is not to be treated as illegitimate and is not to suffer any disabilities simply because his parents contracted an invalid marriage.

Apart from this, it seems to me, with respect, that the attackers of the Bill have failed to realise its greatest virtue, which is that it eliminates the distinction present in the law as it now stands between customary marriages which are polygamous and statutory marriages which are monogamous. Whether we like it or not, the fact is—probably due to ideas implanted in the colonial period—that both the people in this country and the present law distinguish between

(a) A first class marriage, i.e. a monogamous marriage celebrated in church or at a Registry Office.

(b) A second class marriage, i.e. a customary polygamous marriage.

The Commission's Report referred to this in paragraph 47 of the Report and commented

"We regard this as most unsatisfactory: the purpose of a marriage ceremony is to bring into being the marital status and we think that all forms of marriage, allowed by law should be equally effective in law."

It is not only that there is a "class distinction" between the two forms of marriage, but the present law imposes very strict disabilities if a man contracts firstly a monogamous marriage and follows that by a customary marriage to another wife. Although this is a criminal offence, it is an open secret that it is the norm rather than the exception but no prosecutions are in fact instituted. More important, although the parties think they have contracted a perfectly valid second marriage, such second customary marriage is in fact invalid under section 37 of the present Marriage Act (Cap. 150). Not only that, but the Courts will hold that since such marriages are "invalid", then children resulting therefrom are "illegitimate" and neither they nor their wives can inherit any property left by the husband. Everything, in the absence of a will, goes to the first-class wife and her children.

One honourable member in the last debate on the Bill is reported in the press to have asked "amid thunderous cheers from the House":

"Are we being made to believe that the marriages our fathers entered were illegal and that we are all illegitimate?"

The simple answer is that if one preserves the present unsatisfactory laws to which I have referred, the answer in many cases is "yes". If, however, the Marriage Bill is passed it will get rid of these unjustified distinctions and the answer to the question will be "No". I refer in particular to clauses 48 and 64 of the Bill which provide

- 'Legitimacy. 48. (1) Where children are born to persons who were parties to a purported ceremony of marriage which is a nullity by reason of the provisions of section 46, such children shall for all purposes be deemed to be legitimate.
- (2) Where prior to the commencement of this Part of this Act any persons were parties to a ceremony purporting to be a marriage which under the law then applicable thereto was a nullity, any children of such persons shall

for all purposes be deemed to be legitimate and, where such children were born before the commencement of this Part, they shall be deemed so to be legitimate from its commencement.'

'Equality between wives. 64. Subject to the provisions of any other written law, where a man has two or more wives, each wife shall enjoy equal rights, be subject to equal liabilities and have equal status in law.'

Turning to the criticism that the Bill gives too many rights to women, Mr. Justice Cotran states:

"It is true that the Bill, if enacted, will give women certain rights which they hitherto did not possess especially if their marriage was contracted under customary law. The principal rights will be (1) to maintenance after divorce (2) to retain their own property if self-acquired and (3) to an interest in the matrimonial home.

I do not think there is anything revolutionary or wrong in giving married women these elementary rights. Kenya has recognized the principle of no discrimination on grounds of sex in its Constitution and the time has long gone when women were regarded as a man's 'property'.

Furthermore, the attitude of Parliament in relation to women when it comes to discussing the Marriage Bill seems diametrically opposed to their attitude on the subject of succession. As is well known when the Commission on the Law of Marriage was set up a sister Commission on the Law of Succession was also appointed. That Commission made sweeping recommendations with regard to women's right of inheritance to property and those recommendations, as contained in the Draft Bill of the Commission, were enacted into law in 1972⁴. Although that Act has not been brought into force yet it was passed by Parliament. It gives married women a life interest in their deceased husbands' properties with a power of appointment for the children. It gives daughters equal rights to inherit as sons. It seems strange that Parliament is prepared to give women those property rights upon their husband's death, but not during his lifetime or upon divorce. I should have thought that the two go together."

The writer concludes with a plea that the Kenya Parliament should reconsider its decision:

"As I understand the position, the Marriage Bill has now been shelved for 6 months to allow the new Parliament to look at the matter afresh after the general elections. I should like to make a special plea to the new House when they do so: the existing laws of marriage and divorce in this country are *archaic*. The English type of law is outdated and does not even apply anymore in England. There is much in the customary law which is good and should be preserved, but some of it is unworkable in a modern Kenya. The existing law is discriminatory, un-African, aped from the British and creates a most undesirable distinction between statutory and customary marriages. The Marriage Bill will remove all this. It will make all marriages equal before the law. It will, far from getting rid of the African traditions and customs, upgrade African marriages to the status which they deserve.

One final point. The proposals recommended in the Report of the Marriage Commission have since 1968 been discussed and debated widely, not only in Kenya but in several other African countries, at Seminars, Conferences and Workshops, at various places of learning. The ideas contained in the Report have found so much favour that they have been incorporated into the law, not only of African countries, but other Commonwealth

countries with pluralistic systems of personal law. Our neighbour, Tanzania, passed a Marriage Act in 1971 which, but for a few alterations, copies verbatim the provisions drafted by our Kenya Commission. Although we may disagree with our neighbour Tanzania on many policies, I do not think anyone can accuse them of being un-African. It would be a great pity if a measure which has received so much support in and outside Kenya were rejected by our Parliament for a fourth time."

APPOINTMENT OF TRADITIONAL COURTS CHAIRMEN AND ASSESSORS IN MALAWI

Traditional courts chairmen are persons who preside in the traditional courts in Malawi. They are basically laymen commanding respect, and considered as having considerable knowledge of the customary law of the area where the court is situated. Assisting court chairmen during the trial of cases are members or panels of assessors. The power to appoint a chairman, a member and an assessor is vested in the Minister of Justice, who is at present the President.

For example, in the General Notice No. 647 of the Malawi Government Gazette of 30th September, 1977 it is stated:

"Traditional Courts Act (Cap. 3:03).
Appointment of Court chairman.
Mzenga Traditional Court.

In exercise of the powers conferred upon him by section 4 of the Traditional Courts Act, His Excellency Ngwazi Dr. H. Kamuzu Banda, the Life President of Malawi, has appointed Mr. Watson Mwale to be chairman of the Mzenga Traditional Court as from the 8th August, 1977, until further notice.

J. B. V. Nyimba

for Chief Traditional Courts Commissioner."

An example for panel of assessors:

In the General Notice No. 489 of Malawi Government Gazette of 5th August, 1977:

"Traditional Courts Act (Cap. 3:03).
Membership—Chiradzulu Traditional Court.

In exercise of the powers conferred upon him by section 4 of the Traditional Court Act, His Excellency Ngwazi Dr. H. Kamuzu Banda the Life President of Malawi, has appointed a panel of assessors in respect of Chiradzulu Traditional Court as from 1st July, 1977 which shall consist of:

Mr. Samuel Mlilima—Member/assessor.
Mr. John Sing'anga—Assessor.
Group Village Headman Juwa—Assessor.
Dated 8th July, 1977.

J. B. V. Nyimba

For Chief Traditional Courts Commissioner."

The appointments involve a number of stages and persons before the Minister gives his sanction.

(a) The Chief Traditional Courts Commissioner, who is the official head of the department, is responsible to the Minister through the Secretary for Justice for the administration and policy of traditional courts. He advises the Minister on the constitution, jurisdiction and membership of Traditional Courts. This function is provided for under section 26 of the Traditional Courts Act. As a supervisor, the Chief Traditional Courts Commissioner is able to know the needs of a court chairman or assessors