

# MARRIAGE, DIVORCE AND INHERITANCE

The Uganda Council of Women's  
movement for legislative reform

Winifred Brown



CAMBRIDGE AFRICAN MONOGRAPHS 10



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Winifred Brown graduated in medicine at Queen's University Belfast in 1937. In 1939 she went to India and practised social medicine in Kerala, South India. In 1953 her husband became Bishop of Uganda (and later Archbishop), and she worked with him in all parts of that country. Involvement with the Uganda Council of Women and the Mothers' Union brought to light the problems which are described in this book.

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Winifred Brown

## Introduction

The purpose of this study is to give an account of a grassroots movement in Uganda for the status of women and the reform of the laws relating to marriage, divorce and inheritance.

The incident which sparked off the movement occurred in 1956, when one young Muganda woman was suddenly widowed in a car crash, and discovered that she was left destitute with her young family. The Young Wives group to which she belonged (a junior branch of the Mothers' Union) supported her, and began to study the laws affecting the case. They quickly became aware of the clash between two legal systems, both operating in Uganda. Christian marriage and civil marriage (also monogamous) was regulated by Protectorate Government Ordinances, based on an English law of 1904, and administered by central government courts. Customary law, varying from place to place and often unwritten, was decided by the clans, under the jurisdiction of local courts. These dealt with polygamous marriages, bride-price, and inheritance. The two systems frequently contradicted each other, and the resulting confusion often caused injustice.

As the wife of the Anglican Bishop, and later the Archbishop, of Uganda, I was involved in the movement from the beginning when the Young Wives brought their problems, first to the Mothers' Union and to the Diocesan Board of Women's Work in the Church, and then also to the Uganda Council of Women. I continued to be deeply involved until 1965, when we left Uganda, which was of course by then an independent country.

On a return visit to Uganda in January 1987, I met many old friends – women who had been involved in the struggle. I also met church members, both men and women, of a younger generation who were concerned with the same problems, but who were not aware of what had happened twenty to thirty years earlier. I still had in my possession many of the original documents from the period during which I was involved. I therefore decided to write a first-hand account of that time, for the information of those who are still working for the reform of the laws and for the improved status of women.

It is impossible to single out all the women who played an important part in this movement. Among the leaders in Kampala were Mrs Pumla Kisosonkole (President of the Uganda Council of Women), Mrs Rebecca Mulira, Mrs Rhoda Kalema, Mrs Eseza Makumbi, together with many from other areas of Uganda. Among the Europeans were Mrs Barbera Saben (Member of the Legislative Council), Mrs Catherine Hastie (Community Development) and myself.

This story of a grassroots movement demonstrates the importance of communication. Firstly, those who are working for the relief of the problems must be in direct touch with those who are experiencing them. Those who are examining the problems must then be able to express their findings cogently and persuasively to the authorities who have the power to change things. I have quoted from a number of questionnaires, statements and resolutions to demonstrate such communication at each stage of our campaign in Uganda. Thus, the women were first encouraged to discuss the subject in their own terms. Then, their leaders were able to formulate their ideas in such a way that they could be presented to Government. It was this communication, in these two stages, which gave the movement impetus and strength.

I have been asked what part European women played in the movement. The answer is that they acted only as sympathetic channels of communication and sources of encouragement. They did not attempt to impose their own ideas, but helped with ways and means of translating ideas into fact, in partnership with African women. For example, Ordinance laws relating to marriage, divorce and inheritance were inaccessible, and were written in legal terms based on English thought. In the Uganda Council of Women, we were able to explain what these laws meant in simple English which could be readily understood and translated into local languages. The booklet, 'Laws about Marriage in Uganda' which was translated into five languages, set out a summary of customary as well as Ordinance laws, making intelligible what was otherwise obscure. I myself sold thousands of copies, more to men than to women, when I travelled with my husband on safari through various parts of Uganda. Similarly, Europeans and Africans working together were able to collect women's ideas expressed in African language and thought patterns, and formulate them in terms which were effective in making an impact on the authorities. Such communication between grassroots and those in authority is vital for any movement for reform.

Central to the story is the tension between African customary ideas of marriage as polygamous, and the Christian view brought from the West that it should be monogamous. Arguments about the rights and wrongs of polygamy in Africa have been going on for a very long time, and continue today, even in the Church. Dr Adrian Hastings has written an important review of the subject, *Christian Marriage in Africa Today* (S.P.C.K. 1973), but he seems to have been unaware that what I have described had been happening in Uganda for about twenty years.

When I read the Old Testament stories I am constantly struck by the resemblance between the ideas and practice of the ancient Hebrews and those in African society, particularly with regard to marriage and concubinage. I do

not want to enter into the theology of the subject, nor to pass any moral judgements on the practice of polygamy as such. My concern is with the struggle of women caught in the confusion and contradictions between two systems, and the injustices they suffer. I have observed it from the standpoint of the Christian Church and women in Christian marriage seeking security and stability in their family life. The clash between the two systems also causes injustice to women in customary marriage, as when a man discards his customary wife and then marries a younger more educated woman in church.

From the practical point of view, the facts must be faced, and one of these is the arithmetical question of the numerical balance between men and women in society. Polygamy is suited to a society where there are more women than men, as when many men are killed in warfare or tribal fighting. In such a situation widows and unmarried girls need husbands to give protection and the means of subsistence for themselves and their children, and polygamous marriage can provide for this.

But, as I have pointed out, in a society where men and women are approximately equal in numbers, if some men take more than their share of available women as wives, whether for their own convenience or for their self-importance, this upsets the balance, and leaves too small a number of women for them to have one wife each. This means several men sharing one woman. Thus, polygamy gives rise to promiscuity, and to prostitution as a lucrative profession, and is unsuited to a stable modern society.

Uganda today (1987) has been through a period of terrible civil war. Many women and children, as well as men, have been killed. It may be that more men than women were killed, and that these women need husbands. But war brings other problems, such as promiscuity and rape. To add to this, there is the terrible problem of the sexually transmitted disease, AIDS. The Uganda Government is facing this honestly, and trying by every means it knows to prevent its spread. They have conducted a publicity campaign under the slogan, 'Love Carefully', advocating the use of condoms.

It is now realised that such methods are not enough to prevent the spread of AIDS. The Church is co-operating with Government in a complementary campaign, under a new slogan, 'Love Faithfully'. This has been described (*Christian Aid Newsletter*, July-September 1987) as 'an excellent example of Church/State co-operation in a sensitive area'. In such a campaign the Mothers' Union, (together with the Fathers' Union), will have an important and challenging role.

Faithful love cannot be enforced by law. It is a gift of God. But sensible, just and practicable laws relating to marriage and the family create an environment

which encourages faithfulness. Hence, the campaign for just and workable laws is still of significance for the health of society.

Largely owing to the political upheavals which Uganda has suffered, the story which I have told of the movement for reform and its achievements is not widely known in Uganda. Very few people are aware of Decree 16 (1973) which provides for the registration of all marriages. I believe that it is important that it should be more widely known, that its importance be understood, and that it should be implemented, and if necessary strengthened.

The problems described are not confined to Uganda, they have their parallels throughout Africa. The reform movement in Uganda has not been widely known outside Uganda. This is probably because those of us who were involved in it were concentrating our attention on the immediate problems as they affected Uganda itself, and especially the women. As already pointed out, Dr Adrian Hastings in his report (*Christian Marriage in Africa*, 1973) seemed not to be aware of what I have recorded. Similarly, in a report of the All Africa Conference of Churches seminar on *The Christian Home and Family Life*, sponsored by the World Council of Churches at Mindolo in 1963, there is no reference to the Uganda movement for reform.

I have written this account of what happened in the past to encourage and help all those in Uganda who may wish to continue work for reform in the present and in the future. I hope that this account may also be relevant in other places where Christians are facing similar problems.



## 1 : Christian marriage in Uganda

Shortly after our arrival in Uganda in 1953, a party of American Church Women visited the country. They asked a group of Christian women at Namirembe Cathedral, 'What is the greatest thing Christ has done for Uganda?' After discussion (in Luganda), these women answered, 'The most important thing which Christianity has done is to bring Christian marriage. Before Christianity came, a woman could be thrown away by her husband - like a parcel - but now, a woman in Christian marriage cannot be discarded. She has a Ring'.

For Christian women in Uganda the ring was a symbol of the permanent worth of a wife as a person. It gave her a status, which could not be taken away.

The Mothers' Union was the first women's organisation of any kind in Uganda, and membership was confined to women married in church (Anglican). Its aims were threefold: to uphold the sanctity of Christian marriage; to help mothers in their responsibilities for training their children; to meet together in prayer. Here we shall concentrate on the first of these aims, in relation to the struggle for justice and for the reform of the marriage laws.

The Mothers' Union in Uganda was founded in 1914 by Mrs Weatherhead, wife of the headmaster of King's College, Budo, a school for training the sons of chiefs. The first branch was intended for the wives of students, who in those days were older than schoolboys of today, and who all came from polygamous homes. The idea was that this would give a Christian pattern to marriage relationships in the future, in the changing and developing culture. The first branch was affiliated to the Mothers' Union in London, and branches quickly multiplied. Among the early leaders were Mrs Sala Mukasa, and Mrs Naomi Binaisa. According to an article written by Mrs Daniell in the *Uganda Church Review* in October 1926, by then there were eighty eight branches. Even at this time simple books on mothercraft were studied in Luganda, and branches could discuss things, although the leaders might have little more knowledge than the other members. Every member had first to spend one or two years on probation, after which she was allowed to fix on her wedding ring a special blue enamel Mothers' Union badge. Many of the best leaders were old girls of Gayaza School, which had been founded by Miss Allen of the Church Missionary Society in 1905. Sir Albert Cook wrote, 'Even at that very early date it was recognised that the education of girls, while very backward, was equally important with that of boys' (*Uganda Memories*, Uganda Society, 1945, p. 208). The school pioneered girls' education and made a great contribution to the status of women both in Uganda and throughout East Africa.

In the early days Christian marriage was a new thing, and an important part of the marriage service was the giving and receiving of the ring. The ring gave the woman a status and a value which was not known in customary marriage (although in customary marriage itself the first wife had a status superior to that of subsequent wives). Very often in Church marriages the ring was not bought, but hired for the occasion, because it was regarded as too great a luxury for 'only a woman' to wear. Gradually, however, the custom of buying and giving a ring spread. In those days the Mothers' Union booklets sometimes dealt with such subjects as 'The Meaning of Wedding Rings'. The Mothers' Union in England (in the 1950s) would send out cheap rings to Uganda to be sold by the Mothers' Union to members who for any reason did not have them.

About 1953 in Busoga some Christian women complained to me that their husbands were not only taking other women, but were giving them rings, which they felt usurped their status as Church wives. Thus, even wives in Christian marriage felt a sense of insecurity. They had a strong desire for permanence of marriage and stable and happy homes.

Strictly speaking, membership was for those women married in church who had been admitted to the Mothers' Union by an appropriate church service. In every little Anglican church in Uganda there were women who had been married in church, and were, therefore, eligible for membership. They may not have been officially enrolled, or paid their subscriptions, but such women were widely regarded as belonging to the Mothers' Union, because they were 'Ring Wives'. The Mothers' Union functioned like a trade union of women married in church, defending their own rights and status. They tended to regard all other women, their husbands' other 'wives', and even unmarried professional women, as outsiders. They described them (in English) as 'prostitutes'.

The Mothers' Union was an Anglican Society. The Roman Catholics had their parallel organisation and similar attitudes.

There were frequent complaints by women married in church of bad treatment by their husbands. The following examples from widely separated areas, illustrate how women felt about this matter.

From Kigezi, Mrs Brazier, wife of the Area Bishop in 1955, wrote:

Wherever we go in Kigezi, the same question comes up sooner or later in each place mostly from the women. A women married with a ring who leaves her husband and goes to live with another man is forced by the local government to go back to her husband, but a husband (who has *promised* to cherish his wife and share his goods with her until death) can bring another into the *rugo* (homestead), take away his wife's belongings



and give them to the new woman, and can even drive his wife away, and she can do nothing about it. We have of course told the people that a wife if driven out can go to the court and accuse her husband - but we know (i) that he never drives her out directly. More likely he makes life so impossible for her that she leaves and thereby puts herself in the wrong; (ii) that few women will ever leave their husbands, because they always hope the marriage can be patched up and to bring an accusation is to alienate the husband completely.

They say, 'If a husband has *promised*, why can't he be punished for breaking his promise?'. We say, 'You can't *make* anyone keep a promise even in England'. They say, 'But in England the guilty party is penalised by losing the children'. We point out that in this part of Africa the children belong to the man and his family and that can't be easily altered. And our pastors say all the local judges who try such cases have themselves several wives so would not be at all sympathetic to that side of the question, and this tradition of the family would die hard.

We pointed out too that only those who were saved have any hope of a happy marriage, but even Christian girls do get bad husbands and Christian husbands bad wives.

Then the women said, rather pathetically, 'We wondered if Queenie (i.e. the Queen) couldn't do something for us', and that remark put the idea into my mind as to whether the Mothers' Union has ever had the idea of approaching Lady Cohen (the Governor's wife), if not the Queen. Of course, there are always faults on both sides, but I was very struck by the evident sense of insecurity which all the women, except the pastors' wives, felt.

Another example from the women in Acholi, Northern Uganda, was a Memorandum presented to the Governor, Sir Andrew Cohen, when he visited the area, 11 August 1956.

Your Excellency, Lady Cohen, and your party, we are extremely happy to welcome you and your party on behalf of the women of our race. We take this golden opportunity to present to you this memorandum in which we show you clearly our grievance - that it looks clearly as though you are tending to forget us. Women in the villages are not at all happy with this question of marriage, because when a man has married a woman, he does not take any trouble in the least to give her comfort, happiness and freedom.

- (1) This rule which was brought here by the Europeans, that if a man has married a woman he should complete his marriage properly in

the church. That is good, but we had found that it does not help very much, instead, it is bringing us more trouble. For even if you are properly married, a man may decide to leave you and collect four or five other wives beside you. This shows that marriage in church has no meaning at all in this country. All the marriage vows become void. We want you to help in this matter, if you could, so that we may share in the happiness and freedom of the world.

We do not want to be treated like a goat whose master treats it as he likes. He can take it and feed it either among thorns or where there is no suitable grass. We are being treated exactly like a goat.

- (2) In this country if another man is in love with his friend's wife, the husband of the woman takes him to court, and then when he is found guilty he is fined or taken to prison if he has no money to pay. But this is not so on our side; we cannot take to court women friends who fall in love with our husband. Your Excellency, we humbly beg you to make a rule here to safeguard us, so that such women also are taken before the court.

The reason why in the olden days Acholi men were marrying many wives was because they wanted to produce many children who when grown up would be a useful defence against their enemies in wars, which were frequently taking place in those days. The enemy could easily conquer you if you were very few in number. But nowadays, the situation is completely different, there are no such wars going on, and moreover there are children to be educated. A man cannot support his family properly if he has many wives, as he tends to pay too much attention to one only, and you know love cannot be shared between four or ten people. Here, he tends to neglect his duty as a husband to care for the children of his other wives, to whom he has no love at all. The first wife to be married is in most cases neglected. It may be that they were married in church, which makes it difficult for her to leave him and then marry another man. The reason being: first, she has made marriage vows not to marry another man while her husband is still alive. Not only that, it is also shameful.

The second difficulty is when you have many young children now, who is prepared to look after them? Sure enough they are greatly in the hands of tyrants - other wives of your husband - as you know we Africans do not have servants in our homes. For these reasons we cannot copy European women, because we know that even if we give better training to our girls it will not be of great benefit to

them, and it is also the reason we do not urge our girls to study hard for better education, as a man is going to treat her like a dog when she is married.

- (3) Even if we take this matter to the rulers of this land - Rwodi and Jagi - they are not going to listen to our complaint, because they are real polygamists. For that reason they cannot enforce the rule on the people they rule, that a man should have one wife only. To tell you the truth, Your Excellency, you can hardly find the first woman to be married living with her husband. Among his ten wives a man may perhaps love only one or two, and the rest of the women have to look after themselves and look after their children. Do you think a woman can do all these things herself? As in most cases in Acholi a woman may have ten or even twelve children, and she has no way of getting money to feed or clothe them or educate them at school. Women in Acholi are treated like slaves who cannot complain even if being treated unkindly or cruelly. Your Excellency, if you will not put this ill feeling to an end before you leave this country and go to your own land, we shall not dream of you people who respect their wives.

- (4) When a man has divorced his wife, whom he stayed with for many years he wants either the woman to refund to him all the money he has paid for marrying her, or the woman's parents to refund it; whereas he has wasted the woman's time and energy during that long period and, furthermore, she has produced children for him. Your Excellency, do you consider this fair play?

Now in case her husband dies the relatives of her husband force her to marry a kinsman whether she likes it or not; or to go away and marry another man from whom they shall demand money. In addition to that they take or better still rob from her that which her dead husband left. Now when you look at all these hardships, do you think, Your Excellency, that we are being treated like human beings?

We are, therefore, most grateful to Your Excellency, if only you could help us in this matter, which is a burden on us.

These records demonstrate the feelings of village women in even remote parts of Uganda, looking to the Protectorate Government for help. They had not yet, however, developed an effective method of protest, or of pressing for reform.

## 2 : Christian marriage and Uganda laws

The complaints which the Christian women were now expressing about their marriage problems arose precisely from their Christian viewpoint. Before the introduction of Christianity, women had accepted the customary view of marriage.

Christian marriage had legal recognition by the Protectorate government as monogamous and normally indissoluble. In practice this did not give women the security which the marriage laws promised, because along with the Protectorate laws there existed another legal system, based on African custom and administered by different courts.

Christian and civil marriage were constituted by vows between the contracting parties either in church or in the registry office, as monogamous and lifelong. They were registered with the central Government and were regulated by laws based on the English law of 1904. Disputes were settled by central Government courts.

Customary marriages were potentially polygamous. Payment of the bride-price by the husband's family and its acceptance by the bride's family constituted marriage, and return of the bride-price constituted divorce. It was an arrangement between the clans concerned. Disputes were settled by local government courts. Recognition of the marriage did not depend on its registration.

When these two systems of law contradicted one another, that based on English law (monogamous marriage) was generally ignored. For example according to Protectorate law, if a man was married to one woman in Christian or civil marriage, and to another according to native custom, he could be jailed for five years, but this was unenforcible and had been forgotten.

The clash between the two systems of law, and its effects on Christian marriage are illustrated by a case which occurred in Toro in 1960 after the women's movement for reform had begun to gain strength. The County Chief had ordered a Mr Kanyarusoke to come to court to receive back the bride-price he had paid for his wife whom he had married in church. He refused to come. He was told that if he still refused the money it would be lodged with the Toro Government, and if it was not reclaimed within three years it would be forfeited. The County Chief wrote, 'Once a bride-price is returned a woman is no longer bound to her husband except by vows he made in church. Mr Kanyarusoke should also be reminded that it was he who broke his vows by taking another woman according to traditional custom'.

The Bishop of Ruwenzori, the Right Reverend Erica Sabiti, wrote to the *Katikiro* (Prime Minister of Toro), asking him to discuss the matter with the Chief Judge:

It appears that in Toro the basis of marriage is the bride-price, and if chiefs order that bride-price to be returned marriages are automatically dissolved; but this cannot be the case, because divorce in a civil marriage is ordered by a judge only in a British (i.e. Protectorate) court. Sir, in future could you send all cases concerned with Christian marriage back to the appropriate Churches, if people wish to apply for divorce, so that the Churches can do something in trying to bring harmony between married people. If we fail, then we can send these people to the Divorce Courts. I feel that it is not for the chiefs to order the return of the bride-price, thereby dissolving Christian marriages, before cases have been taken to the Divorce Court. I hope that for the good of the country and stability in homes you will treat the question very seriously.

The *Katikiro* replied to Bishop Sabiti as follows:

I have seen the Chief Judge about this.

Matters which are dealt with in the Marriage Ordinance, the Marriage of Africans Ordinance or in the Divorce Ordinance, cannot be brought to the native courts except when the accuser wants the bride-price to be given back, or in the case of adultery. Such cases can be heard in Native courts, *vide* Section 8B African Courts Ordinance.

When a wife refuses to stay with her husband, or when a man refuses to have his wife back, the court asks the wife's relations to return the bride-price. Sometimes when a woman decides to leave her husband, she brings the bride-price to a native court and thus she is released from her marriage.

In our tribal traditions a court cannot force anyone to live with anybody if they no longer wish to do so, because it might lead to some calamity.

Native courts do not deal with divorce in Christian or civil marriages; they only deal with the return of the bride-price.

However, the effect of the return of the bride-price was that the couple were regarded by the community as in fact divorced.

### ***Inheritance.***

Matters of property and inheritance were regulated by tribal custom, depending

on the clan system, and outside Buganda administrated by local courts. Dr H.F. Morris points out that in Buganda succession matters lay outside the purview of any legally constituted court (Clan Cases Agreement 1924, re-enacted as the Buganda Clan Cases Declaratory Law in 1926). There was a Buganda Wills Law which provided for the making of wills in English-law form, but these could be overturned if there was any conflict with customary law. Throughout Uganda the making of English-type wills overriding customary law was not open to Africans till 1966. Women felt that with the clan authorities they had even less chance of fair treatment than in public proceedings in a local court. In the last paragraph of the Acholi women's memorandum to the Governor they complained that a widow's property, even all her personal possessions, were taken by her husband's family. Not only that, the widow herself was inherited by the male heir. She could be forced to marry whom they decided for her, or they could demand bride-price if she married someone else.

Mrs Sarah Ntiro, speaking to the A.G.M. of the Uganda Council of Women in 1958, described a similar plight among the women of Bunyoro. She asked,

Should wives of Christian marriages be forced to be inherited by their husbands' relatives? In cases of conflict between Protectorate and native customary laws, which wins? Who should be the heir, a son of the legitimate wife, or the nearest male relative, taking all the property? Should an enlightened widow allow this, should she or they decide whom her daughter should marry?.

She concluded, 'Enlightened women have to lead'.

An example of a case in which Christian attitudes triumphed over local custom occurred during the 1950s in Busoga. An old and much respected clergyman, Canon Ibula, died. There was a big gathering at the funeral, and it would have been normal practice for the heirs, his two sons, to have taken possession of the home and everything in it. But they were convinced and sincere Christians. They declared, 'Our father and mother were one when they were alive, and all these things will remain our mother's until she dies'. This astonished everyone present, including highly educated Christian people.

Another example of a case where the two systems of law clashed was quoted by Bishop Usher Wilson of the Upper Nile Diocese in the follow-up to the Lambeth Conference in 1958. Under the heading 'Am I married or am I not?' a woman wrote to the *Uganda Argus* to say she had been married in church to a man who later drove her out, giving her a letter which was often erroneously thought to amount to divorce. She had subsequently returned to him and nursed him when he was ill, but he died. According to customary law the



widow is taken by the husband's brother, and this he tried to do, but the widow refused. Subsequently, some seven years after her first marriage, this woman, who had two children, married another man, this time by customary law. The second husband paid the bride-price to the woman's father. But on the second night of the marriage the first husband's brother broke in on them and had the wife locked in prison on a charge of adultery. She was released, but her father and second husband were fined sh. 200/- and 300/- respectively, and the marriage could not be resumed till the case was concluded.

The Bishop commented: 'African bride-price nowadays simply amounts to selling a girl or a woman for a sum of money or its equivalent to a man and the parents are enriched'.

[This subject is discussed in H. F. Morris, 'Family law in Uganda', 1960, reprinted here as Appendix 1, and in H. F. Morris and J. S. Read, *Indirect Rule and the Search for Justice*, Clarendon Press, 1972, Chapter 7 'Indirect Rule and the Law of Marriage'.]

### 3 : Movement for reform - Namirembe Young Wives

By the 1940s the original members of the Mothers' Union were grandmothers. There was a new generation, whose outlook and emphases were different. Encouraged by Mrs Stuart, wife of the Bishop, they formed a Namirembe Young Wives group, a junior branch of the Mothers' Union.

In 1956 the president of the Young Wives was Mrs Rebecca Mulira, daughter of Mrs Sala Mukasa. A member of this group was Mrs X, whose husband was suddenly killed in a car crash. Some years before they married, Mr X had been sent to the UK on a government-sponsored training course. Such students were encouraged to make their wills before they left. In his will he had left all his property to the woman he had been living with, and to their children. He returned to Uganda, and married in church, telling his new wife nothing about his previous alliance. He probably forgot all about his will. On his death the property went, in accordance with the will, to the previous woman. His wife was left penniless, with several small children. In her shock and distress she rushed off to confide in a friend, a senior member of the Mothers' Union, and in Mrs Rebecca Mulira.

Under the chairmanship of Mrs Mulira the Young Wives began to study the laws of inheritance in Buganda. They became very interested and expressed their views forcibly. At this time H.H. the *Kabaka's* Government was revising the law, one of the proposals being that a man's heir could be chosen from any of his sons. The Young Wives drafted a memorandum which they sent to the *Great Lukiiko* (Buganda Parliament) protesting against this. They asserted that the heir must be the son of the legal wife, the church wife, if he had one, and that this heir should have the biggest share of the property. They claimed that the widow of Christian marriage, or the principal wife of any marriage, should have one third of her husband's estate, and the house, for life, and that she should have a say in all matters concerning his estate, and be principal trustee for the children. The role of the clan should be confined to the ceremony of declaring the heir, and they should have no claim on the property.

The Young Wives who sent this memorandum to the *Great Lukiiko* were all educated Baganda. They were aware that their problem was not new. In 1939 there had been an acrimonious dispute in Buganda over succession to the throne. The Church, urged on by the Mothers' Union, had supported the cause of the only son of the *Kabaka* by his wife in Christian marriage, Lady Irene. Other sons of the *Kabaka* were supported by other groups, but in the end Edward Frederick Mutesa, according to the Church the only legitimate heir, was elected and crowned.



The Young Wives took their complaints both to their Church, and to the Uganda Council of Women. In a memorandum they declared: 'The women today are urging two basic needs: the recognition of the status in society of the responsibilities of Christian marriage and the recognition of the legal wife and legal children in the event of the death of her husband'. They asked the Church to bring pressure to bear on the Protectorate Government to give recognition only to the legal wife ('ringed wife') of a man married in church, and to the legal widow's need for protection.

At their request the Marriage Board of the Diocese set up a 'Subcommittee on Marriage Questions' to consider their claims. The Bishop wrote to the Roman Catholic Archbishop, Cabana, on the same subject. In his letter the Bishop referred to the recent passing in the *Great Lukiiko* of the bill against which the Young Wives were protesting.

The subcommittee met on 24 January 1957, and decided that action should be taken to bring the subjects again to the notice of the Buganda Government, preferably through a joint deputation of Anglicans and Roman Catholics. They also proposed further action to draft legislation for local governments to resolve their problems.

In July 1957, on behalf of the Diocesan Board of Women's Work, I wrote to all the Mothers' Union branches, enclosing a questionnaire, asking them to discuss these questions and any others which they felt were important, and to report back to us. They were asked to include in their discussions men and other women who might be concerned, and to write to the newspapers and where possible to bring pressure to bear on local governments. The questionnaire was as follows:

### **Questionnaire, July 1957**

1. Marriage is a covenant. Both parties who enter into the covenant undertake responsibilities.  
If a man or a woman breaks the covenant, the innocent party should be protected by law. Do you agree with this?
2. a) Do you think old African customs are changing?  
b) If so, in what way are they changing?
3. If they are changing, do you think the laws should change ?
4. Should the customary bride-price be changed?
5. a) In your area, when a man dies, how are his wife and children left?  
How are the belongings, money and land allotted and who has the

responsibility for the care of the widow and her children?

- b) What proportion of the property do you think should go to the widow and do you think that the children should remain with their mother or that other people should take them and bring them up?
- 6. a) If the marriage has broken down and there are children, which parent should have the children?  
b) Who should be responsible for the financial support of the children? What problems are there likely to be for such children in their character and development, because they are not living with their parents in their own homes?
- 7. a) In your area, if a man is not helping his wife, is she allowed to work and earn her own livelihood, without her husband interfering and taking money?  
b) Do you think that such a woman should be allowed to work and earn money?
- 8. In Christian marriage a man and his wife promise to care for each other in sickness and in health. In your area,  
a) What happens to a man when he is ill?  
b) What happens to a woman when she is ill?

The response to this questionnaire was enthusiastic.

On 4 October 1957 the Bishop wrote to members of the subcommittee as follows:

- (a) I discussed the matter with the [Roman Catholic] Archbishop of Rubaga, who said he could not co-operate with us in this matter. He said, 'Since the nature of the business relates entirely to Kiganda customs I personally think it wise to leave the matter entirely in the hands of African laymen, chiefs or others'.
- (b) A few of our people met representatives of the Diocese of the Upper Nile on 7 May. They decided to ask five people to prepare a memorandum for submission to the Church of Uganda which would collate material already available in the two dioceses on matters relating to the position and rights of women. The memorandum would consist of three sections:
  - i A statement of the present difficulties from the Christian point of view.

- ii A statement of the legal position in regard to Christian marriage and inheritance.
- iii Recommendations for action which could be put by the Church to local governments and to the Protectorate Government.

When ready, this memorandum will be submitted in the first place to the two dioceses for whatever further consultation and amendment they consider necessary. After this, if necessary, it may be referred back to the committee in order that an agreed unified statement may be prepared and the document then submitted to local and Protectorate governments.

What the Church wants is the proper recognition of Christian marriage.

The letter goes on to list some of the problems already described.

In Buganda inheritance is a matter to be decided entirely by the clan and the *Kabaka*. If the clan authorities do not like the will it seems possible for them to invalidate it, and then the property is treated as if the person had never made a will. In this case the clan authorities choose the heir. Nothing is said about the heir being a legitimate son, but it seems that a man who is absent from the *Okwabya Olumbe* (funeral) ceremonies cannot be the heir. (This may be directed against *Balokole* (revival movement) who find themselves unable to attend such ceremonies.) In these regulations there is nothing at all to safeguard the widow and children of Christian marriage, and nonsense is made of the marriage vows. There is no right of appeal against the decision of the clan and the *Kabaka*.

(Members of the revival movement within the Church have never thought it possible to attend *Okwabya Olumbe* ceremonies connected with the naming of the heir, which are held at night and involve beer drinking and sexual licence. This refusal to participate has been taken by other Baganda as an insult to the clan and a refusal to identify with the tribal culture.)

The letter continues:

What ought the Church to do? We all know that the greatest need of the Church and the country at present is to strengthen Christian marriage, but can we do this unless inheritance laws are tied up with it? If we try to say that a man who deliberately chooses Christian marriage must be bound by inheritance laws of a different kind from the present ones *we are really attacking the whole clan system which is the continuing basis of Kiganda society*. (It is worth noting that in the new Succession and Wills Law non-Baganda are not allowed to be left any property in Buganda.) We certainly

do not want to precipitate a serious clash at this time. There is no doubt what lines the women of the Diocese would wish us to take.

He then quotes resolutions from the Women's Council in the Toro-Bunyoro area, on lines similar to those expressed in other areas, and he concludes:

I send you also a series of quotations prepared by the Uganda Council of Women for wide circulation and discussion in the Mothers' Union of the country as well as in all possible women's groups.

### ***Widows' league***

Early in 1958 some of the senior members of the Mothers' Union, led by Mrs Sala Mukasa, decided the time had come to form a Widows' League, 'to promote the general welfare of widows'. The Widows' League wrote to me (19 March 1958):

We feel that this is the time for the Church to open discussions with H.H. the *Kabaka* who in his position as *Sabataka* is the custodian of native custom, with the object of reducing the power of the heads of clans and the unfairness that is often meted out to widows.

We would emphasise that these heads of clans have no privity of contract with the deceased husband and whenever they interfere they do so to the detriment of the widow.

This is regarded as a hopelessly retrograde step taking us back to the days of paganism and disrespect for human life and dignity especially where women are concerned. We have numerous instances of widows thrown out of their homes and subjected to all sorts of insults, contempt and ridicule by persons who, apart from professing to be fellow clansmen of the deceased have nothing in common with the widow. Very often such persons start getting interested in the family after the husband is dead, they start collecting as vultures to grab whatever property they can lay their hands on.

As things now nearly stand, all married women would prefer predeceasing their husbands for fear of the hardship and suffering if they were to survive their husbands. Such fears are already breeding their reactions among some young women against committing holy matrimony for fear, as the experiences of their mothers have taught them, of what they are likely to go through in the event of their surviving their husbands.

We sincerely believe that every Christian Church is in duty bound to give spiritual leadership, but this does not mean that the Church should

completely ignore matters that are partly temporal, the Church would be failing in its duty if it were to turn a deaf ear or appear to condone such gross injustices as those we have endeavoured to bring to light.

We, however, remain confident that the Church will give the lead in removing evil and promoting what is fair and just, by being a pioneer in removing what appears to us to be a glaring example of man's inhumanity to man.

## 4 : The Uganda Council of Women

This council was formed in 1946 when a number of African and European women decided the time had come for women of all communities and all age groups to get together and press for government recognition and support for women's concerns. Among the African founder members were some of the Young Wives from Namirembe; among the European women were Mrs Barbara Saben, a Kampala City Councillor and later a member of the Legislative Council; Miss Catherine Hastie, who was in charge of all the community development women's clubs; and Mrs Stuart, wife of the Anglican Bishop of Uganda. The Council they founded was composed of representatives of all women's groups in Uganda: African; European; and Asian, both Hindu and Muslim; church groups, both Anglican and Roman Catholic; and community development clubs in the villages throughout the country. One of the first achievements of the Council was to introduce the Y.W.C.A. into Uganda, and to persuade the Protectorate Government to fund it. They built a first class headquarters and hostel in Kampala which is still in active use today, a place where women of all backgrounds and communities, both young and old, could meet and work together.

In 1957 (when Mrs Pumla Kisosonkole was president of the Uganda Council of Women), Mrs Eseza Makumbi one of the Namirembe Young Wives, brought to the Council their concern about the marriage laws. The Council circulated a questionnaire, on the lines of that already considered by the Mothers' Union, to all sorts of women's groups, both church and community development clubs, throughout the country.

These questions aroused great interest. A number of men, government ministers and sociologists, put forward the view that village women were not concerned with these matters, but were quite content with things as they were. But women who were working in the villages hotly denied this. One community development officer reported, "The women in the clubs get very excited about these question papers. But they say, "we mustn't let our husbands see them".

As a result of these discussions the Uganda Council of Women decided to bring the matter to their A.G.M. in December 1958. Mrs Makumbi moved a resolution, which was passed unanimously, asking Government to introduce legislation that *all marriages should be registered*, whether religious, civil or customary. This meeting could be regarded as the public launching of the women's campaign for reform. It received considerable notice in the press.

The Uganda Council of Women appointed a subcommittee to study the status of women in relation to the laws of marriage, divorce and inheritance (under



my chairmanship). This subcommittee entered into correspondence with interested bodies, and with Government. They planned to hold a big conference on the subject early in 1960.

In preparation for this conference, a booklet was written in simple language, in English and Luganda, outlining some features of the law as it stood, and raising a number of questions for further discussion. This was widely circulated to women's organisations. Representative women were chosen in every district to report on the discussion in their own language areas. They came to the conference well prepared.

At the conference, talks were given by experts on the subjects which had been studied: bride wealth, property and inheritance, rights of succession, marriage laws, women in public life, and the right to work. There were opportunities for delegates from different regions to discuss together and report on the plenary sessions. The following resolutions were passed unanimously:

### ***Bride wealth***

- (1) That the return of the customary payment of bride wealth should be abolished in respect of all marriages which may be dissolved in the future.
- (2) That there was need to stimulate public opinion and to educate men, women and children on all problems connected with the customary payment of bride wealth, beginning in the home, and to encourage joint discussion.

### ***Property rights of women and rights of succession***

- (3) That the title of heir should normally go to the eldest son of a marriage contracted under Protectorate law; and that the title of heir should normally go to the eldest son of the senior wife of a marriage contracted under native customary law.
- (4) That a just division of a man's property, after due provision for the widow, is for a major share to go to the heir if he is a son of the deceased; if not a son, a token share to the named heir; and the remainder to be shared among the remaining children.
- (5) That everything possible be done to educate public opinion of the need for people to make written wills.

- (6) That when a man dies the widow, whether or not she has children, should receive a substantial share of her husband's property including the house and land attached to the house so long as she does not remarry; but in the event of her remarriage, the house and land attached to the house should go to the children or family according to the custom of the tribe.

### ***Right to work***

- (7) That there is a need to educate public opinion to appreciate the contribution of women to society, and for women to be made aware of their own responsibilities in the home as well as in public life.
- (8) That there is a need for a husband and wife to understand that they are partners and should share their whole life and plan it together.
- (9) That government be urged to give immediate attention to the creation of facilities for post-primary and secondary education of girls especially in those areas where no provision exists.
- (10) That women not living with their husbands and/or not supported by them should have the right to work and to earn money.

### ***Marriage laws***

- (11) That a booklet of Protectorate laws about marriage, divorce, inheritance and succession be published with simple explanations.
- (12) That booklets be published describing customary laws relating to marriage, divorce and inheritance.
- (13) That all marriages and divorces be registered and that their validity shall depend on registration.
- (14) That this conference is of the opinion that government must be urged to carry out a full and detailed investigation into the laws concerning family and inheritance, with a view to redrafting them to suit modern conditions; and more especially that proper provision be made for widows, deserted wives and children.

The conference received widespread attention in the press and radio. There were daily reports of the sessions in the local newspapers, both English and Luganda, and articles and correspondence continued during the following weeks.



For example, on the subject of bride-price there were a number of letters from men defending the custom. Mr I.E. Ejalu of Soroti wrote (*Uganda Argus*, 28.4.1960) : 'One is more likely to love a wife whom one has paid for than one whom one wins with words and kisses', and went on to suggest that 'the name Bride-Price should be replaced by the word Bride-Prize'.

On behalf of the Uganda Council of Women I replied (*Uganda Argus*, 4.5.60) that the practice had many points in its favour:

This represents the opinion of a very great number of Africans, and many of the women attending the conference expressed the same view. All were agreed that in the old tradition there were many valuable things which they did not want to see destroyed, but they also agreed that in a modern money economy, where cash is given instead of cows or goats, the custom is sometimes abused and it may appear as though the girl is being sold to the highest bidder.

The delegates felt that a present to the parents of the girl is appropriate as a sign of thanks and appreciation that they have brought up their daughter well. They agreed that the custom should not be abolished by law, nor a maximum price fixed by law. But they felt that when a marriage breaks down and the husband reclaims the bride-price this is degrading for a woman.

They felt that even as a financial transaction it is not fair, as in many cases the woman has worked hard for her husband and borne children to him. They did not pass a resolution urging the abolition of the bride-price, but they passed a resolution urging that the bride-price should not be returned when the marriage breaks down.

This conclusion was arrived at unanimously after much thought and discussion. None of those who attended the conference had thought of this solution to the problem before the conference, and I think this conclusion surprised us all. But under the present system marriage under native custom depends on payment of the bride-price and divorce on its repayment. Therefore, if the return of the bride-price were to be abolished it would become necessary to find some other means of getting a divorce.

Resolutions were passed, therefore, suggesting that all marriages and divorces should be registered, and their validity should depend on their registration, not on the exchange or return of a price.

As a result of the conference there was considerable excitement among the women, a sense of the importance of improving the status of women, to enable them to take their place in the future and contribute their full potential to the

new independent Uganda.

In an article in the journal *African Women* (December 1960, Vol. IV No. 1) I summed up as follows:

The success of the conference depended on the fact that the delegates had all prepared for it, as well as on the fact that the time was ripe. It has aroused tremendous interest in many quarters. Many men, including a number of government officers, have become aware that women hold strong views on these subjects, and are capable of discussing them sensibly. The women who attended the conference were themselves thrilled to discover their own capabilities and have returned to their own places determined to carry on in this kind of leadership. The resolutions have been forwarded to government and are being studied and it remains to be seen what action will be taken. The women emphasised again and again that future discussion on the subject should be with men and women together. There is no doubt that women will not now rest until they have convinced public opinion, men and women together, that something must be done.

The 1960 conference proved a great step forward in the campaign for women's rights. There were positive results, both in the short term and in the long term. These included the following:

- (i) One of the speakers at the conference was Dr H.F. Morris, African Courts Adviser to the Uganda Government, who spoke on the subject of Protectorate Law of Marriage and Divorce. Following his talk the conference drew up resolutions 11, 12, and 14. Seven months later, in October 1960, Dr Morris wrote a paper, 'Family Law in Uganda'. This was a clear, comprehensive and informative document, covering both customary law and central government law, but it was not very widely known. [see Appendix 1]
- (ii) In 1961 the Uganda Council of Women published a booklet, 'Laws about Marriage in Uganda', in simple English, and translated it into four or five vernaculars. Thousands of copies were sold, at sh.1/50 each. Many of the purchasers were men. (Resolutions 11, 12).
- (iii) 1961 – The Hindu Marriage Ordinance was passed in Legislative Council.
- (iv) 1964 – Commission on Laws of Marriage in Uganda appointed by Government, Report published 1965. (Resolution 14)
- (v) 1966 – Succession Act made applicable to Africans, by Statutory Instrument enabling testators to make wills escaping the restrictions

customary law. (Resolution 5)

- (vi) 1972 – Decree 22. Succession (Amendment) Decree. (Resolutions 4 and 6, Protection of Widows)
- (vii) 1973 – Decree 16. Customary marriage (Registration) Decree. (Resolution 13)

## 5 : Asian women

Spurred on by the example of the African women, Asian members of the Uganda Council of Women also expressed dissatisfaction with their social and legal status. In March 1960 they set up a subcommittee, under the chairmanship of Mrs Sarla Makandya, to study the subject.

They defined their task under three headings:

- (i) The legal status of Hindu married women.
- (ii) The legal status of Muslim married women.
- (iii) The social status of Asian women in general.

At the end of May 1960, the subcommittee sent out a circular 'to all U.C.W. branches and to most Asian organisations' asking for co-operation and support for reforms. Response was immediate, and members set about collecting case histories, consulting Asian lawyers, seeking support from leading personalities in Kampala, and asking advice from sister organisations in India and Pakistan. In order to create country-wide opinion, articles appeared in the newspapers and radio broadcasts were organised.

### *(i) Hindu Women*

There was no Protectorate law regulating Hindu marriages, hence, women married according to Hindu rites had no legal protection, no legal basis for the inheritance of property or even for the custody of children.

Young Hindu women complained that they had no status even in their own homes, but were entirely under the domination of their husbands' families. Some did not even know of the existence of divorce.

The subcommittee reported :

The typical Asian woman is not the smart well-dressed woman seen in Kampala. The typical Asian woman here lives in the slums of the larger urban centres or out in the 'bush' where her husband may run a small shop. She suffers indignities largely because she is uneducated and is unaware of the rights and privileges to which she is entitled. The incidence of cruelty and neglect suffered by this woman at the hands of her husband and mother-in-law comes up time again in the case histories received by the subcommittee. Her husband could enjoy polygamy, could desert her and leave her with no support for herself or her children, or could perhaps die without leaving her a penny or a piece of property.

Instead the sons might be the sole inheritors. All of these examples were possible because there was no legal recognition of the Hindu marriage in Uganda.

The Uganda courts would not entertain any suits for matrimonial redress because according to the customary law in India, a Hindu marriage was potentially polygamous. The Indian legislation of 1955 could be invoked in Uganda only if special laws were passed. It therefore became the primary task of the subcommittee to create a public opinion so that necessary laws could be passed.

After much hard work, 'which included overcoming formidable opposition from pessimistic quarters of the Asian community', the committee prepared a schedule based on the Kenya Ordinance and the Hindu Code Bill of India. Women members of Legislative Council were approached, the Attorney General was notified, questions were asked in Legislative Council on behalf of the committee, and in January 1961 a bill was introduced. This bill did not at first come up to the expectations of the committee, but various amendments were accepted, and the bill passed into law.

#### *Hindu Marriage Ordinance, 1961*

The effect of the Ordinance was to give legal recognition to Hindu marriages as monogamous, although marriages contracted before the Ordinance, whether monogamous or polygamous, were recognised and given legal status. Registration of marriages was made compulsory, and divorce causes listed. Minimum age limits were set, 18 for the groom and 16 for the bride. Wherever consent of a guardian was necessary for the marriage contract, the persons entitled to give such consent were listed from among the close relatives. (The committee considered this to be better than a similar list in the Kenya Ordinance, as curtailing unnecessary interference by distant relatives.)

#### ***(ii) Muslim Women***

After the passing of the Hindu Marriage Ordinance the Asian women's subcommittee turned its attention to the problems of Muslim women. This seemed more difficult and controversial. According to the laws of Islam, a Muslim man could have up to four wives. If he wanted a divorce, he had only to say to his wife three times, 'I divorce thee', and she was divorced.

In Uganda, Muslim marriages and divorces were registered with the central government, under The Marriage and Divorce of Mohammedans Ordinance.

There were some Muslim women on the committee who felt strongly the need for reform of the laws as they affected Muslim women in Uganda. However

there were others who did not admit any need for change. Most of the articulate members of the U.C.W. came from well-to-do educated sections of the community around Kampala. Probably in many cases their husbands had only one wife, at least one wife who was socially recognised. Such women were probably better off than Hindus; they were content with things as they were.

One Ismaili woman, writing to the *Uganda Argus* in 1960, quoted the old Agha Khan, Aly Khan, as saying, 'For us marriage rates as a civil contract like any other. It has nothing to do with religion. You like a girl and marry her. You no longer get on, so you part. God has absolutely nothing to do with it. The problem isn't a problem'.

Another Muslim woman, Mrs F. Ahmed, President of the Muslim Women's Society, wrote, (*Uganda Argus*, 22.6.1960): 'The laws were laid down by the Prophet Mohammed which give women as much right as that accorded to men. Moreover, Muslim laws are accepted all over the world'.

Although the women on the subcommittee felt strongly that many women had real difficulties and were in need of help, and that there was a real need to reform the law, among others opinions were divided. This made it difficult to take united action.

#### *African Muslim Women*

Only a small minority of these were educated. Three of them (teachers trained at Buloba), with their husbands' support, came to discuss the possibility of working for reform of the law. But because of their small numbers, they could not campaign alone, and because of the lack of unity among the Asians, little was accomplished.



## 6 : The Anglican Church and the status of women

The Young Wives who voiced their grievances and started the movement for reform of the law were educated Baganda, members of the Anglican Diocese of Uganda. But the problems they raised were not confined to their own area, their own diocese, or even their own Church in Uganda. Within Uganda, the Anglican Diocese of the Upper Nile was also involved in the Northern and Eastern Provinces. But the implications were even wider.

In 1958 the Lambeth Conference urged that 'the Church should make every effort to advance the Status of Women in every possible way'. A number of bishops spoke of polygamy and related problems, and a resolution passed by the Conference (120 b) acknowledged that 'the introduction of monogamy into societies that practise polygamy involves a social and economic revolution which the Christian Church has not yet solved'. Reporting this, the *African Newsletter* of the Church Overseas Council (February 1960) added, 'This is an understatement, and unless it can be answered the Church must suffer in spiritual health'.

The Newsletter recorded that following the Conference a number of bishops from different parts of Africa contributed to a symposium on the subject. According to this, the Bishop of Accra (September 1958) stated: 'We in Ghana are even further away from Christian standards than I had supposed. The majority of men in Ghana dislike and resist the idea of being tied to one woman. The women's attitude is not yet articulate'.

The Bishop of the Upper Nile, referring to the A.G.M. of the Uganda Council of Women in December 1958, at which he was the invited main speaker, was able to write, 'A matter of interest to other bishops is the beginning of what I think is a women's movement for better status in the Uganda Protectorate'.

At this time the vast majority of Christians in Uganda belonged either to the Roman Catholic or to the Anglican churches. No other 'main-line' churches worked in Uganda, although there were small Seventh Day Adventist, Pentecostal and Orthodox churches.

In 1959, in the Anglican Church in Uganda (then called the 'Native Anglican Church' - N.A.C.) there were two dioceses, the Upper Nile Diocese, covering the Northern and Eastern Provinces, and the Diocese of Uganda, (mainly Bantu). These two dioceses were now co-operating with each other and with the Uganda Council of Women on the questions of laws relating to marriage, divorce and inheritance.

The Committee on Marriage Questions set up by the Diocese of Uganda in 1957 had already met several times and passed various resolutions concerning

both the spiritual and legal aspects of the subject, (a) encouraging Christian attitudes in those getting married in church, and (b) bringing pressure to bear on both Protectorate and local governments for reform of the law and justice for women.

In 1959, the Diocesan Council of the Upper Nile also set up a 'Committee on the Revision of the Marriage Laws', under the chairmanship of Archdeacon Masaba. The secretary was the Revd W. Norman, who had been a barrister. The committee was asked to circulate their findings to the archdeaconries, who after detailed discussion reported back to the committee for collation of their findings and recommendations. Thus the whole area was covered. The committee met six times and in their report their main complaints included:

- (i) Two distinct systems of law governing the same cases, often with contradictions and anomalies.
- (ii) In a monogamous (Christian) marriage which was theoretically binding in law, it was easy in practice for a man to avoid the legal consequences of his undertaking.
- (iii) Under both systems of law, a woman was at a disadvantage both in marriage and widowhood.

Accordingly our suggestions are designed to integrate the two systems of law in such a way that though both continue to exist no conflict can arise between them; to strengthen the law relating to monogamous marriage; and to improve the position of women by some regulation of customary law relating to marriage and inheritance, as well as by amendments to the present Marriage and Divorce Ordinances.

At the same time, we do not desire, except where it is absolutely necessary for our purposes, to alter or restrict existing African customs – Nevertheless, customs are not sacrosanct (Uganda Council of Women Resolutions, 1960).

The committee then put forward various detailed recommendations for discussion, and expressed the hope that a government commission should be set up to consider these and related suggestions. (cf. Uganda Council of Women Resolutions, 1960)

- (a) Registration of all marriages. The legal validity of future customary marriages to depend on their registration.
- (b) Dissolution of customary marriages also to be registered. Such marriages should only be capable of being brought to an end by a decree of a competent court.



- (c) If a marriage is celebrated without the customary bride-price being paid, this may be recovered as a debt, but the validity of the marriage should not be affected.
- (d) The possibility of divorce for a woman on grounds of her husband's cruelty.
- (e) Protection of widows. 'A widow shall not be compelled to marry a member of her deceased husband's clan.'

In September 1959, the Revd W. Norman sent me a copy of this report asking for my comments and for information about the progress of our committee in the Uganda Diocese.

I replied that the committee had met twice in 1958, and passed resolutions concerning the spiritual and legal aspects of the task, but little had been accomplished. I went on to inform him what had been happening, not directly through the Church, but through the Uganda Council of Women.

You will know that at their A.G.M. the Uganda Council of Women passed a resolution, brought by Mrs Makumbi, asking for the registration of all marriages. The group of women whom Mrs Makumbi represents are primarily interested in Christian marriage, and I think it is true to say that their feeling is: 'Let us concentrate on Christian marriage laws and leave the rest'. Some of us feel, however, that it is essential to work for the stability of *all* types of marriage, that it is impossible to stabilise Christian marriage without also clearer laws to stabilise native customary marriage and to straighten out the confusion. The Uganda Council of Women also feels that although those who have brought up this subject are interested chiefly in Christian marriage it will be wise if we tackle the subject from a broader viewpoint of public opinion and do not appear to identify ourselves too closely with the Church, but conduct an independent campaign. We feel our contribution will be more effective on these lines. But whatever reforms we want to put through the first step seems to be fact finding – to discover what the law is – and this is a very big undertaking requiring experts.

About six months after I wrote this, the Uganda Council of Women held their Conference on the Status of Women (March 1960), as already recorded. Following this, the subcommittee of the Uganda Council of Women itself produced and published the booklet, 'Laws about Marriage in Uganda'.

In 1960, the two dioceses of the Anglican Church (N.A.C.) divided into a number of smaller dioceses, and in April 1961 these combined to form an autonomous province, known as the Church of Uganda.

The time for national independence was approaching. The Uganda Council of Women were busy trying to put pressure on the political parties and the churches for reform. The Uganda People's Congress Statement expressed an intention to codify customary law, and this subject was debated in the Legislative Council with reference to marriage among other matters in April 1961.

The Uganda Council of Women also sent a letter to the two archbishops, Anglican and Roman Catholic, urging them to work together for this end. They wrote:

We find that there is great confusion in the minds of the people about the law, and confusion and contradictions within the law itself, and that these aggravate the break-up and instability of marriage. We believe the time has come to press for certain reforms and clarifications in the laws connected with marriage, divorce, bride-price, etc. We believe that there is fundamental agreement between the churches in their basic attitudes to this problem, we believe that joint action by the churches might be effective in persuading Government to take action.

They submitted to the archbishops a memorandum setting out their own suggestions, including that *'all marriages and divorces should be registered and their validity should depend on their registration'*.

The two archbishops consulted together a number of times.

The Church of Uganda set up a Provincial Committee on Marriage Laws superseding the two previous diocesan committees. This committee planned joint discussions with the Roman Catholic Church and with the Uganda Council of Women. They took as a basis for their discussions the findings and proposals of the old Upper Nile Diocesan Committee, together with later amendments and proposals of the Uganda Council of Women.

Suggested subjects for joint discussion included: registration of marriage and divorce, clarification of what constituted marriage and divorce; jurisdiction (no court having the power to treat an Ordinance marriage as if it were a customary marriage or to order the return of the bride-price without the appropriate form of divorce having been granted), greater protection for the injured party (usually a woman), protection of wives' separation and maintenance, protection of widows, custody of children. Time was also allowed for discussion on the procedure for approaching government, drafting the report and follow-up.

In the Provincial Committee's introductory letter, reference was made to the debate in Legislative Council in April 1961 on the question of whether

customary law should be codified. The committee commented, 'Enactment of a better law of marriage need not wait for that. It is doubtful if we should press for rapid codification of these customs, which as pointed out in the debate, could well result in the perpetuation of unsatisfactory laws, which might otherwise gradually disappear'.

On 7 September 1962 a joint meeting between the two churches was held at Rubaga to consider the extent of agreement. The chairman, Archbishop Brown, pointed out that if reforms were proposed to government with the support of the Churches there could be greater possibility of their acceptance.

There was general agreement on many of the points discussed, but on the question of registration of all marriages, including customary marriages, the Roman Catholics expressed reservations. The chairman suggested that the Anglican committee should be asked to prepare a detailed memorandum setting out their arguments in favour of registration, for consideration by the archbishops.

The Archbishop of Rubaga's views on this report were on the whole very favourable, except for continued reservations on the subject of registration of customary marriages. On this subject he wrote:

*The Catholic Church cannot give support to the registration of all customary marriages.* Customary marriages or unions between people other than Catholics can be legitimate, but if one or both of the parties concerned are Catholics, the union will always be held as illegitimate in the Catholic Church. The Catholic Church, therefore, cannot give any support to any measure which would give to such unions the appearance of legitimacy or approval – it would be wrong for us to give our approval for something we know to be bad for members of our Church.

Registration of such unions for Catholics would in no way make such unions valid before the Church. The good it is hoped would come from the registration of such unions does not justify the acceptance of a bad thing. Moreover, in our opinion, the good hoped for from the registration of all customary unions is mostly an illusion. Registration of Christian marriages does nothing to help stabilise those marriages. The Catholic Church would support the registration of non-christian marriages, and leave the registration of marriages between Christians as it now stands.

The Revd W. Norman, secretary of the Anglican committee, commented on the Archbishop's remarks:

There is no point of major importance on which we differ greatly from him except that of registration. Here, he and his advisors still do not

appear really to understand what we want. *Already* the law regards customary marriages as legitimate, and recognises them (unless there is a pre-existing ordinance marriage, and even for them customary 'wives' are recognised for some purposes). Registration would make *no difference* to this. It would only tell *who* is the customary wife.

It is interesting to note that when the independent Uganda Government set up a commission on the subject in 1964, the Roman Catholic Church had been convinced, and in the memorandum which it submitted to the Commission recommended:

Although registration of marriage as such is not necessary for the validity of marriage, nevertheless the Catholic Church recommends the compulsory registration of all marriages complying with the conditions necessary for a valid marriage. There is much confusion at present, because not all marriages are registered. Sometimes it is difficult to prove that a marriage has been contracted. Registration would help to give more stability to the home. By registration the State would be aware of the existence of a marriage, and could support it, if necessary, in a competent court.

With regard to the solemnisation of customary marriages, the memorandum recommended (p. 5, IV) 'The same as stated in the Anglican Church memorandum'.

The Anglican committee drew up a report entitled *Statement on the Revision of Marriage Laws*. This was circulated to various interested people for consideration and comment, and was approved by the bishops in December 1963. The Africa Secretary of the Church Missionary Society, the Revd John V. Taylor, who had himself worked in Uganda, wrote:

I think the report is the best bit of work on these lines I have seen in Africa. I presume I am right in supposing that what is here proposed is that a man wishing to be a polygamist can have a plurality of customary marriages all duly registered. Only Ordinance marriage makes him liable to the undertaking of monogamy and gives a wife of such a marriage the right to institute divorce proceedings if he marries another woman by customary marriage. That seems to me the only proper legal solution in the present stage of African society and deals with the problem of different marriage patterns far better than the Ghana Government's White Paper which, while trying to control and legalise polygamy, gave no security to the wife who entered into what she believed to be a monogamous marriage. I do hope and pray that these proposals are all accepted.

[See Appendix 2 : Church of Uganda statement on the revision of marriage

laws]

## 7 : Political parties and independence

On 9 October 1962 Uganda gained its independence. For a year or two before this the political parties were lining up, preparing their policies and election manifestos. There was a great awareness of the pressure of the women's movement, which received considerable media coverage. The Uganda Council of Women wrote a number of letters and had interviews with various politicians. They emphasised the importance of the Universal Declaration of Human Rights, Article 16:

- (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
- (2) Marriage shall be entered into only with the free and full consent of the intending spouses.
- (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

The political parties expressed their sympathetic concern. The Democratic Party published a party policy statement entitled 'Uganda Women march to Freedom', promising many of the reforms asked for relating to law, educational opportunities, and participation of women in public life. They summed up as follows:

The D.P. recognises and wishes to commend very highly the work the Uganda Council of Women, the Forward Society, and other women's organisations are doing in encouraging women to play an active part in the political world. The D.P. will continue to give support to these organisations.

The Uganda People's Congress also expressed its support for the reforms demanded, and its intention to codify customary law. The debate continued after Independence.

In August 1963 the Prime Minister, Dr Milton Obote, announced at a reception given to him at the Y.W.C.A., that a committee was to be appointed to investigate the status of married women and to recommend reforms in the law to protect them. He said, 'The Uganda Council of Women has been petitioning government about various aspects of the question. Now their cry has been heard'.

Two months later, in October 1963, the Minister of Justice, Mr Grace Ibingira, announced, again at a reception in the Y.W.C.A., that he was appointing a



commission to look into the country's marriage and divorce laws, and that it was due to report in January or February. He said, among other things, that government intended to bring in legislation which would stop a man who married a woman in a Christian wedding from taking on more wives under customary law. (In fact the commission's report was not published until 1965.)

### ***Reactions in Parliament***

Towards the end of 1963, soon after the announcement that a commission was to be appointed, there were reports in the press of debates in Parliament on the subject of the Status of Women. Many of the MPs seemed to regard the subject as a joke. The *Uganda Argus* (2.10.1963) reported that in one debate there were allegations of MPs 'fathering babies' born to the trainee secretaries at the training centre at Nakawa. Mrs Florence Lubega, Parliamentary Secretary to the Ministry of Community Development and Labour 'appealed to every man in this House and outside to leave alone young girls undergoing training' and not to deprive the country of badly needed secretaries. 'Mrs Lubega's anger stopped the laughter as members accused others of paying nocturnal visits to the centre.' There was a heated debate with more roars of laughter at various suggestions to deal with the problem. Many of the participants in the debate seemed to think such problems inevitable.

Again it was reported (12.11.63)

Laughter rocked the National Assembly yesterday when an MP (from Teso) lectured members on how to treat their wives. Men should not beat their wives. The law should continue to be 'one man, many wives'. As a first step towards stopping young girls from wandering the streets, all bachelor MPs should take a wife. Asking for a law to stop husbands beating their wives, he admitted, 'I might have done it, but I want a bill to control me'. Calling for a law to limit bride-price, he said, 'a number of young girls stayed at their parents' homes with fatherless children because the girl's lover could not afford to marry her'.

He ran into opposition from Mr Obonyi from Acholi who upheld the Christian viewpoint that one man should have only one wife. Calling for fair shares for all, he asked what would happen if there were one hundred boys and one hundred girls, and one or two boys each took five wives. (Several boys would have to share some girls, or go without any.)

Again 'there were hilarious scenes in Parliament' when two days later (13 November) Mr Omadi (Bukedi) 'said he would marshal back-bench and opposition support to oppose any government bill to stop a man taking more

than one wife. Wives were happier when there were two or three of them, he maintained'.

Saying that he understood the government bill would limit a man to only one wife, Mr Munaba told members, 'I am going to try with all my strength to see that it fails because it interferes with customary law'. He maintained that a man should be able to have as many wives as he wants. There were roars of laughter when Mr Munaba claimed that American women coming into Uganda with organisations such as the Y.W.C.A. were 'brainwashing our wives and are telling them not to do things'.

Mr Ibingira told him, 'We are going to recognise polygamy, but only under specific conditions'. Mr Omadi wanted to know what conditions. Mr Ibingira replied, 'We don't want to encourage harlotry here. We don't want our women to roam around the towns. All of them must be married'. And he told the members who were laughing, 'I am very serious, that is why you can see I am not laughing. One man should have as many wives as he can afford'.

**Note.** We have reproduced these reports to show how little the politicians respected women or understood the women's demands on the real problem. The Uganda Council of Women and the Churches were not asking that polygamy should be abolished, but only that those getting married should choose which kind of marriage they wanted and abide by its rules. They also failed to understand that if some men took more than their share of women as wives, that must *cause*, not prevent, prostitution, because it would leave other men without enough women to have one wife each.

## **8 : Commission on Marriage Laws, 1964-5**

In January 1964 the government appointed a Commission on Marriage, Divorce and the Status of Women with the following terms of reference:

To consider the laws and customs regulating marriage, divorce and the status of women in Uganda, bearing in mind the need to ensure that those laws and customs while preserving existing traditions and practices, as far as possible, should be consistent with justice and morality and appropriate to the position of Uganda as an independent nation and to make recommendations.

The chairman of the Commission was the Hon. W.W. Kalema, MP and the Secretary, a Ghanaian, V.C.R.A.C. Crabbe. The Commission eventually reported in July 1965.

The commission travelled throughout Uganda meeting all kinds of people, including women's groups, gathering information and opinions about customary law, often unwritten, and its relationship to the ordinances concerned with marriage and divorce.

In their report they described the existing laws and the defects they found in them, both a) the various ordinances, which came under the jurisdiction of the central government courts, and b) customary laws, which varied from place to place and were administered by local courts.

The commission's first conclusion was that there were too many laws regulating marriage and divorce in Uganda (Para. 99). Not only were there the two basically differing systems, customary and Ordinance law, there were five different ordinances: the Marriage Ordinance (CAP. 109); the Divorce Ordinance (CAP. 112); Marriage and Divorce of Mohammedans Ordinance (CAP. 110); the Marriage of Africans Ordinance (CAP. 111) and the Hindu Marriage and Divorce Ordinance (No. 2 of 1961).

### ***Marriage Laws Recommendations (Paras. 211 - 222)***

The commission agreed unanimously that *there should be one law to regulate all marriages*, and that legislation should be introduced so that in future *no person should be allowed to register more than one marriage* although if a registered marriage were dissolved then another one could be registered in its place.

In some of the recommendations and comments it seems that the thinking of the Report is based on a Ghanaian model rather than on the ideas and aims of

the women's movement in Uganda.

The recommendation that *no-one should be allowed to register more than one marriage* does not seem to preclude men from taking more than one woman as customary wives or concubines, only these would not be registered. The children, however, would have equal rights with the children of the registered wife. It does not seem that the validity of such marriages would depend on their registration.

This was at variance with Resolution 13 of the Uganda Council of Women (1960 conference) that '*All marriages and divorces should be registered and that their validity should depend on their registration*'. Both Anglican and Roman Catholic Churches now agreed that this resolution was fundamental to their campaign for reform.

Their proposals were that both systems of marriage should be allowed to continue, but it should be clearly defined that one was monogamous, and the other, potentially at least, polygamous. But the marriage partners would have to choose, to make it clear which type of marriage they had undertaken. The marriage contract with its rights and responsibilities, its obligations, should be clearly stated and understood, as should the penalties for breaking the undertakings. Thus, one man could not be married to one woman in monogamous marriage, and at the same time to one or more other women by the polygamous customary system. To avoid confusion, therefore, all marriages must be registered, and legal divorce, even in customary marriage, could not be by the return of the bride-price, but by court action, which would be registered.

The commission (Para. 103) acknowledged the confusion caused by lack of registration of customary marriages. 'It is often very difficult to ascertain whether two people who profess to be man and wife are married at all.' It regards the lack of registration as 'a slur on customary marriages'. The commission was, therefore, of the unanimous opinion that '*customary marriages should be registered*, and that legislation should provide for this'. However, it did not go so far as to recommend that without registration such marriages would not be regarded as valid.

They recommended (Para. 103) the recognition of cohabitation by a couple as though married, but without any marriage contract.

We recommend that the proposed law should provide that where a man and a woman have been living together or otherwise for a period of not less than twelve months as man and wife, it should not be lawful for either party to deny the subsistence of a marriage between them, whenever that status is called into question by the other party, and, therefore either

party should be liable to the disabilities if any, and enjoy the privileges incidental or conducive, thereto.

This seemed to leave confused the issue of the registration of all marriages, and to imply that failure to register would not interfere with the legal validity of a marriage.

### ***Maintenance and Legitimation of Children (Paras. 223 - 228)***

The commission recommended that the mother of a child should be able to sue the father for maintenance, both for herself and the child. The father of a child born out of lawful marriage should have the power to legitimise the child at any time, indeed, he should be encouraged to do so. Such a child would have equal status with the children of the legal wife, but legitimation of the child should not confer status on its mother [i.e. as a wife]. On page 53 Comment 2, the Report even advocated that in childless marriages the would-be parent [presumably the man] should beget illegitimate children and legitimise them rather than adopt unrelated children. 'We think it appropriate and better if recourse is had to legitimation rather than the adoption of a child who is not by nature your child.'

### ***Divorce (Paras. 229 - 234)***

On the subject of divorce, the commission pointed out that according to the Divorce Ordinance a husband could divorce his wife for adultery, but the wife could not divorce her husband for adultery alone, uncomplicated by further offences such as incest, bigamy, cruelty, or desertion without reasonable excuse for a period of two years or more.

They recommended that divorce petitions should be lodged with the High Court, but only three years after the registration of the marriage; that divorce should not depend on any particular legally defined matrimonial offence, but on the decision of a committee appointed by the judge to hear the case, in camera. The report commented (Para. 234, Note 3) that this committee should consist of '*men* of wisdom and experience'. (There is no mention of *women* with similar qualifications.)

(Para. 237) 'Matters of restoration of property, maintenance, and custody of the children should be decided by the judge.' Presumably this would cover matters of customary law, such as bride-price.

## ***Inheritance (Paras. 240 - 243)***

(This was the subject which had first sparked off the women's movement for reform). The Commission recommended that a widow should receive one third of her husband's 'self-acquired' property until her death or remarriage, and that this should go to her children on her death. The remaining two thirds should be divided among all the children. A Public Trustee should have power to appoint as his agent a suitable person 'with full powers and authority to take possession of any property failing to be dealt with under our recommendations. We do not think members of a clan should be allowed to take property of an intestate without regard to the interests of the children and the wife of the deceased'. (See Uganda Council of Women Resolution No. 6, 1960)

(Para. 243) 'A female person should have capacity to execute a contract and to hold and deal with property in her own right in any manner she deems fit, including the power to make a will.'

In its comment (p. 69) the Commission noted that the recommendations it put forward were based on the English Law of Wills, which in Uganda did not apply to Africans because by the Succession Ordinance of 1906 inheritance was based on customary law.

Although the Commission sought and obtained widespread opinion from all over Uganda as well as from the Uganda Council of Women and the Churches, one strand in its thinking was clearly derived from a non-Ugandan source. The Secretary of the Uganda Government's Commission was a Ghanaian (V.C.R.A.C. Crabbe) and it is evident that much of the Report and its recommendations were based, without acknowledgement, on a Ghanaian model.

In 1961, as the result of public interest in the subject following the Uganda Council of Women's conference of 1960, there appeared in the Uganda newspapers many articles and letters on the subject of the status of women and the marriage laws. One such article, from Reuter's correspondent in Accra, appeared in the *Uganda Argus* (14.6.61 – four years before the Uganda Commission's Report was published). This reported that in Ghana, too, there was tension between Ordinance laws and customary marriages, and that public opinion was enthusiastically in favour of polygamy. To sort out the legal confusion the Ghana Government had drawn up a White Paper with the following proposals:

Every man should be allowed one registered (and legally recognised) wife



and as many unregistered wives as he likes.

Only the registered wife will be entitled to a share of the man's property if he dies, but all the man's children, whether by registered or unregistered wives, will have equal rights to their dead father's property.

Divorce petitions should be heard by a judge or magistrate in chambers, instead of an open court. He would be assisted by a panel of four persons who would be required to 'bring to bear on the issue before them their wisdom, sympathy, and understanding'. [All these recommendations appear in the Uganda Commission's report of 1965].

The correspondent goes on to report that the Ghanaian Minister of Local Government, Mr A.E.A. Ofori Attah, had explained in a broadcast that when a man has a registered wife, if he marries or has children by another woman, such a second marriage should not constitute grounds for divorce.

Mr Attah said that these proposals 'have all along taken into consideration those of our customs and practices which are not repugnant to natural justice or morality, as well as those principles which, in the Governments' view are in keeping with the progress of the country'.

The correspondent then quoted another article in the *Ghanaian Times* which said that the market women in Accra were of the opinion that if polygamy were legalised 'many of the street girls would marry and settle down'.

According to Reuter's correspondent, the only opposition to the proposals came from the Churches.

To this article I replied, on behalf of the Uganda Council of Women, (*Uganda Argus*, 28.6.61) as follows:

The Uganda Council of Women's Committee on the Status of Women has read with great interest and some surprise your article on polygamy in Ghana which appeared on 14 June 1961.

They would like to comment on a few points:

- (1) The statement that 'The majority of men there have more than one wife'.

In every country of the world boys and girls are born in approximately equal numbers. We would like to know what Ghana does with its surplus males. When the Ghana commentator describes the proposals for recognition of polygamy as 'confirming age-old African traditional practices', perhaps he envisages continuing the age-old practice of tribal warfare in which surplus males are killed

and the victors take their wives. But when he goes on to say that they 'are progressive and in keeping with changing times' we would like to ask what modern method Ghana uses to control her male population. If some men take more than their share of women, we can think of only three courses open to the remaining men -

- (1) To be liquidated
- (2) To remain celibate
- (3) To share a few women between them (i.e. 'street girls')

The third seems to be the most likely solution.

- (2) We therefore fail to understand the logic of the Accra reporter who considers Ghana's legislation encouraging polygamy would encourage street girls to marry and settle down. On the contrary, we see it as encouraging a lucrative profession of prostitution for the satisfaction of unattached males.
- (3) The present marriage laws in Ghana appear to be similar to those in Uganda. Under Native Law and Custom men are free to take as many wives as they wish. But if they chose to enter into a contract of monogamous marriage and have that marriage registered, then it is (in theory) an offence punishable by imprisonment to take another wife. Your correspondent says that in Ghana the Government are trying 'to put some order (!) into the increasingly confused family situation' by proposing that every man should be allowed one registered wife and as many others as he pleases. We cannot see how this could produce 'order'. If a man of his own free will enters into a contract of monogamous marriage with one woman and has his contract registered with Government, we fail to see why he should be allowed to break his contract with impunity.
- (4) In Uganda the U.C.W. would like to see abolished the (theoretical) prison sentences for bigamy and similar offences. But they would like to see introduced clear legislation protecting the injured party when a marriage contract is broken.
  - (1) If a man breaks his marriage contract, the legal wife should be able to claim reasonable maintenance, including a house, for herself and her children.
  - (2) The grounds for divorce should be the same for women as for men. At present a man can divorce his wife for adultery, but not a wife her husband. The U.C.W. does not want easy

divorce for casual adultery, but only for repeated adultery, such as taking another woman into the home and treating her as a wife. We believe that such legislation rather than the Ghana proposals would help to bring some order and stability to the family.

In its report, the 1956 Commission (p.43, Comment) states that it is not often realised how many people in customary marriage are, in fact, monogamous. To illustrate this, it quotes a study carried out in Bwamba (in Western Uganda) by E.H. Winter, who found that 144 men had between them 217 wives, but of these 97 had only one wife each, while ('only') 47 men had more than one. This, however, leaves unanswered the question what is to happen to the corresponding number of men who are left without wives (in this case about 73)?

On the subject of polygamy, I have never been able to find a satisfactory answer to this arithmetical question.

## 9 : Commission report - comment and criticism

The leading pressure groups for reform were the Uganda Council of Women and the Anglican and Roman Catholic Churches, each of which presented a memorandum. Memoranda on similar lines were presented by various women's groups such as the Mothers' Union, the Widows' League, and the Women's Voluntary Organisations.

The Roman Catholic Church wrote in their memorandum:

Although registration of marriage as such is not necessary for the validity of marriage, nevertheless the Catholic Church recommends the compulsory registration of all marriages complying with the conditions necessary for a valid marriage. There is much confusion at present, because not all marriages are registered. Sometimes it is difficult to prove that a marriage has been contracted. Registration would help to give stability to the home. By registration the State would be aware of the existence of a marriage and could support it, if necessary, in a competent court.

They expressed their reservations as follows:

The Catholic Church will recognise as valid marriages for Catholics only those marriages contracted before a priest, who has jurisdiction, and in the right form.

The Catholic Church does not recognise the civil form of marriage between two baptised Catholics.

The Catholic Church does not recognise divorce.

Archbishop Leslie Brown sent a letter (20 October 1965) to the Prime Minister, Dr Milton Obote, setting out the reactions of the Anglican Church to the Commission's report. He welcomed the granting of property rights to women, and the provision for widows, although he doubted whether some of the recommendations went far enough. He wrote: 'I would pick out for special mention the following points which I feel are of fundamental importance:

- (1) The Church would welcome whole-heartedly the recommendation that there should be one law governing all types of marriage in Uganda (Para. 212) and that there should be registration for all types of marriages (Para. 213). I note in Para. 103 the unanimity of the Commission that customary marriage should be registered, and that legislation should provide for this.
- (2) I have, however, certain misgivings, in that I can find nothing in the Report recommending that such *registration should be compulsory*. It

appears that although provision may be made for registration of customary marriages there is nothing to hinder customary marriages taking place as before without registration.

- (3) Further, as I understand Para. 222, it seems to be recommended that if a couple live as man and wife for twelve months, 'whether together or otherwise' without any marriage ceremony, customary or otherwise, and with no registration, they should be regarded as married. This appears to undermine any attempt at reform through the provision for registration. I think that the wording is obscure.

These Anglican views on the report undoubtedly represented the reactions of many other organisations.

[See Appendix 3 : Church of Uganda comment on commission report]

## 10 : Subsequent progress

Towards the end of 1965 we left Uganda, and this was the end of my personal involvement in the campaign for reform. The achievements of the movement can be summed up as follows:

- (1) Through their experiences of the 1960 conference of the Uganda Council of Women, the women of Uganda had come to realise that they were capable, intelligent, and had a right to be heard. They further discovered that it was possible to make themselves heard, and to move society to change its attitudes.
- (2) Within a year of the conference, as a result of the lead given by African members of the U.C.W., legislation was passed regulating Hindu marriage in Uganda, where previously there was none. The significance of this was diminished by the expulsion of the Asians by Amin in 1972.
- (3) The appointment of the Government Commission on Marriage, Divorce, and the Status of Women, and its report in 1965, which recognised the injustices and analysed the problems. In spite of confusions, and even contradictions, in the Report, it indicated ways to improve the status of women and to reform the laws.

(Subsequently there was much political upheaval in Uganda, and the impetus for reform could easily have been lost, but as a result of the new awareness of injustices suffered by women, further action was taken by government, first under President Obote, and then during Amin's regime.)

- (4) As recorded in Chapter 8, the Commission recommended that legal provisions based on the English law of wills should be available for Africans. Dr H.F. Morris writes:

Though the recommendations of the 1964 Commission were never implemented as such, in 1966 the recommendations regarding the making of wills 'based upon the English law of wills' (Report, comment p. 69) were in effect implemented when by Statutory Instrument a large part of the Succession Act (the old Succession Ordinance of 1906) was applied to Africans for the first time, including the portion on the making of wills. This enabled a testator (in theory at any rate) to escape restrictions of customary law on free testation.

- (5) In 1972 Mr Nkambo Mugerwa, Minister of Justice and Attorney General, introduced new legislation for the protection of widows and their



children: *Decree 22, Succession (Amendment) Decree of 1972*. It was explained to me that this decree was in two parts:

- (1) Where a husband died without making any will:

As you know, in some parts of this country, in such cases the relatives and *Abakulu be Kika* (clan elders) could disinherit the widow and her children, but that Decree gave the widow and her children the necessary protection by giving her legal claim on her house and part of her husband's property.

- (2) Where a husband died after making a will in which his wife was not included, the Decree provided for her to take the case to a court of law which could determine what portion she would get, including the house.

Dr Morris called this a revolutionary decree because, for the first time, clear regulations were made for the disposal of the estate of an intestate. The residential home is held in trust for the heir. The widow and her family have the right of occupancy under certain conditions. The rest of the property is divided in certain proportions between the customary heir (one percent), and the wives and all the children of the deceased.

The *Administration of Estates (Small Estates) (Special Provision) Decree*, provides, however, that these regulations about the estates of intestates should not apply to small estates of less value than shs. 100,000 at that time. Dr Morris points out that it is uncertain whether the new provisions of the Succession Act are applicable to these small estates (Chapter on 'Uganda' by H.F. Morris in N. Rubin and E. Cathan, *Annual Survey of African Law*, Vol. VI, 1972).

- (6) Decree 16: *The Customary Marriage (Registration) Decree of 1973*. This Decree provided for the registration of all customary marriages. According to this decree:

- (a) Customary marriages may be polygamous.
- (b) Parties to customary marriage shall, as soon as possible, but in any event not more than six months, after the completion of the marriage, attend the office of the Register of Marriages of the district in which it took place with at least two witnesses of the ceremony, to register the details.
- (c) A copy of the record by the registrar is admissible in any court of law as conclusive evidence of marriage. Minimum age of marriage: 18 for a male, 16 for a female.

- (d) There are heavy fines or prison sentences for infringements of this law, or for false statements, or failure to register within six months of the ceremony, although six months after the ceremony it is still possible to register such a marriage on payment of a fee.
- (e) Customary marriages entered into during monogamous marriage would, in the future (as hitherto), be a criminal offence, although the Decree as drafted seems to accept as valid such unions if they had been entered into before the Decree was passed (see p.16).

Mr John Bikangaga kindly collected the following information from lawyers in Kampala:

Mr C.S. Lule who was Attorney-General at the time when the Decree of 1973 was passed had observed the difficulties of women in customary marriages. Many of these difficulties were connected with inheritance, but there were also grave difficulties when their husbands decided to discard them and their children in order to marry younger, better educated wives in church. The Decree made it possible for a wife married under customary practices to seek intervention if her husband should try to marry another girl in church, and the court may insist on the man marrying the former wife 'properly' in church instead of looking for a new girl. Thus the claims of the children to their father's inheritance are safeguarded by the same Decree.

In response to my enquiries, Mr John Bikangaga wrote (October 1987):

The questions arising from your letter were put in summary form:

- (a) Does the legal validity of a marriage depend on it being registered, or
- (b) Is it just a voluntary thing?
- (c) If a marriage is not registered, is it regarded as a valid marriage in law?
- (d) How much protection does the Decree give to married women (and men)?
- (e) Could it be that the fact that the fines which are specified are so low that they undermine the whole force of the Decree?

They [the lawyers] answered as follows:

- (a) The validity of a customary marriage does not depend on its registration. The test for validity is that all the essential customary steps or procedures must have been fulfilled; registration is merely

for the purposes of evidence should need arise, and usually registration takes place after the marriage has come into existence. So any otherwise valid customary marriage is not rendered invalid by failure to register it .

- (b) Usually a customary marriage is polygamous and is often not recognised by churches, and socially it might be frowned upon. However, according to the Laws of Uganda, a customary marriage is as valid as any other marriage under the law that operated until the Decree came into force.
- (c) During the colonial days, customary marriages were not recognised by the then courts, and civil marriages under the Marriage Act were taken to be superior under our Evidence and Succession Law. The coming into force of the Decree changed the position, and all marriages are now at a par. Under present Uganda Succession Law, for example, wives married under Customary Law are fully recognised and protected. There is even no distinction between what were formerly referred to as either legitimate or illegitimate children for purposes of succession. The fact that fines are very low does not in the lawyers' view undermine the force of the Decree since registration is merely for purposes of evidence. The low fine is not a matter that is peculiar to the Customary Marriage (Registration) Decree, but simply calls for an urgent reform of most of our Ugandan laws.

Para. (c) reflects feelings against colonial legislation as denigrating African custom. In fact, as Dr Morris points out, when customary law was applied (and this included all proceedings in the local courts as well as on appropriate occasions in the superior courts), customary marriages were fully recognised. According to Dr Morris, 'The questions of the inferior status of customary marriage only arose in cases where English law, or English-based law was applicable'.

As I have pointed out in the Introduction, the movement for reform came from African women, and in this account I have tried to clarify what was involved in their struggle. Their primary aims were; the protection of widows in matters of inheritance, and associated with this the making of wills which could not be overturned by clan law, and the registration of *all* marriages, including customary marriages. These aims were expressed by the Uganda Council of Women in Resolutions 5, 6 and 13 of its 1960 conference. The laws described in this chapter deal with these three points, although according to the decree dealing with customary marriages their validity does not depend on their

registration. Laws which people ignore or are ignorant of cannot be effective. I have written this account to make known the facts to those who are still working for just laws, especially with regard to women, so that they may be supported and encouraged to take effective action wherever it is needed.

# Appendix 1 : Family law in Uganda

by H.F. Morris

## I. OUTLINE OF NATIVE LAW AND CUSTOM ON FAMILY MATTERS

### A. *Marriage and divorce.*

#### 1. *Marriage in customary law*

An African marriage is, broadly speaking, a contract between the intending bridegroom and the bride's father, and the actual marriage consists in the performance of this contract, the father handing over his daughter and the bridegroom providing consideration in the form of certain customary payments which I shall refer to as bride wealth. This contract may at any time be terminated for good reason if, for example, the wife deserts her husband and goes back to her father, and the bride wealth is then returned to the husband. Such marriages are, of course, polygamous that is to say, a man may enter into as many such marriage contracts as he wishes and can afford.

#### 2. *Rights of the husband and wife*

The husband and wife in a customary marriage are by no means equal partners. The marriage contract gives the man certain property rights over his wife which he can enforce in the native courts if they are infringed – that is to say, if his wife commits adultery, then he can sue the adulterer for compensation. Needless to say, the wife has no such rights which have been infringed if her husband has extra-marital relations with other women. The wife has a duty of obedience to her husband and has a duty not merely to perform the normal domestic obligations of the care of the house and children, but must also carry out manual duties such as that of cultivation of her husband's crops if required to do so. Traditionally, a husband had almost unlimited rights to treat his wife as he willed, particularly as regards chastisement for disobedience. Modern native custom, however, would set definite limits to the degree of chastisements which could be inflicted, and native courts can and often do hear cases of cruelty alleged by a wife against her husband, and will punish a man who has been convicted of ill-treating his wife without reasonable cause. Although the wife is completely subject to the will of her husband, the latter has certain obligations towards her and he must, for example, ensure, so far as he is able, that she is properly fed, housed and clothed.

### *3. Degree of consent necessary in customary marriages*

Since a customary marriage involves a contract between the intending bridegroom and the bride's father, it may be asked to what extent a girl's consent to the marriage is relevant. The answer is that although a father would be unlikely to arrange a marriage between his daughter and a man who was in fact repugnant to her, since such a marriage would be unlikely to last and would probably result in a divorce and a return of the bride wealth, yet in old native law there was no need for the girl's wishes to be considered. In modern customary law, however, a girl could lay a complaint before the courts if her father or brother was insisting on her marriage to a man whom she did not wish to marry, and the courts, although they would not punish the father or brother for trying to force this marriage, would order him not to continue with it. On the other hand, if a woman wants to marry a man who also wants to marry her but is unacceptable to her father, the latter can refuse to enter into a contract with him, and the man and woman who want to get married have no redress in customary law. There is, of course, nothing to stop them, provided they are both of age, from getting married under the Marriage Ordinances without anyone's consent. The consent of the bridegroom's parents to his marriage, although customary, is not in any way necessary provided the bridegroom can find the bride wealth himself.

Child marriages do not now normally take place. Both the boy and the girl must have reached puberty. If a father tried to marry off his daughter while under age and a complaint was brought to the courts, the courts would forbid the marriage.

### *4. Bride wealth*

Bride wealth, which in the past had a certain symbolic significance representing the union between the bride's and bridegroom's family, has in recent years become increasingly a cash payment made primarily to the father or, if he is dead, to the brother of the girl. It is, moreover, increasingly looked on as a payment to the father or brother as an individual rather than to the clan. Furthermore, the amount of bride wealth is steadily rising and fathers have tended to assess the bride wealth in terms of the cost of the girl's upbringing, a higher payment being expected in the case of a well-educated daughter. This tendency has alarmed many District Councils, some of which have tried from time to time to lay down a maximum bride wealth, and in some cases bye-laws have been passed. Districts which have passed bye-laws on this subject under the African Local Governments Ordinance and District Councils Ordinance are Bukedi and Teso. Such attempts have not on the whole been successful; as so often happens, when price levels normally subject to the law of supply and demand are artificially stabilised, a black market



grows up, and where a bye-law lays down a minimum payment for the bride wealth, there tends to be an official payment at the stipulated maximum and an unofficial payment in addition for the balance. Of course, if divorce follows, then only the official amount can be reclaimed in the court. Details of bride wealth paid in certain individual districts are as follows:

Buganda	No control	Normal about shs. 120/-.
Bugisu	Controlled	3 h/cattle and 2 goats
Bukedi	Controlled	5 h/cattle and shs. 20/-
Busoga	No control	Varies from about shs. 50/- and 1 h/c to shs. 600/- and 2 h/c.
Kegezi	Controlled	h/c and 5 goats or shs. 500/-.
Toro	No control now	Average about shs. 300/-.
Lango	Controlled	500/- or 5 h/c, 6 goats, 6 hoes and shs. 18/-.
Acholi	Controlled	500/- or equivalent livestock.
West Nile	Controlled	566/- or equivalent livestock.

#### *5. Position of senior wife*

The first wife a man takes is known as the senior wife and has a special and somewhat privileged position in his household and has certain ritual duties to perform. Her husband's heir is normally, but not necessarily, one of her sons.

#### *6. Position of wife on death of husband*

On the death of her husband, a woman is free to choose whether she wishes to remain with a member of her husband's family or go back to her father's home. If she chooses the latter and is young enough to remarry, the bride wealth will be returned.

#### *7. Registration of customary marriages*

The following districts have passed bye-laws requiring the registration of customary marriages: Lango, Bukedi and Teso. It is an offence in such districts not to register a marriage, but non-registration does not invalidate the marriage in any way.

#### *8. Adultery*

Adultery is an infringement of the property rights vested in the husband by reason of the marriage contract, and gives rise to a claim for compensation by the injured husband against the adulterer. Moreover, adultery is in all cases treated as a crime, that is to say, a punishment is imposed as well as an order for compensation. The normal order in an adultery case is a fine of about shs. 200/-.

### *9. Position of children born out of wedlock*

There is considerable difference in different tribes between the attitude of customary law regarding the rights to a child born out of wedlock. The usual attitude in Bantu tribes is that the natural father can at any time redeem his child from the husband of the mother or, if she is unmarried, from her father, on payment of compensation. In the Northern Province tribes, however, the right to the child is normally vested in the husband or woman's father.

### *10. Divorce*

The termination of the customary marriage contract involving the return of the wife to her father and the handing back to the husband of the bride wealth can arise through the action of either the husband or the wife. If, for example, the wife behaves in a way contrary to the customary behaviour expected of a wife, e.g. if she repeatedly commits adultery or is flagrantly disobedient, the husband can demand back his bride wealth and send his wife back to her father. On the other hand, the wife, through cruelty or other behaviour on the husband's part violating the customary behaviour required of a husband, may leave him for her father's home and the husband would be entitled to the return of bride wealth. It should be added that cases may arise where the wife does not wish to live with her husband any longer and returns to her father, although her husband has not behaved in a way which would, in customary law, justify a divorce. In such a case, the courts would not today enforce the wife's return if she could not be persuaded to go back voluntarily, and the result would be in effect a divorce, the bride wealth being returnable to the husband.

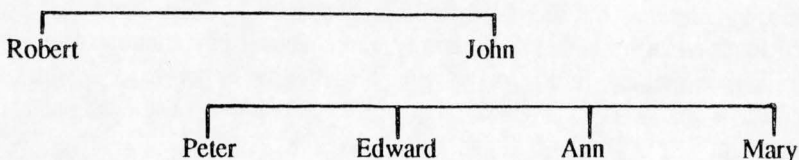
## *B. Inheritance*

### *1. General outline of the customary law of inheritance*

The bulk of a man's property on his death is divided between his sons, the son chosen as heir getting a larger share than the others. The daughters may in some tribes get a share, though very small, but in others they get nothing. The residue of the property is divided among the other close relations of the clan. Details of the customary inheritance law will, of course, differ from tribe to tribe, but a general pattern is discernible and the following distribution of a man's property is typical (the details were given to me in respect of Bugosa).

### *2. The 'heir'*

All Uganda tribes have the concept of an heir. The translation of the vernacular word, is, however, somewhat confusing, for the 'heir' in customary law is something rather different from the 'heir' in English law, who is merely the person who succeeds to the dead man's property. In customary law the heir does indeed normally receive the largest share of the dead man's estate,



John dies without a will leaving property consisting of 100 head of cattle. The family decide that Peter shall be his 'heir' and the property is divided roughly as follows:

Peter gets 50 head of cattle

Edward gets 30 head of cattle

Ann gets 5 head of cattle

Mary gets 5 head of cattle

Robert gets 10 head of cattle

(or if there are other brothers or close relations, they will share the 10 h/c with Robert. In certain districts, Robert and the other close relations would, however, get nothing).

but he also has certain duties to perform. He is in many ways comparable to the English 'executor' and 'guardian'; he takes the dead man's place as head of the family and is responsible for certain ritual ceremonies, and also for the care of the younger members of the family and other dependents.

### 3. *The position of the widow*

The widow does not, of course, receive any share of her husband's property outright on his death, but so long as she remains in the family – that is to say, goes with the deceased's heir as his wife or, if the heir is her son, continues to live under his care – then in general she will retain the use of such property as she had during her husband's lifetime. If, however, she returns to her father or marries someone outside the family, then she can take nothing away with her.

### 4. *Testate succession*

*The oral will.* In most districts there has always been under native law and custom the right before death publicly (that is to say, in the presence of one's family) to make statement as to whom one wishes to be one's heir, and how the property is to be divided. Such a statement is, however, a very different thing from an English will, since the power which the dying man has to exercise discretion in the way he disposes of his property is very limited. The broad rules of inheritance are laid down in the customary law of the tribe and a man cannot by oral 'will' go outside these rules. That is to say, although he

may express a wish that one of his children is to get a particular piece of property, he may not thereby upset the balance of fair distribution according to custom. When he is dead, the family and clan will pay attention to the wishes he has expressed in his oral 'will' but they will not carry it out if they consider that it is in any way unjust, i.e. contrary to customary laws of just division.

In most of the Bantu tribes of Uganda a man may, when making his will, disinherit certain members of his family. But such disinheritance is only effective if the dying man makes clear the reasons why he is disinheriting say his son, and then after his death, this disinheritance will only be effective if the family or clan are agreed that the disinheritance was just; that is to say, that the son had infringed native custom by, for example, gross disobedience to his father.

*The written will.* The written will is now common in Buganda, Bugosa and Ankole and its use is steadily spreading elsewhere, although as yet it is unusual in the Northern Province. In Buganda a Wills Law was passed in 1916 requiring the signature of the witnesses for the validity of a will. Although such written wills have more force behind them than the traditional oral will, and the wishes of the deceased expressed in them will normally be carried out, yet the idea that a will must be just still prevails, certainly outside Buganda, and to a lesser extent in Buganda. That is to say, if it is felt that any of the provisions of the will, or the will as a whole is unjust, being contrary to native custom, then its terms may be altered either by the family or, if the matter goes to the courts, by the court itself.

##### *5. Jurisdiction of courts in cases of disputed succession*

Outside Buganda a dispute regarding either testate or intestate succession is taken to the local native court for decision. In Buganda the position is complicated by the Clan Cases Agreement of 1924. Under the Agreement all clan matters were taken out of the hands of the courts and made subject to decision by the clan councils. Now it has been clearly ruled in the case of *Kajubi v. Kabali* in 1944, which went on appeal to the East African Court of Appeal, that matters of intestate succession are clan matters, and therefore excluded from the court's jurisdiction. Upon the question of whether or not testate succession is also exclusively a clan matter there has long been doubt, and although certain cases have definitely been dealt with by the Buganda courts, it is still by no means certain whether or not this has been in conflict with the Agreement.

## II. OUTLINE OF CENTRAL GOVERNMENT LAW ON FAMILY MATTERS

### 1. Marriage

The Marriage Ordinance of 1904 provided facilities for the performance and registration of monogamous marriages. These are, of course, civil marriages and may be registered whatever the religion or lack of religion of the parties may be. For the benefit of Christians, provision has been made for a religious ceremony to be carried out at the time of marriage by the gazetting of certain churches as places where marriage may be registered. Since such registered marriages are monogamous marriages, offences of the nature of bigamy are created by the Ordinance. These offences are:

- (a) marrying another woman under the Ordinance whilst the first marriage is still in existence – bigamy proper;
- (b) marrying another woman by native law and custom whilst the registered marriage is still in existence;
- (c) having the marriage registered under the Marriage Ordinance whilst a marriage by native custom to another woman is still in existence.

The maximum penalty for all these offences is five years imprisonment.

The Marriage of Africans Ordinance applies only to Christian Africans and dispenses with certain formalities required by the Marriage Ordinance in the case of such marriages, which have to be performed in church. The penalty sections of the Marriage Ordinance apply in the same way to marriages carried out under the Marriage of Africans Ordinance. It would seem quite clear from the wording of the Ordinance that it is permissive; that is to say, that Christian Africans *may* get married under the Marriage of Africans Ordinance if they so wish. Nevertheless, a rather strange judgement by Judge Guthrie-Smith in 1924, which aroused the most heated discussion and criticism during the following years, and which was described by one Governor as 'hopelessly and utterly wrong' has never been reversed. This stated in effect that Christian Africans *must* get married under this Ordinance and that any marriage by native law and custom between Christians is invalid. It was no doubt as a result of this judgement that in the 1920s native laws were passed under the Native Law Ordinance in both Ankole and Toro forbidding the marriage between Christians and pagans unless it was conducted in church.

The Marriage and Divorce of Mohammedans Ordinance provides for the registration of marriages carried out between Muslims in accordance with Muslim rites. Such marriages are, of course, polygamous and in practice it is only African Muslims who avail themselves of the facilities of registration

provided by this Ordinance.

It will be seen from what has been said that there are broadly only three types of marriage for which provision has been made by law:

- (a) a native customary marriage, which gives rise to rights which may be enforced in the native courts;
- (b) marriages under the Marriage Ordinance and the Marriage of Africans Ordinance;
- (c) marriage under the Marriage and Divorce of Mohammedans Ordinance.

Any other sort of marriage, say a marriage between Indians according to Hindu religious custom, is afforded no statutory recognition. There would be nothing, of course, to prevent these two Hindus from getting married under the Marriage Ordinance, but if they did they would, of course, be bound by a monogamous marriage regardless of what their religion might teach.

## *2. Divorce*

The Divorce Ordinance of 1904 lays down conditions under which a marriage carried out under the Marriage Ordinance or Marriage of Africans Ordinance may be terminated by a First Class Magistrate if the parties are Africans or by the High Court if they are not. This law follows the English law of divorce as it existed in 1904. That is to say, it differs very considerably from present-day law in England, which allows divorce on a varied number of grounds. Under the Divorce Ordinance, divorce can only be obtained on the grounds of adultery. Furthermore, the wife is in a weaker position than the husband in the obtaining of a divorce, for the husband can get a divorce on proving adultery, whereas the wife has to prove adultery coupled with some other wrongful behaviour such as desertion or cruelty or sexual irregularities. Once a divorce has been granted, the parties are free to contract fresh marriages.

## *3. The divergence between the teaching of the Church and the terms of the Divorce Ordinance*

The Divorce Ordinance lays down conditions upon which a registered marriage may be terminated, even though that marriage has been performed in a Christian church. The churches' teaching on divorce, on the other hand, differs radically from the terms of the Ordinance. The Anglican Church, although it recognises divorce on the grounds of adultery (following the text of Matthew 19.ix) does not recognise the right of divorced parties to remarry. The Roman Catholic Church does not recognise the right of divorce at all.



#### *4. Inheritance*

The Protectorate law on inheritance is contained in the Succession Ordinance of 1906. This is based on English law, both regarding the making of wills and the rules for the division of property on intestacy. Mention should, however, be made of the position of widows under this Ordinance. If a man dies intestate, then, if he has children his widow takes one third of his property absolutely. If he has no children, the widow takes half absolutely. Although this provided very generously for the widow on intestacy, she has no safeguard, as she has had since 1937 in England, against her husband making a will and leaving all his property away from either his wife or his children. In fact, under Uganda law there is complete freedom to will one's property as one wishes. The Succession Ordinance does not apply to the estates of Africans.

### **III. SOME OBSERVATIONS ON THE RELATION AND CONFLICT BETWEEN CUSTOMARY FAMILY LAW AND CENTRAL GOVERNMENT FAMILY LAW**

#### *1. The combination of two forms of marriage*

Nearly all Christian Africans combine a customary marriage contract with a registered marriage solemnised in church. That is to say, bride wealth is paid to the bride's father and two types of marriage have in fact been carried out; there has been a customary contract under native law and custom and also a registered marriage under the Ordinance. Where a man has genuinely desired to enter upon a monogamous marriage no difficulty results. A large number of African Christians, however, wish to have the social advantage of a church marriage (which is undoubtedly looked upon as a superior form of marriage and one which is socially obligatory upon a man of high status) but have no intention of having one wife only for the rest of their life. As a result, a very large number of the men who marry in church under the Ordinance later take further wives by native custom. In so doing, of course, they lay themselves open to a prosecution under the Marriage Ordinance. In practice, however, such prosecutions are very rarely, if ever, taken.

#### *2. Incidence of marriages without customary contract*

There is a growing number of cases where enlightened parents of the bride do not insist on the payment of bride wealth, and cases have been mentioned where the father, in order to satisfy his traditionalist relatives, takes the bride wealth and then hands it back as a wedding present. This tendency is most marked in Buganda, where the bride wealth is in any case low and is tending to become nominal. On the other hand, cases of marriage under the Marriage Ordinances without bride wealth and without the bride's father having voluntarily dispensed with it are very rare indeed. The missions have always

realised that if there is no bride wealth and no consent on the parents' part, the marriage is unlikely to last, and therefore they normally ensure that the consent of the girl's father has been obtained before they will perform the marriage. Indeed, the Roman Catholic Church in the Northern Province issues a form 'Examination of state of freedom to marry' to the parties, who have to answer certain questions, one of which is 'Have you given the dowry'? In the last resort, however, where a man and woman want to get married and the church is satisfied that the woman's father is withholding consent without any valid cause, and no reconciliation can be achieved, then the church will perform the marriage without bride wealth or parents' consent.

### *3. Jurisdiction of native courts where there is both a customary and a registered marriage*

During the 1920s and 30s there was considerable controversy as to whether native courts should have jurisdiction over the purely customary contract side of marriage; that is to say, if John and Mary were married in church, John paying to Mary's father Peter the customary bride wealth, and if later John and Mary quarrelled and Mary returned to live with her father, could John sue Peter in the native court for return of bride wealth? On the whole, the Provincial Administration, particularly those stationed in the Eastern and Northern Provinces, felt that native courts most certainly should have this power, since the customary contract had been carried out entirely under native law and custom and was supplementary to the registered marriage. It was recognised of course that the return of the bride wealth did not in fact constitute divorce, and John and Mary remained married under Protectorate law. The missions, on the other hand, were naturally bitterly opposed to such an approach, maintaining that if native courts were given the power to order return of the bride wealth in such cases, this would be tantamount to a divorce whatever the legal position might be, and the parties and everybody else would consider that the marriage was at an end. The controversy went on during the 1930s and this was one of the points which Sir Phillip Mitchell hoped his proposed enquiry into marriage (which never took place owing to the war) would solve. The reactions of the native authorities to the questionnaire which was circulated to sound opinion prior to the enquiry were broadly divided along geographical lines. Buganda and the West (where mission influence had been longest established) on the whole not wanting native courts to have any jurisdiction in such marriages. When the Buganda and Native Courts Ordinances were passed in 1940, the latter Ordinance stated that native courts have no jurisdiction over any proceedings concerning marriage or divorce regulated by the Marriage Ordinance, Marriage of Africans Ordinance or Divorce Ordinance 'unless it is a claim arising only in regard to bride-price and adultery and founded only on native law and custom'. The corresponding

section to the Buganda Courts Ordinance, however, omits the phrase 'unless it is a claim [...] on native law and custom'. In practice today in most districts outside Buganda, native courts will hear adultery cases and cases for refund of bride wealth, even though there has been a registered marriage. When bride wealth has been returned, although there has not legally been a divorce, in practice there has, and the parties will remarry by native custom (though thereby becoming liable to prosecution under the Marriage Ordinance) and certainly the general public in the area and in most cases the court itself will consider that a divorce has taken place. In some areas, however, where mission influence is particularly strong, e.g. the West Nile, courts will not hear such cases, and in one district, Bukedi, a circular from the District Commissioner in recent years has forbidden the hearing of such cases by the courts, although quite clearly the Native Courts Ordinance envisaged such matters being within the courts' jurisdiction.

#### **IV. SOME POINTS OF DIFFICULTY OR CONTROVERSY WHICH ARE RAISED BY VARIOUS BODIES OF OPINION OR WHICH ARE LIKELY TO BE RAISED**

##### *1. Should the penalty sections of the Marriage Ordinance be repealed?*

These sections are not in practice invoked and this brings the law into disrepute. The English law of bigamy is primarily designed to safeguard a woman (or man) against a man (or a woman) who might otherwise conceal an earlier marriage and enter into what the woman (or man) thinks is a valid marriage. But conditions here are quite different. The African woman who marries by native custom a man already married under the Marriage Ordinances normally does so with her eyes open. Why should this be an offence when a mere casual affair with a woman is not? Indeed, a man of ingenuity could no doubt avoid the penalty by refusing to pay bride wealth for his second 'wife', since he would then not have contracted a real marriage with her by native custom.

##### *2. Should native courts have any jurisdiction over the customary contract aspect of a marriage under the Marriage Ordinances?*

If native courts are to retain their present power to order return of bride wealth, is there any way of ensuring that this in fact is not tantamount to a divorce, giving the parties the impression that they have the right to remarry?

##### *3. Rights arising from registered marriage are largely rights under native law*

Is the position satisfactory whereby, although a man and woman get married under the Marriages of Africans Ordinance with a Christian ceremony, under an Ordinance based on English law, the rights arising from the marriage, i.e. the woman's rights *vis-à-vis* her husband and the children's rights of

succession, are in practice governed by native law and custom, which is in many respects quite inimical to English family law (see next section)?

#### *4. Position of 'legal' wife*

If, as is so often the case, a man takes wives by native custom after being married in church, his 'legal' wife does not automatically enjoy any privileged position under native custom, although as the first wife she will normally rank as 'senior wife'. The 'heir', although normally the eldest son, might be chosen from any of the children, no distinction being made between those who are 'legitimate' under English law and those that are not. Should the children of the Christian marriage get preferential treatment? It might be argued that, since by the terms of the Marriage Ordinance the subsequent 'marriages' by native custom are invalid, they therefore give rise to no rights even in native law (since native law cannot be administered if it is in conflict with Protectorate law) and that therefore the children of these union have no rights. The answer to this, I think, is that under native law the children do not derive rights from the validity of their parents' marriage but from the fact that they are their parents' offspring, i.e. native law and custom does not take account of 'legitimacy' or 'illegitimacy' in the English sense. The question of preferential treatment of the offspring of Christian marriages came to the fore a few years ago when the proposed Buganda Succession Law was strongly criticised by Bishop Kiwanuka.

#### *5. When a man dies, does his widow get adequate protection?*

Under Protectorate law, if a man dies intestate his widow gets either half or one third of his property, depending on whether there are children, but he can by will completely disinherit her. There is some demand (Uganda Council of Women) for a provision along the lines of the English law of 1937 whereby maintenance for a widow and dependent family can be claimed out of the deceased's estate if adequate provision was not made in the will.

Under native law, the widow would get nothing, but she would be looked after. In practice she would either live on with her husband's family or with her grown-up son or else return to her father. In short, provided the tribal system is still operating effectively, no hardship is likely to arise, but in the urban areas where it is disintegrating or where the relatives have adopted a more sophisticated and individualistic attitude towards their traditional family responsibilities, there is a danger of widows being subjected to hardship. (Where the husband leaves a will, see next section.)

#### *6. Should a man be free to will his property as he wishes, and if so, how can he ensure that his wishes are carried out?*

Since the Succession Ordinance does not apply to Africans, a man's will is

always liable to be overturned because it offends against native law and custom, and native custom does not accept leaving one's property to one's wife. Should a man who wishes to make such a will then be able to do so by opting in on the Succession Ordinance, say by a clause inserted in his will, thereby ensuring that the will will in fact be honoured? Would this be in conflict in Buganda with the Clan Cases Agreement?

But does educated African opinion really want unfettered power to dispose of property by will as under the individualistic English law? I rather doubt it. Although the Conference on the Status of Women talked a lot about the desirability of making wills, I got the impression that what they really wanted was rules of succession such as some continental countries have, providing that all members of the family get a fair share and giving only very limited room for manœuvre for the testator within these broad rules. Above all, these rules would provide for a reasonable share for the widow, or at least a life interest in a share (or until remarriage). This would, of course, be much in keeping with the traditional outlook and the idea of the 'just will'.

#### *7. Responsibility of husband for maintenance*

As far as I am aware, Protectorate law does not make any provision for a wife who has been deserted by her husband to sue for maintenance. Presumably the common law right to pledge her husband's credit for necessities would apply, but from a practical point of view this is not going to do her much good.

#### *8. Adultery*

The English law and native law custom consider adultery from completely different points of view. In nearly all districts it is a criminal offence under native law for a man to have sexual relations with another man's wife or with a girl or unmarried woman. In fact, the compensation aspect of the case is of more importance than the punishment. The reason behind this is, of course, that the property rights of the injured husband or father have been infringed. The rights of the adulterer's wife are on the other hand not considered to have been in any infringed and it would, for example, be no offence for a husband to have sexual relations with a prostitute. In Protectorate law, adultery is merely an aspect of the tort of enticement and an action can be taken either by the injured husband or the injured wife. It is more usual, of course, for adultery merely to be grounds for an action for divorce.

Resentment is sometimes expressed at the fact that non-natives who commit adultery with African women are not subject to native law or, therefore, to any penalty. In fact, of course, the injured husband or father of the girl (if unmarried) could sue the non-native for enticement, claiming damages in a Protectorate court.



### *9. Return of bride wealth*

The recent Conference on the Status of Women strongly recommended that the return of bride wealth should be abolished. In fact, the custom of return of bride wealth when a marriage breaks up is dying out in Buganda, but in the rest of the country, particularly in the Northern Province, there would have to be a complete revolution in the ideas of the vast majority of the people before such a change would be acceptable.

### *10. Registration of customary marriages*

Under the District Councils Ordinance, districts have the power to pass bye-laws regulating and controlling native customary marriages, including the fixing of dowries and the manner in which such marriages may be terminated, and also requiring marriages to be reported and registered with registrars appointed for such purposes. Bye-laws have been passed in the following districts concerning the registration of marriages: Lango, Bukedi and Teso. Such bye-laws, however, merely provide that customary marriages shall be registered and that it is a criminal offence, carrying a punishment of a fine, if this registration is not carried out. The registration, however, does not constitute the marriage; that is to say, provided a marriage has been carried out with payment of bride wealth, it is a valid marriage under native law and custom even though it has not been registered. The opinion has been expressed that all districts should make registration compulsory, that divorce should also be registered, and also that the validity of the customary marriage should depend upon registration in the same way as a civil marriage does under English law.

### *11. Succession bye-laws*

The recent Status of Women Conference recommended that various changes should be made in the customary law regarding succession. Since quite clearly the English laws of intestate succession as laid down in the Succession Ordinance, which are founded upon the English idea of a family with its underlying concept of consanguinity, are in general quite unsuitable for and unacceptable to the African population, whose idea of inheritance is based upon that of clan, it would seem inevitable that succession must be governed by native law and custom, however much it may be necessary to alter that native law and custom to bring it up to date. If such law is to be altered, then the appropriate bodies to do it would presumably be the District Councils. As the District Councils Ordinance stands at the moment, the Councils have not got the power to pass bye-laws on this subject. Should they be given this power?



*12. Hindu marriage*

Should there be legislation recognising some form of Hindu marriage? This appears to be under consideration at present.

*13. The Divorce Ordinances*

Should this Ordinance be brought into line with present-day English law? If not, should it, at least, be amended to provide equal rights for a woman as for a man?

H.F. Morris

25 October 1960

## **Appendix 2 : Church of Uganda statement on the revision of marriage laws**

Prepared by a committee appointed by the Archbishop of Uganda in accordance with Minute 26 of the Provincial Assembly 1962 and approved by the Bishops in December 1963.

It has long been recognised that the existing Law of Marriage in Uganda is unsatisfactory. The principal complaints against it are these:

- (1) There are two distinct systems of law apart from Muslim and Hindu law, and these often govern the same cases so that conflicts and anomalies result.
- (2) Even where only customary law is involved, it is often difficult to be certain whether a marriage exists or not.
- (3) Although it is possible to enter into a binding monogamous marriage, it is easy in practice for a man to avoid the legal consequences of such a marriage.
- (4) The remedies available in matrimonial cases are inadequate and women particularly are at a disadvantage.
- (5) There is also the question of a woman's rights after her husband's death, which are inadequate and uncertain.

We are not proposing to abolish customary marriage but we do strongly recommend that it should be regulated and that the injustices to which it gives rise should be corrected.

We would support the integration of the two systems of law in such a way that though both continue to exist no conflict could arise between them; and we desire to make it possible to ascertain what parties have rights and duties under what law; to strengthen the law relating to monogamous marriage; to improve the position of women by some regulation of customary law relating to marriage and inheritance, as well as by amendments to the present Marriage and Divorce Ordinances.

Although we make suggestions on the subjects of customary marriage even when undertaken by Christians, and of bride-price, this does not mean that we approve of them. But these institutions are with us and we do not think that it is possible to get rid of them. That being so, they should be regulated so that the least possible harm results from them.

We regard it as unsatisfactory that there should be two separate Ordinances governing the same type of marriage, namely the Marriage Ordinance and the

Marriage of Africans Ordinance, and we hope that if and when legislation is passed on the subject of marriage, it will be embodied in a single Ordinance without racial discrimination.

We realise that improvements in the law are by themselves wholly inadequate, yet a juster law of marriage can, we believe, provide a sounder foundation for a stable and enduring family life. This will be for the good of men, women and children of every religion and of our country as a whole.

### ***Jurisdiction of courts***

- (1) Under the African Courts Ordinance 1957 Section 8(b), African courts appear to have power to order the return of bride-price, even in the case of Ordinance marriages. When this is done the local community regard the marriage as being at an end, even though under Uganda law it still exists.

We regard this as very unsatisfactory and recommend:

That no court should have power to hear a case for return of bride-price in respect of an Ordinance marriage until that marriage has been dissolved or annulled by a competent court. This could be achieved by the deletion of the Clause beginning 'unless [...]' in this subsection.

- (2) We do not know what will be the future pattern of courts in this country. We are anxious that people who have been wronged should not be deterred from seeking a remedy by the expense or unfamiliarity of the procedure involved, and we recommend:
  - (a) that the Marriage Ordinance should be administered by competent judges in courts to which people can easily resort.
  - (b) that any courts which can dissolve or annul an Ordinance marriage should have power to decide questions concerning bride-price.

### ***Registration of marriages***

We are in favour of the compulsory registration of all marriages and divorces, both customary and Ordinance, and we consider that no marriage or divorce should be valid unless registered. Our reasons are these:

- (a) To provide proof of the existence of the marriage. At present men and women frequently live together as man and wife without having paid the whole or even part of the bride-price. In other cases, there may be no proof of payment. Again, in these days bride-price is sometimes not

demanded. With the growth of towns and increasing movement of population and with inter-marriage between different tribes, it is often very difficult to prove whether a particular union is a customary marriage or not.

- (b) Without such proof the parties to a marriage cannot claim whatever rights they may have under the existing law, nor could any reform of the law, for example in matters of inheritance, be of value to them.
- (c) Registration would provide a better opportunity for a woman to object if pressure was being put upon her to enter into a marriage she did not desire.
- (d) Registration would enable a woman to discover how many times a prospective husband had been married. This would be particularly important in tribes where privileges were enjoyed by the first wife.
- (e) If there were an existing Ordinance marriage the impossibility of registration of subsequent unions would deter women from entering into them.
- (f) Those concerned with an Ordinance marriage would more easily discover the existence of a previous customary marriage between one of the parties and another person.
- (g) Registration of divorce would make it possible to ascertain whether a previous marriage with another woman had been dissolved.
- (h) Registration would also enable some check to be kept on the amount of bride-price paid and would limit the amount recoverable if the marriage broke down.

We recommend therefore:

THAT

- (a) from a certain date, all customary marriages and divorces should be registered, both locally and in a central register.
- (b) no customary marriage entered into after that date should be valid unless registered.
- (c) the validity of marriages entered into before that date should not be affected.
- (d) an unregistered customary marriage being invalid, the courts would have no jurisdiction to hear a case concerning it with regard either to return of bride-price or adultery.

- (e) when either of the parties to a proposed customary marriage is found to be married to another person by Ordinance marriage, there can be no further marriage and therefore no registration can take place.
- (f) persons married previously should be at liberty voluntarily to register their marriages.
- (g) in respect of customary marriages, the registrar should satisfy himself:
  - (i) that the parties to the marriage are desirous of being married.
  - (ii) that the consent of the father or guardian of the bride has been obtained, provided that a court should be empowered to give consent if it is unreasonably withheld or impracticable to obtain.
  - (iii) that neither of the parties is debarred from entering into the marriage by any impediment arising under Ordinance or customary law, such as age.
  - (iv) that the bride-price is within the permitted maximum, or is not unreasonable.
- (h) the parties to the marriage must appear before the registrar in person, together and with witnesses.
- (i) the following should be registered:
  - (i) The bridegroom's name, condition, age, tribe and occupation; his address and place of origin or family home.
  - (ii) The same details for the bride.
  - (iii) The names of the parents of the bridegroom and the occupation of the father.
  - (iv) The same details for the bride, and the name of her guardian if her father is dead.
  - (v) Whether or not bride-price is being paid and, if so, how much has been paid and how much is still due.
- (j) when the father or guardian of the bride has agreed to the parties to the marriage living together as man and wife, he cannot object to the registration of their marriage, even if bride-price has not been paid.

*Note:* We recognise that this provision at present may be impracticable in Karamoja.

- (k) a customary marriage once duly registered should be regarded as valid, unless registration was obtained by force or fraud, or unless at the time

of registration the parties were debarred from entering the marriage by legal impediment.

- (l) provision should be made for appeals against refusal to register marriage.
- (m) any dissolution of a registered marriage should also be registered.
- (n) all Ordinance marriages should also be locally registered and the fee paid to the officiating minister should include the local registration fee.
- (o) registration fees should be low in order to encourage compliance with the law.

### ***Bride-price***

While we are agreed that, whatever the original merits of the custom of bride-price, it is at present abused, especially in regard to the very large amounts demanded, we can suggest no satisfactory means of limiting these amounts other than the registrar satisfying himself that the bride-price is within a permitted maximum regulated by law or is not unreasonable. Nevertheless, we believe that some of the other evils arising from the custom can be mitigated by regulation of the circumstances in which bride-price may be returned. Among these evils, we would mention particularly the cruelty practised by husbands with a view to driving their wives to desert them. Such cruelty may not be sufficient in customary law to justify the wife's desertion, and if she refuses to return to her husband, her family will forfeit the bride-price.

We therefore recommend:

THAT

- (a) when a marriage is dissolved, bride-price may only be returned if the wife is primarily responsible for the breaking up of the home.
- (b) when a marriage ends with death, no bride-price should be returned.
- (c) if bride-price is returned, account should be taken of the duration of the marriage; and the number of children borne by the wife; and each of these factors should reduce the amount returnable.
- (d) when a woman brings up a daughter without assistance from the girl's father or his family, she should have a claim against whoever is entitled to receive bride-price for a reasonable proportion of it in recognition of the expense she has incurred in maintaining and educating the girl. If, however, she has received money or property from the father or his family, whether by will, court order, or otherwise, this should be taken into account. The necessity, if any, of providing for the girl's brother's



bride-price should also be taken into account.

### ***Customary marriage - dissolution***

We do not think it necessary or desirable to interfere with the grounds on which a customary marriage can be brought to an end, except that

We recommend:

THAT

- (a) a woman should be able to bring an action against her husband in the local courts for dissolution of a customary marriage on the grounds of cruelty or neglect or desertion for three years, without the return of the bride-price.
- (b) a registered customary marriage should only be capable of being brought to an end by the decree of a competent court.

### ***Conversion of customary marriage to Ordinance marriage.***

We recommend:

THAT

- (a) a minister of religion should be a registrar for this purpose if he is not so already.
- (b) to avoid doubt as to which law is applicable when a customary marriage is converted into an Ordinance marriage, the fact should be entered in the Central Register of Marriages and should also be noted against the entry referring to the marriage in its original customary form, in both the local and central registers.

### ***Ordinance marriage - solemnisation***

The question arises as to what extent it is or ought to be obligatory for those entering Ordinance marriage to comply with the requirements of customary law. The Marriage of Africans Ordinance, while probably referring to such matters as banns, is obscure on this point. It is generally supposed in Buganda and the West that if people want to be married under Ordinance then they may do so without regard to custom, provided they are of full age. In the East and the North such defiance is much rarer. The situation is complicated by the existence of bye-laws in certain districts obliging the registration of bride-price, and it is by no means certain whether these bye-laws must be complied

with by those marrying under the Ordinance.

We think that these matters ought to be clarified and we recommend:  
THAT

- (a) failure to observe customary law should not invalidate an Ordinance marriage.
- (b) it should not be possible for a marriage to be registered as a customary marriage if it is to be or has been solemnised under the Ordinance.
- (c) the intended marriage should be announced by the publication of banns or other customary means and, if not forbidden, the minister or registrar may proceed with it.
- (d) if any bride-price is paid, nothing should prevent a District Authority from demanding that the payment be registered; but it should be made clear that registration of the bride-price payment is not a registration of customary marriage.
- (e) if a marriage is celebrated without the agreed bride-price having been paid, it may be recovered as a debt, but the validity of the marriage should not be affected.

### ***Presumption of death***

We recommend:

THAT

there should be a provision for presumption of death.

### ***Divorce in Ordinance marriage***

In making recommendations on this subject we do not want it to be thought that we approve of the dissolution of Christian marriage. In the world as it is, however, governments make provision for divorce, and if such provision is made we consider it should be just and reasonable.

The present Ordinance allows a man to divorce his wife on the ground of adultery alone, but a woman can divorce her husband only if in addition to adultery he is guilty of cruelty, desertion or bigamy, apart from certain rare matrimonial offences. We regard these provisions as unfair and unreasonable. We recommend that either party should be able to obtain a divorce on any of the following grounds:

- (1) Persistent adultery.
- (2) Cruelty.
- (3) Desertion for three years.
- (4) Insanity which has continued for three years immediately preceding the petition.
- (5) Going through a form of marriage of any kind with another partner.
- (6) Rape, sodomy or bestiality.

### ***Nullity in Ordinance marriage***

- (1) *Prohibited Degrees.* The law on this point appears to be the same as that of England in 1904. We recognise the difficulty of dealing with this matter, but we would be content that the following marriages only should be prohibited.

A man with his:

Mother	Father's father's wife
Daughter	Mother's father's wife
Father's mother	Wife's father's mother
Mother's mother	Wife's mother's mother
Son's daughter	Wife's son's daughter
Daughter's daughter	Wife's daughter's daughter
Sister	Son's son's wife
Father's daughter	Daughter's son's wife
Mother's daughter	Father's sister
Wife's mother	Mother's sister
Wife's daughter	Brother's daughter
Father's wife	Sister's daughter Son's wife

A woman with corresponding relatives.

These prohibitions should apply whether the relationship arises naturally or by legal adoption, and whether through an Ordinance or a customary marriage.

- (2) Refusal to consummate a marriage, and concealed pregnancy by another man at the time of marriage should both be grounds for a decree of nullity.
- (3) Otherwise, we recommend that the existing grounds for nullity should remain. We suggest in passing that the allusion to the law of England in

the Divorce Ordinance Section 13 (1)(e) should be omitted.

### ***Judicial separation in Ordinance marriage***

We recommend that the present grounds for this form of relief should remain unchanged, except that there should be the additional ground of change of religion; and further, if a partner to a marriage changes religion or denomination, the other partner be given the right to continue the bringing up of the children of the marriage in the original faith.

### ***Maintenance***

There are many cases at present in which normal married life is made impossible by the misconduct of one of the parties to a marriage without there being grounds for divorce or judicial separation, and where such grounds do exist there may be no desire on the part of the injured party to seek such drastic remedies.

We therefore recommend that a husband or wife should be able to apply to a Court for relief on the following grounds:

- (1) Cruelty to the spouse.
- (2) Cruelty to the children.
- (3) Failure to maintain the family.
- (4) Adultery.
- (5) Habitual drunkenness.
- (6) Desertion.
- (7) Dismissal from the home.
- (8) Insistence on intercourse when suffering from V. D.
- (9) Compulsory prostitution. (This would apply to the wife.)
- (10) Change of religion.

On such an application the following relief could be granted:

- (1) An order for reasonable maintenance, depending on the income of the parties.

This might include an order that a person should be entitled to occupy a certain piece of ground; to continue in occupation of a house; to have

the right to possession to chattels in the house and to livestock.

- (2) An order that the applicant is not bound to cohabit with the other party to the marriage.
- (3) An order for the custody of children.
- (4) Right to work; a married woman separated from her husband under court order should be entitled to obtain employment and to retain her earnings *without her husband's consent*.

### ***Criminal liability***

We do not consider that the existing provisions for the prosecution of those who, being married under the Ordinance, go through a form of customary marriage, or vice versa, are of any value. It appears to us that it is neither possible nor desirable to enforce them, and we recommend that they should be abolished.

We do not, however, recommend the abolition of criminal liability for bigamy strictly so called, or for the other offences specified in Sections 44 to 50 of the present Marriage Ordinance.

### ***Age of marriage***

We recommend that a suitable minimum age be fixed and we suggest 16 years for a boy and 14 years for a girl, whether the marriage is under the Ordinance or under customary law. We consider these ages should apply to all types of marriage and to all persons in the country.

### ***Custody of children***

Whenever the court has power to make an order regarding the custody of children, we recommend most strongly that they should be guided by the interests of the children above all other considerations.

Subject to this we consider that it is proper for the court to follow the customs of the people concerned.

These principles should apply to orders in respect of both Ordinance and customary marriage.

## ***Maintenance of children***

When a court makes a decree in any action for divorce, nullity, separation or maintenance, as recommended above, or for the dissolution of a customary marriage, it should have power to make such orders as it thinks fit for the maintenance of the children of the marriage, whether asked to do so or not.

## ***Succession***

We recognise that we are not called upon to make recommendations on this subject, but we feel bound to do so as it is inseparably connected with the status of women. What we here suggest should be regarded as the barest minimum necessary to secure justice.

We recommend:

THAT

- (1) a person should have power to dispose of his property by will. We do not wish to define precisely the limits of this power, and we recognise that difficult questions may arise particularly in the case of land.
- (2) when, however, a person fails to provide adequately for his dependants, the will should be able to be challenged in the courts, who should have discretion to redistribute the estate.
- (3) in such redistribution the court should particularly consider the interests of the legitimate widow, or legitimate widows, and children of the deceased; and we suggest that as an absolute minimum the widow should be granted the following:
  - (a) the right to occupy the land belonging to her husband, or a reasonable proportion of it, used by her before her husband's death, and the house, or another reasonable dwelling, until remarriage. Provided that any person interested should be able to apply to the court for a variation of this order on the grounds of her misbehaviour.
  - (b) the absolute ownership of the household possessions, other personal property of which she was properly in possession at the time of her husband's death, and a reasonable proportion of livestock.
- (4) where a person dies without having made a valid will the court should have power to distribute his estate subject to the considerations made in (3) above.



Here again, we recognise that customary law may govern these matters and the Court should take it into account when exercising its discretion. But we consider that these minimum recommendations should be followed, despite any contrary custom.

### ***Note on registration of customary marriage***

Our report in its preliminary remarks sets out the reasons why we think all marriages, including customary marriages, should be registered. This does not imply that the Church would recognise registered customary marriages as true marriages. It means only that we believe it is desirable that the Church should ask the government to limit its recognition of customary marriages to those which are legally registered. What follows here are simply a few additional explanatory comments.

At present customary unions are recognised by courts as legal marriages, and in cases concerning bride-price and adultery relating to such unions they can be tried before the Courts. We ask only that the Courts should have no power to try such cases if they have not been registered.

At present it is sometimes difficult to know who is married according to the laws of the state and who is not, and this may make it difficult for Christian marriages.

For instance, a man has a wife according to native custom. They part, but there is no return of the bride-price. Is he still married to her? He wants to marry another woman in Church. Is he free to do so or is he not? If he is still married to his first wife, then the Church marriage would be invalid by law and he would be liable to 5 years imprisonment. If he is not, then the church marriage would be a valid marriage according to the law. But who is to decide on this point? We believe that if only registered marriages and divorces were recognised as legal, then such confusions need no longer occur.

## Appendix 3 : Church of Uganda comment on Commission report

### *Chapter 2 : Marriage*

This gives background information which is interesting and informative.

Para. 80 'The Itesot have an extraordinary respect for the female sex'. Our information on this point is at variance with this statement.

Para. 85/89 'The Christians were unanimous and vehement in their denunciation of two Ordinances governing the same type of marriage'. (Marriage Ordinance and Marriage of Africans Ordinance) [see Chapter 2 & Appendix 1]. It is true that the Church recommended that this should be rectified. But the really basic criticism of the existing law was the clash between two conflicting systems of law regulating Ordinance marriages and customary law respectively, which may operate in a contradictory manner in the same case. The conflict is between a system of marriage which is essentially monogamous and permanent as seen in the phrase 'so long as both shall live' (para. 86 quoted from Section 30 of Ordinance), and customary marriage which is potentially polygamous and can be dissolved. We do not agree that the words imply a slur on the legality of customary marriage. (See Chapter 10.) It is not a matter of 'superior' and 'inferior' but of different conditions. The Church's complaint is that where the two systems are allowed to overlap they are contradictory. We hold that people choosing to enter into either system of marriage should know the conditions and abide by them.

Para. 97 Here an example is given of a clash which can occur between the two systems. Where a divorce is given under the Ordinance but no dowry is returned, the girl is still regarded as married under customary law. We would point out that the opposite case is far more common, where a court orders the return of the dowry under customary law, although marriage has been celebrated under the Ordinance and no divorce has gone through the courts (See the Church's memorandum,

recommendation 1).

- Para. 103 As pointed out in our letter we welcome this statement that the Commission unanimously recommended the registration of customary marriages, as a means of ascertaining who is married and who is not. But we can find in the report no clear recommendation for *compulsory* registration of *all* marriages. This seems to undermine the whole of the proposed reforms especially when taken together with Para. 222.

### **chapter 3 : Divorce**

This contains much interesting information.

- Para. 184 We agree with the Commission that the great defect of customary laws regarding divorce is the fact that they are not written. We are apprehensive about the recommendations of the Commission in this report in a subsequent chapter that they suffer from the same defect.
- Para. 185 See our comments on para 97. We would reiterate our plea that in any legislation which is introduced it should be clear *that no court should have power to order the return of the dowry in case of a breakdown of registered marriage until a legal divorce has gone through the appropriate courts.*

### **Chapter 4 : Status of Women**

No comment.

### **Chapter 5 : Dowry**

We agree with the Report that there is a place for a dowry as a token gift when a marriage is contracted. When the system is abused and the dowry for practical purposes becomes a 'bride price' reducing the woman to the status of chattel the Church takes exception to the custom. Our recommendations on this subject are set forth [... in] our Memorandum.

### **Chapter 6 : Marriage**

- Para. 211-212 As stated in our introductory letter, we welcome this

recommendation to unify the law governing all marriages and that Parliament should pass legislation governing all marriages in Uganda.

Para. 213

*We welcome the recommendation that there should be provision for the Registration of all types of marriage.*

Clause (a) (That one marriage only should be registered)

The Church gladly accepts this recommendation and the reasons for it set forth in Note 5. At the same time we wish to make it clear that the Church has no desire to force a monogamous system of marriage on the whole community, nor do we want to have forced upon the Church a potentially polygamous form of marriage or a law condoning promiscuity. *Our basic plea is that there should be the possibility of a couple entering into a contract for monogamous marriage with legal protection for the injured party if either partner breaks the contract, and further, that such legislation for monogamous marriage should not be undermined by contradictory legislation governing this or other types of marriage.* It is for this reason that we ask for compulsory registration of all marriages, with legal definitions of the obligations involved, provision for the protection of the injured party in case of breakdown of marriage, penalties for breach of contract, and a clear definition of conditions for divorce.

We notice that there is no implicit recommendation that all marriages must be registered. Does this mean that the Commission recommends that customary marriages may continue unregistered as at present? WE ASK THAT IT SHOULD BE CLEARLY STATED THAT THOSE WHO MARRY *MUST* REGISTER THEIR MARRIAGES.

Registrars

We think it is desirable that clergy and officials of other religions should be allowed to act as registrars as at present, and that this should be clearly stated in the regulations.

Civil marriage,  
*Boma* marriage

We can find in the Report no reference to civil marriage. It appears that the Commission wishes everyone to undertake either a church or other religious marriage or a customary marriage. There are an increasing number of people, particularly, perhaps, in inter-tribal or inter-racial marriages, who do not wish to comply with tribal custom, but who are

not willing to be married in church. We ask that there should be provision for such marriages before a civil registrar as at present.

We would further ask for clear legal definition of the types of marriage which can be recognised and the obligations involved in each, and that any person married under one of these systems should not be able at the same time to contract a marriage under any other system.

Following this, we would ask for provision by which a man and his wife in customary marriage, which by its nature can be dissolved, could, if they so desired, convert the marriage contract into a permanent lifelong union by registration under the system at present regulated by the Marriage Ordinance.

It is implied in the Report, although not stated, that it is the ceremony, not the registration, which makes the marriage. We accept this, but it raises a problem. What happens if the parties go through a ceremony of marriage, but fail to register? Can either party, or any other interested party, register the marriage? The question of unregistered marriage is still more complex when Para. 222 is considered.

Para. 216      We would accept this recommendation, but would point out  
Age of marriage      that under customary law at present, a girl's parents must consent, whatever her age. The Commission refers to customary law but does not mention this feature explicitly. This is a very important matter, especially in the absence of any provision for civil marriage to which we have already referred. Under Para. 217 the magistrate has power to give consent where the parents unreasonably object, but we would like the matter to be made clearer.

Para. 217      We can accept this only as long as the two people concerned have never entered into registered marriage with another partner. What happens if one of them walks out and marries another partner? What means of redress has the injured party? In the case of one partner going to live with someone else would this be recognised as adultery? e.g. if John is living 'together or otherwise' with Mary when he is already in registered marriage with Florence, what can Florence do? Can she call this adultery: Is adultery a cause for divorce? (no conditions for divorce are laid down). Does this cohabitation

of John with Mary count as a marriage ? We could in no case accept this recommendation if it is implied that cohabitation with another partner could be recognised at the expense of an already existing registered marriage.

Para. 220 We agree with the substance of this, but suggest the omission of the words 'being an unmarried person'. If this person were already married the offence would be even worse.

Para. 221 (d) As pointed out above now that customary law is to be put on a level with the Ordinance we do not know whose consent is required by law (see note on Para. 216).

Paragraph 222 of the Commission Report is commented on below. In order that the comment may be better understood, the text of the Commission Report on which the comment is based is given here first. It reads as follows:

We recommend that the proposed law should provide that where a man and woman have been living together or otherwise for a period of not less than twelve months as man and wife, it should not be lawful for either party to deny the subsistence of marriage between them, whenever that status is called into question by the other party, and therefore either party should be liable to disabilities if any, and enjoy the privileges incidental or conducive thereto.

The wording of this (Para. 222) seems to us obscure, and its implications dubious.

From the comment we understand that its purpose is to stabilise and give legal recognition to irregular unions, especially such cases as are described as occurring in Karamoja (comment 2) where the couple are living together as man and wife but the marriage is not regarded as legal as the payment of the dowry is not yet complete. We are in sympathy with this purpose. WE ARE HOWEVER, UNABLE TO ACCEPT THE RECOMMENDATION AS IT STANDS IN ITS PRESENT FORM, AS IT APPEARS TO ADD TO CONFUSION AND TO UNDERMINE THE WHOLE PURPOSE OF REGISTRATION.

Para. 222 'Called in question by the other party'. What does this mean? e.g. suppose John and Mary have lived together for twelve months as man and wife. Then James pays a dowry to Mary's parents and she goes to live with James. John is not calling into question the subsistence of the marriage: it is Mary who is doing so. This should be made clearer before it is possible to comment intelligently on this paragraph. IN ITS



PRESENT FORM WE FEAR IT WOULD ONLY INCREASE CONFUSION AND ENCOURAGE PROMISCUITY.

Supposing the real meaning is that Mary may not deny her marriage to John, then the question arises: What practical effect can this have?

- (a) She cannot be prosecuted under 220 because her marriage to John is not registered.
- (b) Can her parents be prosecuted for accepting dowry when she already belongs to another man?  
There is nothing to say so.
- (c) John cannot ask for a divorce under 229 since the marriage is not registered.
- (d) Can John bring action for restitution of conjugal rights? Presumably not, for the same reason and because there is no provision for this in the recommendations.
- (e) Can John bring an action for adultery against James under customary law? There was no customary marriage as no dowry was paid by John.
- (f) Can John demand that his marriage be registered? He has not paid dowry and therefore there is no marriage to register, or is there?

If this recommendation is to be of any use the parties should either be able to register the marriage in spite of the fact that it is not a complete customary marriage (see note on para. 213) or marriages under this recommendation should be deemed registered for the purpose of the Act.

The Church of Uganda, as stated above, believes THAT COMPULSORY REGISTRATION OF ALL MARRIAGES IS FUNDAMENTAL TO ANY REFORM, as without it it is impossible to understand who is married and who is not.

A further question arises. What of the rights of one who is not a party to the marriage, but who claims through a party? For example a child with claims on the amount passing to Mary and then the legitimate issue of the marriage under para. 240 (a).

## ***Part 2 : Maintenance of children***

Para. 223/224      We can agree with these provided there is protection for the legal wife and her children. We have heard of a case where the mother of illegitimate children was awarded maintenance for them with the result that the legal wife and her children were left to starve.

Para. 225/228      We agree that it is hard if a child suffers for sins of his parents, and we agree that proper provision should be made for children. We have, however, misgivings about these recommendations. If a man already has illegitimate children at the time of his marriage it is right that his wife should be informed about them and that they should be legitimised. We would favour legislation providing for legitimising in such circumstances.

But can the legal wife be expected to accept into the home without any say in the matter the children of any casual union in which her husband cared to indulge after his marriage, or of children of whom she had no knowledge at the time of the marriage? and when the mother comes to visit such children, must she be accepted too? Will legitimising such children be equivalent to a confession of adultery? Or is adultery no longer a ground for divorce?

We would recommend that if a man wishes to legitimise illegitimate children conceived after marriage it should be done only with the consent of the wife. At the time of marriage also his wife should be consulted about the legitimising of any already existing children.

We strongly protest against the statement at the foot of p. 53. [See Chapter 8] This suggests that in the case of a childless marriage a man should be encouraged to have an illegitimate child by another woman. Is the reverse allowed? i.e. is the wife in a childless marriage to be encouraged to have a child by another man?

## ***Part 3 : Divorce***

The proposals here are revolutionary, and might work well but are potentially dangerous. It is true, as the Commission points out, that the present law is unsatisfactory, and that it is

bad that people should be driven to commit matrimonial offences in order to obtain a divorce. We agree that there should first be an attempt at reconciliation.

At first sight it is a very attractive idea that matrimonial cases should be dealt with on the basis of arbitration, in a rather informal way.

But suppose that a man brings a second wife into his home and his registered wife brings a divorce case, there is nothing here to guarantee her any redress whatsoever. It all depends on the whim of the Divorce Committee. They might as well say to her, 'You are the first wife, you have your privileges, but do you really expect your husband who is an important man to confine himself to one wife all his life? You have nothing to complain of. Go away'. We have heard that a case similar to this occurred in Ghana.

Just as there are no grounds upon which a genuine injured party can claim a divorce as of right, so there are not grounds upon which an innocent party can resist being divorced. For example, a husband might become tired of his wife, go to the court, and persuade the Committee to grant a divorce.

In general, the effect of such uncertainty might be to put women in an even worse position than they are at present.

Some of the difficulty envisaged might be avoided because the Chairman of the Committee must be a Judge of the High Court, presumably a thoroughly responsible person. But this raises its own problems. Many women, and men too, do not go to the courts at present because the grade of court which can deal with matrimonial offences is not one with which they are familiar and the fees are high. The Commission recommends that the grade of court should be even higher, a Judge and not merely a Chief Magistrate and presumably the fee would be higher still. This would, of course, be very hard on poor people, in the absence of any legal aid system. It would also mean long delay in dealing with cases.

P. 56 line 7, 'We strongly feel that there should not be specific grounds for divorce'

We strongly disagree with this recommendation of the Commission for the reasons set out above. It appears that

according to the recommendations of the Commission a Committee is to be given full powers to administer the law, but no law to administer in the form of conditions for divorce: For example if adultery is not defined as a ground for divorce what protection is there for a partner who has agreed in the marriage contract to a lifelong monogamous union?

Para. 229

*'The injured party should petition the High Court.'* What is the definition of 'injured party' if there are no definitions of grounds of divorce?

The Church's suggestions on this point are set out [... in] the Church's memorandum.

### ***Separation with maintenance***

We can find no clear provision in this section for separation with maintenance in the case of breakdown of marriage. The Church considers this essential for the protection of women in marriage. The Churches discussed this at great length with the Commission in June 1964 and believed that the commission had accepted their plea. It may be that it is considered that Para. 223 covers this, but it is not clear that Para. 223 can apply to the legitimate wife and her children and we would like to see a more clear definition of the rights of a wife for separation and maintenance where she is the innocent party in the case of breakdown of marriage.

### ***Nullity***

We can find no provision on this point. (See Church's memorandum)

We would further question the composition of the Divorce Committees, if they are to be established by legislation. There can only be reconciliation if the committee consists of people who themselves accept the basis of marriage in question, and members of such a committee should be acceptable to the community through which the marriage was solemnised: for example, it would not seem reasonable for Muslims to sit on a committee concerning Christian marriage, nor for Hindus to advise on Muslim or customary marriage.

The Church of Uganda would put in a strong plea that in the case of a church marriage the Church should be consulted in nominating such a committee. Where it is not possible for this principle to be observed, as in the case of a mixed marriage, or a civil marriage, we would prefer that the case should go through the courts in the ordinary way.

We note on p. 56 (note 3, line 7) that it is envisaged that the committee should consist of MEN of wisdom. We would ask that if such a committee is constituted 'WOMEN of wisdom' should also sit on it!

#### ***Part 4 : Inheritance***

We are gratified to note that the Commission has recognised the close relationship between laws regulating marriage and inheritance and we gladly accept the proposals as far as they go.

Para. 240

This is a good provision, but two questions arise:

- (1) Why should this be limited to self-acquired property? Very often the property which is of most importance to a widow is land which was not acquired by her husband's own effort, but was inherited by him. It might well be that there is no other land on which she can live. We suggest that the widow should be allowed one third of all property, or at least that land she was cultivating at the time of her husband's death. The same applies to property other than land, and it may be questioned whether the distinction between 'self-acquired' and 'other property' is at all useful or relevant.
- (2) Why should the widow only be guaranteed a living if the husband dies intestate? In Para. 251 the commission deals directly with this point. In their comment on this paragraph on p. 70, they say that they have considered the matter thoroughly and that they do not consider the law ought to provide for a will to be upset in favour of anyone except a child. This does not agree with the remarks on p. 61.

Apart from these questions the provisions for intestate

succession seem sound. The distinction made between legitimate issue and children seems a reasonable one.

Para. 241 (Making wills)

This seems excellent and is long overdue.

Para. 243 (Property rights for women and making wills)

Here a woman is given important new powers and the Church would most heartily welcome this recommendation.

She is not, however, specifically given the right to work, whether living with, or separated from her husband. The Church recommended that in this latter case at least, this right should be clearly laid down.

Para. 244/264 (Wills Provision for Widows' and Children's Succession Law)

We would approve of these suggestions which seem excellent. Except Para. 251, on which see note above. We think that a widow (or for that matter a widower) should also be able to apply for reasonable maintenance.

Para. 265

Here are a large number of subjects which the commission have not dealt with in detail. Some of them, however, are far too important to be merely relegated to regulations not requiring discussion by the public or by Parliament. We would instance the following:

Para. 265 (B) : ***Preliminaries to registration***

As pointed out above, in comments on Paras. 212 and 213, it is not at all clear whether the commission really intends that the requirements of customary marriage must be fulfilled in every single case. They themselves appear to be aware of the difficulty but they make no attempt to solve it. The draft affidavit in Appendix J raises more questions than it answers, e.g. is dowry now to be compulsory in every case? When this appendix is read together with Paras. 208 and 209, it appears that dowry is to be compulsory, that there is to be no escape from it by civil (*boma*) marriage and that it is to be unlimited in amount.

Another question which arises from Appendix J concerns the signatures required from representatives of the various families. It seems that the commission intends to tie young people even more closely than before to the clan and its



elders.

Para. 265 (H) : ***Consanguinity***

The Church has often concerned itself with consanguinity. We ought to be consulted before any regulations are made on this point.

Para. 265 (I) : ***Marriage guidance councils***

The Church would warmly welcome this suggestion. But here, as in the committees dealing with divorce, the counsellors should be in sympathy with the type of marriage in which they are counselling. Training of counsellors is needed, and we would suggest that potential counsellors, carefully selected by the various religions and civil bodies concerned, might be helped by the allocation of overseas scholarships for training in counselling techniques. We would hope that the Christian Churches would play their full part in this important work.

Para. 265 (N) This seems to be far too wide. 'O' provides all that is needed.

In general, the Churches and the public ought to be consulted on any of the matters here listed before Regulations are made.

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