THE LAW AND PRACTICE OF CHILD CUSTODY AFTER DIVORCE IN ANGLOPHONE CAMEROON

by

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ABSTRACT

Matters dealing with post-divorce upbringing of children in Cameroon fall under two jurisdictions - statutory law and customary law. Custody issues arising from statutory marriage divorce are entertained in statutory courts. Determination of post-divorce upbringing of children in customary marriage divorce is done either in Customary Courts or extra-judicially, in the villages.

The English welfare principle stated in the Guardianship of Minors Act 1971 is the law under which statutory courts have to make custody decisions. The practice of the courts, however, does not conform with stated law. The welfare of the child is balanced against customary law father's rights over their children. Statutory court judges have incorporated the customary law rule which says that the father is "owner" of his legitimate children. Judges hold that, as a general rule, it is in the best interests of the child for the father to be awarded custody. This rule of thumb is qualified by the age of the child and the existence of an obvious danger to the child if custody is granted to a father. The judges prefer to award custody of the young ones to their mother. This work has established, however, that the primary concern of the judiciary is not to protect the welfare of the child. Rather, it is to uphold cultural values demonstrated by the influence of customary law father's right in custody adjudication. The work has also illuminated the fact that custody decisions based on customary law father's custody right are not made for the welfare of the child.

As regards children in customary marriage divorce, there is a dual legal framework. Where divorce is obtained in Customary Courts, the Customary Court Rules 1965 are to determine custody decision-making. Under the Customary Court Rules, the welfare of the child is stated as the first and paramount consideration in custody adjudication. In practice, however, determination of post-divorce upbringing in Customary Courts is nearly the same as it is in cases of extra-judicial divorce.

Where a marriage is terminated extra-judicially, indigenous customary law rules determine the upbringing of children. The general rule is that, children of a validly celebrated customary marriage "belong" to their father. Usually, nothing is said about the children: it is presumed that the paternity rule is known and will be followed . As in statutory law, young children are "left" to their mother until they attain the age at which they are transferred to their father. There is no concept of custody in indigenous customary law.

The main focus of this thesis is to expose the Cameroonian custody reality. It involves examining the gap between the statutory legal framework and judicial practice. It also deals with the difference between the Customary Court Rules and the practice of Customary Courts. The thesis discusses and analyses why that difference in law and practice exists. In addition, the absence of a concept of custody in indigenous customary law of "divorce" and the effect of this on the children involved are examined.

This work finds that, as a general rule, custody adjudication in Cameroon is not child centred.

PREFACE

Apart from indigenous customary law regulating extra-judicial divorce, statutory custody law, as well as the law governing custody in Customary Courts, appear to be child-centred. The legal framework generally gives the impression that the welfare of children of statutory and Customary Court divorces informs custody decision-making. This is misleading.

Judicial practice in statutory courts and divorce practice in Customary Courts do not envisage this purported legal position. The welfare of the child is balanced against the all important customary law father's custody right. This is the custody reality regardless of the jurisdiction under which divorce is obtained. Nevertheless, disguised use of customary law father's custody right by the judiciary in statutory courts obscures this reality. Rather, judges portray the child as the only concern of the courts when determining post-divorce upbringing of children.

This thesis intends to examine custody law in Cameroon and critically analyse its application. An inquiry is made beyond the legal confines of divorce, the welfare of the child and custody. It explores social, cultural and economic factors which influence custody decision-making in search for an explanation for the disparity in law and practice. These factors will also explain but not justify the absence of a custody concept in indigenous customary law.

1. ORGANISATION OF THESIS:

The work comprises seven Chapters. Chapter One deals with an historical background of the country in question and the development of its present legal and judicial systems. In view of the vastness of Cameroon's historical material, political and constitutional developments have been given summary treatment only. The Chapter is almost entirely devoted to the discussion of legal and judicial developments. These are issues directly relevant to our discussion of custody law and practice, as the state of custody law today is dictated by events of the past.

Chapter Two treats customary and statutory marriages and the law dealing with these two types of marriages in Cameroon. This is done mindful of restrictions on the length of the thesis. Hence, space and time is devoted almost exclusively to the aspects of marriage relevant to our discussion of divorce and the concept of custody.

Chapter Three examines the concepts of divorce and custody with greater emphasis laid on the concept of custody. We also highlight in this Chapter, the absence of a custody concept in indigenous customary law. In Chapter Four, custody law, in particular, the welfare principle under statutory and customary law is discussed. Apart from examining divorce custody legal framework, judicial interpretation of the meaning of welfare is also treated. In addition, the Chapter examines indigenous customary law as it deals with post-divorce upbringing of children in cases of extra-judicial divorce.

Chapter Five exposes the custody reality, illuminating the divide between custody law and practice. The Chapter demonstrates incorporation of customary law custody rule by the judiciary in exercising the discretion which custody decision-making under the welfare principle entails. The Chapter also discusses Customary Courts' disregard for the principle of welfare, which is stated in the Customary Law Rules 1965 as the law applicable in Customary Court custody adjudication. It establishes that disregard for the welfare of the child in Customary Courts is evidenced by decision-makers' recourse to indigenous customary law. In this regard, Customary Courts seldom make custody orders unless there is specific claim in the petition. Chapter Five further reveals that in contrast with Customary Court practice, disregard for the welfare of the child is not so apparent from judicial pronouncements in statutory law courts. Judicial pronouncements are permeated with rhetoric advancing the welfare of the child as the basis of judicial decisions. A critical analysis of judicial practice will be made inorder to discover the real factors which influence judicial custody decisions. This investigation is made in Chapter Six.

Chapter Six provides a critical insight into judicial decision-making, the aim being to unveil judicial pronouncements indicating child-centredness in custody adjudication. In the process, the Chapter exposes socio-economic and particularly cultural values which, in fact, inform custody decision-making. We also demonstrate in this Chapter, that, but for a few exceptions, the significance attached to these factors is prejudicial to the welfare of children, within the meaning of the welfare principle stated in the law.

The analysis of the issues mentioned above is punctuated by our reservations about this custody reality.

In Chapter Seven, general conclusions are made. Problem areas discussed previously are highlighted before making proposals for changes deemed necessary. In addition a request is made for the development of a custody concept in indigenous customary law.

2. GENERAL ORIENTATION OF RESEARCH:

Advocating that judicial attention be focused on the welfare of the child in making custody decisions would inevitably arouse mixed sentiments in Cameroonian society. Even greater would be the negative reactions towards my proposal that priority be given to the welfare of children in extra-judicial divorce.

Statutory and Customary Court decision-makers, who are enjoined by the law to consider the welfare of the child on divorce, merely pay lip-service to this legal duty. Cultural values and influences which mitigate against recognition of a child as an individual in the family make concern for child welfare on divorce an illusion. This is the effect of the customary law rule which makes a father "owner" of his legitimate children. This customary law rule, which asserts the dominant position of a father over his wife and children, operates in practice, beyond customary marriages. Fathers in general, regardless of the type of marriage, are happy beneficiaries of this customary law rule. Statutory law regulating custody is interpreted by the judiciary in a manner which yields one result: ensures that customary law father's custody right is upheld. Concern for the child's welfare is secondary.

Undoubtedly, therefore, suggestions for effectively requiring the judiciary and Customary Court decision-makers to place the welfare of the child above other claims and rights would receive hostile reactions. This would be more so as regards the proposal that a concept of custody be developed in indigenous customary law as the first step to advancing the importance of considering children's welfare on divorce. Such a proposal, would, for many, mean destroying the base of a father's custody right hence, opening the long standing supremacy of fathers to challenges.

Not surprisingly, my suggestions, which have so far been associated with feminism, are seen as a part of Cameroonian feminists demand for emancipation of women.[1]
The welfare of the child is gender-neutral. Making it in practice, the first and paramount consideration would challenge the primacy of customary law father's custody right. The common reaction has thus, been to associate these proposals with pro-Westernisation as the following quotation indicates:

"... because you people have lived in a Western society, you want to copy

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(1). This inference is made from the responses I got from male academic lawyers I discussed my opinion with in Cameroon in 1990 during my field work and in London between 1989-1991.

what is happening out there. We do not have to import Western social ideologies indiscriminately into an African society like Cameroon ... It has to be done gradually taking one step at a time."[2]

Such responses are intended to jeopardise the process of revealing Cameroonian custody reality. It is thought that, for fear of being regarded as pro-Western, one would refrain from exposing the negative effects of some customary law rules, upheld in statutory judicial practice, on children and their mothers.

The rapport between a mother's suitability for daily care of her children and the welfare of the children is undeniable.[3] We do not, however, intend to put forward mothers as the parent to be awarded custody of their children as a general rule. This would mean reverting to a maternal custody rule of thumb. Advocating for maternal preference independent of the interests of children would destroy the essence of this thesis. The intention is to criticise current Cameroonian custody reality which is indicative of the paternal custody rule of thumb in customary law and paternal preference in statutory courts.

Of course, family socio-economic factors in this society, which will be discussed in Chapter Six, may necessitate mothers having custody of the children in most cases if the welfare of the children is to be preserved. Nevertheless, far from advocating maternal preference, we demand that Cameroonian custody practice should reflect concern for the children in divorce. In other words, what is best for the children involved should be the real determinant of who gets custody regardless of the forum in which divorce is obtained: whether in the High Court, Customary Courts or in extra-judicial divorce settlements.

This should not be seen as mere importation of Western ideas into Cameroonian society. Rather, it should be regarded as a progressive step. Cameroonian children, like those in the West, have diverse interests which need protection and are to be protected. More so as Cameroonian children of divorce whose welfare is sacrificed to uphold cultural values have not been given the opportunity to choose. If they are given a choice between the Western idea of welfare of the child on divorce and customary law father's custody right which is the basis of custody adjudication in Cameroon, there is little doubt what the choice would be.

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(2). Supra, note 1.

(3). See SMART, C., "Power and Politics of Child Custody," in SMART, C., and SEVENHUIJSEN, S., (eds) Child Custody and the Politics of Gender, Routledge, London and New York, 1989, p. 1 at pp. 12-14, 23 and 24.

Cameroonian children would embrace a practice whereby decision-makers consider as first and paramount their welfare on divorce.

By contrast, customary law paternal custody rule which is indigenous law governing upbringing of children in a customary marriage terminated extra-judicially, protects father's interests rather than the children. This implies that importation of the customary law father's right rule by the judiciary into statutory court custody adjudication has the same impact: it relegates the interests of children of such divorces to the background. Statutory court judges simply interpret the welfare of the child in terms of father's right - that it is in the welfare of the child for a father to have custody. A similar liaison between the welfare of the child and customary law father's right is made by Customary Court decision-makers.

This work reveals that post-divorce upbringing of children determined on the basis of paternity, as a general rule, is not in the welfare of the child.

3. SCOPE OF RESEARCH:

Cameroon is a country of geographical and ethnic diversity, the number of tribes currently estimated at two hundred.[4] Despite the differences existing between these tribes in matters of detail, regarding socio-cultural organisation and customary laws, there are similarities in some general matters. For example, capacity and formality requirements in celebration of marriages; procedure for terminating marriages; and a father's right over his legitimate children during and after marriage. With the exception of the tribes in north Cameroon, the rule that a father is "owner" of children born in a valid customary marriage exists in the rest of the Cameroonian tribes.[5]

The Country is politically administered under ten provinces. Tribes in the north, generally identified by their predominant[6] religious affinity as Muslims, make up the three Provinces in that part of the country. Although Moslem law is part of customary law in

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(4). Estimate got from a recent television documentary on Cameroon entitled, "The Birth of a Democracy" shown on British Television, channel 4 on the 10th of November 1991 at 7.30 p.m.

(5). This position is common knowledge.

(6). This is not to say that these northern Cameroonian tribes are all muslims as we shall see in Chapter One.

Cameroon,[7] our generalisation on customary law father's custody right does not include the northern tribes. Similarly, apart from stating that, customary law fathers' right of "ownership" of one's legitimate children determines their post-divorce upbringing in all tribes in the southern part of Cameroon, our detailed discussion on customary law and practice is limited to specific tribes. These are, the Bafaw, Mbonge, Bakundu, Barombi and the Bakossi tribes. All five are within Meme and Kupe-Mwanenguba Divisions respectively, in the South West Province, in the English-speaking part of Cameroon. My study of these tribes was motivated by familiarity with dialects spoken in the tribes as well as the customary law position in the area under consideration.

As regards discussion of statutory law and practice, our research is based on the two English-speaking Provinces in the country. Colonialism gave rise to the existence of an English-speaking and a French-speaking part of Cameroon. This distinction refers to the parts of the country which were under English and French colonial administration respectively. Research on statutory court practice of High Courts, in which original jurisdiction over custody matters arising from a statutory marriage is vested, was limited to the High Courts in the two English-speaking Provinces- the South West and the North West Provinces. In principle, there is a High Court in each Division. In practice, however, there are few High Courts in the two English-speaking Provinces. Even then, not all of the existing High Courts have enough resident judges to sit for a High Court session.[8] In the South West Province, for example, most of the judges are in the High Court and Court of Appeal in Buea. Besides the President of the High Court of Kumba (main town in Meme Division) who is a resident judge, judges from the High Court in Buea are to be present for the High Court in Kumba to sit.

This explains why most divorce and custody decisions are found in the High Courts of Buea and Bamenda towns. They are the heads of Government in the South West and North West Provinces respectively.

The High Court of Bamenda was not visited during my field trip due to limited funds that were available. Nevertheless, the findings on judicial practice based on interviews conducted in the South West Province, cover judicial practice in the North West Province.

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(7). See, ANYANGWE, C., The Cameroonian Judicial System, Publishing and Production Centre for Teaching and Research (CEPER), Yaounde, 1987, pp. 247-249.

(8). See ANYANGWE, op.cit., note 7: p. 166.

Judges spoken to have had years of experience in the High Courts and some in the Courts of Appeal of both Provinces. In addition, cases decided in the High Court and Court of Appeal in Bamenda also feature in the work.

4). RESEARCH METHODOLOGY: STATUTORY LAW AND PRACTICE:

The legal material, the application of which in Cameroonian statutory courts is to be examined, explained and critically analysed in this work, is largely English law. This is because there is no Cameroonian legislation regulating divorce and custody matters arising from statutory marriages, as will be discussed later in the thesis. However, Cameroonian legislation provides legal material in the discussion of various related issues which have been legislated upon. Other works on law and social policy, mainly English, were also used.

The method of investigation employed was that of unstructured interviews. Unstructured in the sense that typed questionnaires were not made. This decision was made without disregard to the widely acknowledged significance and advantage of having structured questionnaires as the main field work tool, especially, in anthropological and sociological research. Questionnaires reduce the possibility of having different responses to the same question which are likely to arise as a result of using different words, to ask the same question in cases of unstructured interviews without questionnaires. From this perspective, questionnaires are helpful in checking inconsistencies in responses and to facilitate analysis of data collected.[9]

The advantage of questionnaires, notwithstanding, they have been seen to be unsuitable when conducting certain types of research. As where, for example, the subject matter of investigation involves discovering personal experiences, feelings, opinions, reasons and motives of those to be interviewed. All these elements are central to the discussion of child custody law and practice in Cameroon as presented in the thesis. Where these elements are significant, it is necessary to gather in depth information about all the facts which are likely to be relevant to the subject under investigation. The subject matter did not involve data as the aim of the field work was to establish legal practice and its relationship with socio-cultural values. A rigid structured set of questions which questionnaires could have entailed,

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(9). See, STACEY, M., Methods of Social Research, Pergamon Press, Oxford. New York. Toronto. Sydney. Brauschweig, 1969, pp. 76-77.

may not have comprised all the appropriate questions as it is likely that their relevance may not have been seen when the questionnaires would have been drawn. In this regard, questionnaires would have been restrictive.[10]

However, an interview schedule was made with a list of areas intended to be covered and questions which were thought to be relevant in preparation for the field trip. Within that framework flexibility was possible and questions were asked as the need arose and, as new and relevant questions developed from responses. Responses were tested by asking the same questions to different respondents in the same tribe as well as those in towns. An obvious difference in the response to a particular question which did not result from the fact that different respondents explained or narrated similar events in different ways, was indicative of inconsistencies and disregarded. The same was done for interviews conducted in the towns. In this case, however, the tribal origins of the respondents was immaterial as far as investigation of statutory custody law and practice was concerned. Respondents were drawn from different professions connected with law, social affairs, children and the family. In this regard, judges, barristers, social workers, academic lawyers, parliamentarians and school teachers were spoken to. Apart from professionals, parents were also interviewed. Interviews were mainly conducted during one major field work trip made between May and November of 1990. A limited amount of research was done during my two months stay in Cameroon between December 1988 to February 1989.

Interviews with judges were significant partly because they substantiated judicial practice evidenced in the cases and highlighted personal preferences and opinions of individual judges in the application of the law. Care was taken to ensure that judges who have had years of experience as High Court judges were interviewed. A lot of information was obtained from two particular judges who had been High Court judges and Court of Appeal judges and became Justices in the Supreme Court. At the time of my interviews, however, they were retired. The two judges are the Honourable Justice Ekema and the Honourable Chief Justice Endeley, S. M. . Another judge with years of experience as a High Court judge, who at the time of my interviews was a judge in the Court of Appeal in Buea, was Mr. Justice Bawak, B. B. . Interviews were also held with Mr. Justice Asuh in Buea in

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(10). See, ibid., pp. 75-76. Cf. BURGESS, R. G., "The Unstructured Interview as a Conversation," in BURGESS, R. G., (ed.) Field Research: A Source Book and Field Manual, George Allen & Unwin, London Boston Sydney, 1982, p. 107 at 107.

1989, just before he left for the High Court in Bamenda where he had been transferred. Mr. Justice Fombe, who was at the time of my interview in 1990 the only resident High Court judge in Kumba, was also one of my respondents.

As the bench is dominated by male judges, especially in the High Court, only one female judge was interviewed: Mrs. Justice Wacka. Repeated efforts at meeting and arranging an interview with the only other female High Court judge in Buea were futile.

Judges spoken to are by virtue of their experience, having worked in various courts in the South West and North West Provinces, in a position to give information on judicial practice in the two Provinces. Questions were posed to them to gain an insight into personal factors, values, opinions and preferences which individually inform custody decision making. For example, judges were asked how they interpret welfare of the child; what aspects of a child's upbringing they consider as a child's welfare interests; what factors they take into account in determining which parent to award custody; how significant they consider welfare reports in custody adjudication.

Ten barristers were interviewed in the towns of Kumba, Buea and Mutengene in the South West Province. Care was also taken to speak mainly to those with years of experience in divorce courts as counsel. They were asked questions regarding application of English law in Cameroonian courts, for example, which English laws are applied in divorce and custody matters and how. Counsel were also asked if, in their opinions, custody decisions were based on the welfare principle as stated by the law.

In addition, information was obtained from the then Ministry of Social Affairs in Yaounde and other Departments of that Ministry in Buea and Kumba. This was obtained from interviews with the Director of Social Affairs in that Ministry in January 1989. Further interviews were conducted with social welfare workers in 1990 in the Social Welfare Departments in the towns of Buea and Kumba. Furthermore, I attended an inter-Provincial Seminar for Women in the South West and North West Provinces held under the auspices of the Ministries of the then Women Affairs and Social Affairs held in the town of Mutengene from the first to the fifth of October 1990. I was able to speak to other personnel of these two Ministries at this Seminar. Questions relating to the role of the Department of Social Welfare in custody adjudication and the effect of divorce on Cameroonian children were asked. Additional information was obtained from the registrars of births, deaths and marriages in the towns of Kumba, Buea and Mutengene.

In analysing custody law and practice, interpretations of the law by and opinions of a wide range of persons in the society were helpful. Academic lawyers contributed significantly in this respect. Their ideas feature in some of the conclusions arrived at. Similarly, of great significance were responses of parents.

Fifteen parents (fathers and mothers) of different social and economic statuses were interviewed in each of the towns of Buea, Kumba, Mutengene, Tombel and Muyuka. Care was taken to ensure that the respondents included parents in subsisting statutory marriages, divorced and single parents. Respondents ages ranged from fifteen (which is the legal age at which capacity to marry is reached for girls) to fifty-five (the official retirement age). Professional mothers/housewives, working as employees in various sectors of the economy, with various educational qualifications were spoken to. Similarly, self-employed housewives in small and large businesses and farmers were interviewed. Non - professional housewives whose job is full-time matrimonial duties were also among the respondents.

Similarly, care was taken to interview fathers drawn from different social groups and statuses. For example, judges and others in the legal profession were interviewed in their capacity as parents. Furthermore, civil service employees, company employees, self - employed small and large businessmen and farmers were represented. Employees interviewed fell under different salary scales, which reflected on their different living styles and standards. Care was taken to ensure that these respondents included people from the South West and North West Provinces. The essence was to make sure that interview responses are representative of the views of parents of statutory marriages and divorce in the two Provinces.

Apart from interviews, cases provided significant material on judicial interpretation of the law. The cases used in the thesis were mainly found in the High Courts' original case files, hence, unreported. Others were got from text books and the West Cameroon Law Report 1962-1964. Marriage registers were also inspected in the Council Offices in the towns of Kumba and Buea in which the civil status registries are situated.

5). RESEARCH METHODOLOGY: CUSTOMARY LAW AND PRACTICE:

Material on customary law and practice was largely obtained from interviews with various classes of people mainly in the villages. This took place in the villages of Big Butu, Matoh Butu, Mbonge Maromba, Kokobuma, Barombi Kang, Kombone and Ekombe. The villages selected are representative of the tribes, the customary law of which is under

consideration in this work. Some interviews on customary law, for example, the application of customary law in Customary Courts, were conducted in the towns of Kumba and Tombel.

The absence of questionnaires and the reason for dispensing with that method of investigation in this work has been explained earlier. Guided by an unstructured interview schedule, the interview process involved sustained periods of questioning a panel of people knowledgeable in their tribal customs. Interviews were conducted in the village council houses or in the chief's house in villages were it was the convenient place. Care was taken to ensure that respondents were not just people whose knowledge of customary law derived from the responsibility of adjudicating or pronouncing upon disputes (such as, chiefs and council members) but other persons knowledgeable in customary law and tribal matters (for example, the village elders). Questions were asked about customary law position on various issues. For example, celebration of marriages; termination of marriages; the status of fathers and mothers in their households; who in customary law has responsibility for the children and the entire household; how this responsibility is actually discharged. Questions were also asked on social organisation and day to day matrimonial activities. Mothers were asked about their feelings towards father's customary law right over children of "their" marriage. In addition, interviews aimed to establish what aspects were considered important in a child's upbringing. Hence, the class of people interviewed at any time, depended on the type of information required.

Information regarding customary law on marriage, divorce and post-divorce upbringing of children was given by chiefs in villages sitting with some elderly members of the village council. Such members were basically males. However, in some of the villages, women had a representative called "Nyanga Mboka"("translated as the mother of the village") in all the tribes. This is the title of a woman appointed by the womenfolk in the village to act as their spokesperson. She is the link between the women in the village and the village administration through her presence in the village council. The "Nyanga Mboka" is, thus, in a position of trust to put across the feelings of mothers/wives about various customary law rules.

Similarly, a chief is regarded by virtue of his position as a person equipped with knowledge about his tribal customs and customary law. Adequate knowledge about one's tribal customs and customary laws is a condition precedent to succession into chieftaincy or appointment as chief. Thus, even retired civil servants who are increasingly becoming Chiefs in their tribes of origin, are to have knowledge of their customs and customary laws. Such

Chiefs learn the customs and customary laws from the old people in the village who are regarded knowledgeable in their customs and customary law. This is by virtue of their long and uninterrupted stay in the villages. It explains why interviews were conducted in the presence of village elders. Together, the chiefs and these elders in the village councils are in a position to give valuable information on various customs and customary laws. Parents were not left out.

Fifteen parents were spoken to in each of the six villages representing the tribes studied. In each village, it was ensured that parents of both sexes were almost equally represented. Similarly, care was taken to make certain that single parents who have never been married were also amongst the respondents. However, emphasis was made on speaking mainly to divorced parents and those who are still married. As stated under the discussion of methodology on statutory law and practice, the ages of parents spoken to in the villages ranged between fifteen (the age of the youngest wives who were actually living with their husbands) and fifty-five. The social and economic backgrounds of the respondents were diverse- teachers in the primary schools in the villages; rich farm owners; small scale producers of food crops and farmers who earn a living as tenants in farms in which they produce cash-crops and share the proceeds in two parts with the farm owner were represented.

Fathers/husbands and mothers/wives were interviewed separately. This was to avoid embarrassment from husbands to wives who intended to speak out loud. Despite this precaution, some mothers still refused to expose their matrimonial state. Nevertheless, useful information was obtained from most of those spoken to. Selected children were asked about their experiences as children of divorced parents. Twenty children who were children of some of the divorced parents spoken to, were asked about their experiences of their parents' separation. The ages ranged from five years to eighteen and they were of both sexes.

Customary Court personnel in the courts of Kumba, Mbonge Maromba, Tombel, Kombone and Bekondo were also interviewed. Material concerning Customary Court practice in divorce and custody matters was based on their interview responses. Customary Court Clerks, registrars, court members and "judges" were spoken to, in this respect. In addition, Customary Court records and the Customary Court Rules 1965, found in the Customary Court Manual for Practice and Procedure of Court Clerks were consulted. Last but not the least, my personal observation.

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DEDICATION

I dedicate this thesis to my parents, sisters, brothers and my husband - Mr. Motale Ruben. They have been my inspiration and hope for the future.

DECLARATION

The contents of this thesis are the result of the student's own investigations except where stated otherwise. No part of this work has been submitted in support of an application for another degree or qualification, of this or any other university or institution of learning.

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CHAPTER ONE

GENERAL INTRODUCTION

In legal writing about Cameroon, the colonial past of the country makes it necessary to begin with an historical background. The current politico-administrative, legal, and economic structures of the country are inextricably linked to events of the past. For example, the various forms in which the name of the country appears in different writings, the legal system, its linguistic structure, can be explained solely in a colonial context. Colonialism introduced a different phase in Cameroon history, as it effected legal, political, economic and even social changes.

Our intention in this Chapter is to present in a summary form, the historical background of Cameroon, the law and practice of custody after divorce of which is the essence of this thesis. The Chapter will be discussed in three parts. The first part traces the origin of the name "Cameroon". Also, an ethnographic survey of the pre-colonial Cameroonian people is discussed under this part. We shall in the second and third parts discuss colonialism in Cameroon with specific emphasis on the development of the Cameroonian legal and judicial systems and the effect of colonialism on its present legal and judicial structures.

A. GENERAL HISTORICAL BACKGROUND:

Three aspects will be considered: the name - Cameroon, ethnographic survey and a summary of the socio-political and economic organisation of the pre-colonial Cameroonian people.

The Name - Cameroon:

Different spellings of Cameroon may be found in a single text on Cameroon, all referring to the same country. For example, it is common for one to find the following spellings: "Kamerun", "Cameroons", "Cameroun". This variations in the spellings reflect the ethnic and linguistic origins of the European countries which had actual occupation of Cameroon. The three forms in which the name of the country appears indicated above, correspond to the German, English and French spellings of Cameroon respectively. The German spelling was used during German occupation of Cameroon, while the English and

French spellings ensued during British and French colonial rule. All three appellations are derived from the name "Rio-dos-Camerons".[1] This was the name given by the Portuguese explorer, Fernando Po, to the Wouri Estuary at the Cameroon coast in 1472. It was later changed to "Rio-dos-Cameroes"[2] by the Spanish traders who took over trade in the Cameroon coast from the Portuguese by the end of the seventeenth century.

The official appellations since independence are, "Cameroon" and "Cameroun" which are the English [3] and French spellings, as these countries were the last colonial administrators in Cameroon. In political terms, however, the full name of the country has undergone changes corresponding to constitutional changes since independence.

On attaining independence in 1960, the part of Cameroon that was under French colonial rule was known as "Republique du Cameroun", translated into English as "Republic of Cameroon". This name was changed to read, "Republique Federale du Cameroun"(the Federal Republic of Cameroon) in 1961 when the part of Cameroon which was under British colonial rule gained independence and voted in a plebiscite to unite with the Republique du Cameroun.[4] A unitary constitution drawn in 1972 engendered a referendum, the result of which was the creation of a unitary state and the end of federalism. The country's name was changed to - "the United Republic of Cameroon" (Republique Unie du Cameroun). Constitutional amendments in 1986 occasioned another change of name in which the word "united" was removed, leaving the name simply, "Republic of Cameroon" (Republique du Cameroun).[5] Thus, the union of ex-British and ex-French Cameroon currently has the name

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(1). In English, it means "River of Prawns". The Portuguese explorer gave this name to the Wouri Estuary in the Cameroon coast because of the abundance of prawns he found in the area. See generally, EYONGETAH, T., BRAIN, R., and PALMER,R., History of the Cameroon, Longman, England, 1987, p 42; RUDIN, H.R., Germans in the Cameroons 1884-1914, Greenwood Press, New York, 1931, p.102; LE VINE, V.T., The Cameroons from Mandate to Independence, University of California Press, Berkeley and Los Angeles, 1964, pp. x1 and 16.

(2). Rio-dos-Cameroes was the Spanish phrase for "River of Prawns."

(3). British Cameroon was known as, "The Cameroons."

(4). A federation of two states was formed, in which ex-British Cameroon was the state of West Cameroon, while ex-French Cameroon was the state of East Cameroon. See generally, EYONGETAH et al., op. cit., note 1: Chs. 28 and 29. Cf. LE VINE, op. cit., note 1: pp. 1, 3-5.

(5). See, generally ANYANGWE, C., The Cameroonian Judicial System, Publishing and Production Centre for Teaching and Research,(CEPER), Yaounde, 1987, p.133; EYONGETAH, et al., op.cit., note 1: p. 135.

which was the birth name of the part of Cameroon which was under French rule when it gained independence in 1961.

Ethnographic and geographical survey:

The Republic of Cameroon is made up of the former British and French mandate and trust "territories", as shall be discussed later. The nineteenth century scramble for colonies in Africa[6] produced the triangular structure which is the shape of the country today. With a population approximated[7] between ten and fourteen million people, Cameroon covers a geographical area of four hundred and fifty by seven hundred and seventy miles respectively. It is situated between West and Central Africa, bounded on the north by lake Chad. The Central African Republic and the Republic of Chad lie on its eastern border. The countries of Congo, Gabon, and Equatorial Guinea are on Cameroon's southern boundary, while Nigeria is at its western border.[8]

The population is unevenly distributed over three main geographical regions in the country: the northern part of the country, which is of sub-saharan climate and vegetation, is basically inhabited by a large ethnic group of Fulani origin who invaded the area and conquered the indigenous tribes.[9] The grassfield area is the second broad classification, covering the central highland area, with tropical climate and savannah vegetation. It is inhabited by a large ethnic group of people with similarities in culture, dialect and social organisation.[10] The third area is covered by the people linguistically grouped as Bantus. They cover the inland and coastal lowland areas otherwise referred to as the forest region, with equatorial climate and vegetation. The inhabitants of this part are also called the forest

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(6). See generally, LE VINE, op. cit., note 1: pp.1, 3-5; EYONG-ETAH,T., and BRAIN, R., A History of the Cameroon, Longman, London, 1974, p. 6-8.

(7). These figures are estimated from the last population census in 1986. See generally, NEBA, S.N., Modern Geography of the Republic of Cameroon, Buea, 1987, p.1.

(8). See generally, ibid.; EYONGETAH, et al., op. cit., note 1: p.1. cf. LE VINE, op. cit., note 1; NDONGKO, W. A., and VIVEKANANDA, F., The Economic Development of Cameroon, Bethany Books, Stockholm, Sweden, 1989, p. 23.

(9). For a discussion of the Fulani conquest, in north Cameroon, see, LE VINE, op. cit., note 1: pp. 38, 39-41. EYONGETAH et al., op. cit., note 1: pp. 22-24 and Ch. 6.

(10). See generally, EYONGETAH, et al., ibid., ch.7. cf. NZEKA, P., The Core Culture of Nso, Jerome R. & Co., Massachusetts, 1980, pp.41-42, 77-83, Ch. 2.

or coastal people.[11]

We do not intend to have a detailed discussion of the organisation of pre-colonial Cameroonian people in this work. The purport of our ethnographic survey is to highlight two characteristics of the country. They are: ethnic diversity and tribal boundaries.

Ethnic diversity:-

Our division of the country into three main ethnic groups appears to simplify the ethnographic distribution of a country with a characteristic of geographical and ethnic diversities.

In the three-tier classification made above, tribes of the forest area classified as Bantus, reflect greater heterogeneity in their social and cultural organisation.[12] The area is made up of a multiplicity of tribes[13] which have cultural and language differences, with similarities in some broad principles only.

Tribes in the grassfield area share a fairly homogenous culture. For example, the sacred authority ascribed to the tribal "fons",[14] succession to chieftaincy, the existence of and the role of secret societies, manner of celebration of customary marriages, are features in which the tribes in this area share similarities.[15] Nevertheless, there are differences in detailed organisation, dialects and customs. This regional diversity does not extend to the northern part of the country.

The northern part of Cameroon appears to be made up of one large ethnic group of Fulani origin. Although there in fact exist other smaller tribal groups in the area,[16] they have common socio-cultural values and the tribes speak similar languages. The uniqueness of north Cameroon may be explained by two factors. First, pre-colonial political organisation

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(11). See generally, ARDENER, E., Coastal Bantu of the Cameroons, International African Institute, London, 1958, pp.9-13; EYONGETAH et al., op. cit., note 1: Chs. 5 and 8.

(12). See, FREDERICK, W.H.M., Through the British Cameroons, London, 1928, p. 61; ARDENER, ibid., pp. 75, 79-107.

(13). For a citation of the different tribes in the region, see, ARDENER, ibid. pp.9-13. EYONGETAH et al., op. cit., note 1: p.5.

(14). "Fon" is the same as chief in the forest region. For the sacred authority of "fons", as opposed to chiefs, see, NZEKA, op. cit., note 10: pp. 41-42; ARDENER, op. cit., note 11: pp. 21, 45 and 59.

(15). See, NZEKA, ibid., pp. 28-29, 41-42, 77-83.

(16). For example, the Massa, Mataka, Kapsiki, and Mofu tribes. See, LE VINE, op. cit., note 1: p. 38. Cf. EYONGETAH et al., op. cit., note 1: ch. 6-and 7.

of the inhabitants of that area in one large centralised Fulani kingdom stamped out minute tribal differences.[17] Religion is the second factor that explains this uniformity.

Unlike the religious situation in the grassfield and forest regions, Muslim religion was and is still the main[18]form of worship in northern Cameroon. The "koran" which is the holy bible for Muslims, is also the constitution for political and administrative organisation in Muslim countries. In addition, it is the legal code,[19] as well as the code for moral and social conduct.[20] Few tribes in that area were able to resist the forceful spread of Muslim religion in northern Cameroon by the Fulani tribe through "jihad wars". The strength of Muslim religion in that area, founded on the political strength, prevented the penetration of various religious sects introduced in the other parts of the country by European missionaries.

The northern Cameroonian situation can be contrasted with that in the forest and grassfield areas where various religious cults based on super-natural beliefs were practised before colonialism.[21] The introduction of christianity by European missionaries provided no impetus for religious unity as christian converts belonged to different christian denominations.[22] Hence, religion did not give rise to unity in this part of the country as it did in north Cameroon. In addition to the traditional tribal diversity discussed above, colonialism led to the creation of artificial boundaries. This either had the effect of separating people from the same tribe and even families, on the one hand, or grouping people from different tribes within a common tribal area, on the other. This complicates further, our three-tier classification.

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(17). The Fulanis occupied the area through "jihad" (holy) wars for the spread of Islamic religion. Supra, note 9.

(18). Although there are other religious sects, Islamic followers are the largest group. See, EYONG-ETAH and BRAIN, op. cit., note 6: p. 32.

(19). For a discussion on Moslem law, see, ANYANGWE, op. cit., note 5: pp. 247-248.

(20). Ibid., p. 247, para. 2.

(21). See, ARDENER, op. cit., note 11: pp. 90-94. See also, Report by Her Majesty's Government of the United Kingdom of Great Britain and Northern Ireland to the United Nations on the Cameroons Under British Trusteeship for the Year, 1948, H.M.S.O, London, 1949, pp. 9-11. We shall hereinafter refer to the report cited simply as "Report by Her Majesty's Government on the Cameroons for the Year 1948".

(22). For details on the various forms of worship before christianity, see, ARDENER, op. cit., note 11: pp. 107-108. For the introduction of various christian sects, see, ARDENER, S., Eye Witness to the Annexation of Cameroon 1883-1887, Buea, 1968, pp. 6 and 19, para. 1. Cf. EYONGETAH et al., op. cit., note 1: ch. 11. Cf. O'NEIL, R., Mission to the Cameroon, Mission Book Service, London, 1991.

Tribal Boundaries:-

The current tribal divisions in certain areas of the country are the result of artificial colonial boundary delimitations. To facilitate colonial administration, boundaries were marked creating politico-administrative divisions. In some parts of the country, such boundaries were made across tribes, separating some tribes. In the politico-administrative divisions, these tribes which were divided fell under different administrative units. This anomaly is reflected in the political divisions today. Out of ten Provinces that make up the country, two are in ex-British Cameroon. An example of notoriety is the presence of part of the grassfield ethnic group in the forest area inhabited by the Bantu people. The "Bangwa" tribe, as that part of the grassfield people are called, has no socio-cultural similarities with the forest people amongst whom the Bangwas were politically grouped. The Bangwa tribe is part of the eastern grassfield tribe which, in the course of dividing the country between Britain and France, fell under British Cameroon. The rest of the eastern grassfield tribes were under French Cameroon. As a consequence, the Bangwa tribal people are currently grouped politically, with the Bantu tribes which inhabit the forest region. The same is true of the "Balong" tribe. Delimitation of spheres between France and Britain explains the presence of the Balong people under two political divisions. Part of the tribe that fell under French colonial administration is "francophone", and they fall in the Eastern Province in the current political division. By contrast, the part of the tribe which remained under British administration is "anglophone" and, it falls under the South West Province in the current administrative division. Hence, whereas some of the inhabitants of that tribe are francophones, others are anglophones. Artificial boundary delimitation also divided families. Separation of families had greater consequences for certain tribes, such as the "Keyaka" tribe in the forest region.

Colonial administrative divisions in British Cameroon gave rise to division of the Keyaka tribe, part of which became Nigerian territory. This separation became permanent thus, relatives of people in that Cameroonian tribe live in a socio- cultural milieu in Nigeria where they have no ancestral foundation, and are separated from their folks in Cameroon.[23]

The question that may be asked is, whether after over thirty years of independence, the Cameroonian government has not left too late the problem of re-definition of colonial

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(23). See generally, EYONG-ETAH and BRAIN, op. cit., note 6: pp. 10-11.

boundaries.

The country, whose divorce and custody law is under consideration in this work is a conglomeration of many tribes[24] with diverse culture, dialects, traditional values, customs and customary law. Development of national government by the colonial administrators did not eradicate tribal divisions. Instead, it compounded further post- independent political, legal and administrative unity. Modern government was developed under and is modelled after the systems of two different countries, with distinct legal, political, and economic colonial policies. We shall discuss the colonial presence. Before that discourse, however, we intend to highlight briefly the pre-colonial organisation of the Cameroonian people.

Pre-Colonial Cameroon:

The history and existence of African people, south of the Sahara before colonialism had for some time been given a cavalier treatment by anthropologists. The history of the people was linked with the advent of colonialism. In a speech delivered in Oxford in 1962, Prof. Roper is quoted to have said the following: "... perhaps in the future there will be some African History to teach. But at present there is none, there is only the history of the Europeans in Africa. The rest is darkness... and darkness is not a subject of history".[25] Perhaps lack of documentation on pre-colonial African people led anthropologists to characterise these societies as stateless and lawless.[26] The absence of modern government in pre-colonial Africa should not exterminate the history of a continent in which kingdoms are known[27] to have existed before the colonial period.

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(24). Currently estimated at 200 tribes. Estimate made in a recent television documentary on Cameroon entitled, "The Birth of a Democracy," shown on British Television, channel 4 on the 10th of November 1991 at 7.30 p.m. Cf. NDONGKO, op. cit., note 8: p. 23.

(25). By Hugh Trevor Roper, quoted in the article entitled, "The rise of Christian Europe", in The Listener, November 28 1963, cited in CROWDER, M., West Africa Under Colonial Rule, Hutchinson & Co., London, 1968, p. 10. See also, Margery Perham's excerpt in The Times, January 10 1925, cited in CROWDER, ibid., p. 10-11.

(26). See, SAWER, G., Law in Society, Oxford University Press, 1965, p. 22; CHANOCK, M., Law, Custom and Social Order, Cambridge University Press, Cambridge, London, New York, New Rochelle, Melbourne, Sydney, 1985, p. 219. See also, ALLEN, C.K., Law in the Making, Clarendon Press, Oxford, 7th ed., 1964, p.1; cf. EVANS-PRITCHARD, E., The Nuer, Oxford university Press, London, 1940.

(27). See, GONIDEC, P.F., Les Droit Africains-Evolutions et Sources, 2e ed., L.G.D.J., Paris, 1976, p. 7; EVANS-PRITCHARD, ibid. See also, NZEKA, op.cit., note 10. Cf.

Although the kingdoms that existed were not politically structured as modern governments introduced during colonial administration, they were nevertheless, centrally organised. In the "Nso" kingdom of the grassfield region in Cameroon, for example, a system of checks and balances similar to what De Tocqueville[28] found in America was developed. This was made possible by the presence of "sacred societies"[29] which performed functions corresponding to executive, legislative and judicial roles in modern democratic governments. The essence was to develop a mechanism to prevent the "fons" from becoming autocratic rulers.[30]

Similar elements of national government existed in the Sokoto Empire which stretched through northern Cameroon and northern Nigeria under the leadership of the Sultan, Usman Dan Fodio. He was resident in Sokoto in Nigeria which was the headquarters of the Empire. Through a bureaucracy of Emirs he appointed to administer the "Emirates" or kingdoms into which the Empire was divided, the Emperor established a firm government with centralised politico-administrative and economic policies.[31] Although not based on a cash nexus, a public economic system existed in these kingdoms based on the exchange of goods for goods,[32] involving both internal and international trade across Africa. Taxes payable with goods were demanded from traders as loyalties to be paid to the "Emir" or "fon" and as gifts to the palace. These collections, together with slaves taken as booty from tribal wars constituted "funds" for the "central treasury" in the kingdoms. The personnel used as administrators in the kingdoms were paid with the proceeds in the palace "treasury".[33] In the case of the kingdom in north Cameroon, the "Emir" was accountable to the Emperor in

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FORDE, D., and KABERRY, P.M., (eds) West African kingdoms in the Nineteenth Century, Oxford University Press, London 1967.

(28). De TOCQUEVILLE, A., Democracy in America, vol. I, Schocken Books, New York, 1961, Ch. viii.

(29). For example, the "ngweron," the "ngumba" and the "Kwifon" societies in Nso, Bali and Kom kingdom respectively. See, NZEKA, op. cit., note 10: pp.79-80; ANYANGWE, op.cit., note 5: p. 14.

(30). See, NZEKA, ibid., pp. 77, 78 at para. 1 and Ch. 2.

(31). See, EYONG-ETAH and BRAIN, op. cit., note 6: pp. 36-41.

(32). Trade was based on exchange of home goods, for example, pottery, copper, bronze works, slaves, agricultural produce, for foreign goods; such as, salt, cotton and gold. Ibid., pp. 31, 32, 36-41.

(33). Ibid., pp. 36-41.

Sokoto for the collections.[34]

Similarly, contrary to the characteristic of lawlessness ascribed to these pre-colonial societies, indigenous customary law and system of administration of justice provided the judicial and legal framework. In the grassfield area, justice was dispensed by adhoc bodies, such as sacred societies. Traditional beliefs in the power of supernatural spirits also deterred the commission of crimes. Through the use of informal trial procedures, for example, ordeals, swearing and the contribution of diviners and sorcerers, criminals were apprehended and punished. Penalties varied, from fines paid by cattle, farm produce, ornaments, to corporal punishment, mutilation and death. Some criminals were sold as slaves.[35] Adjudicating on matters relating to land, succession, inheritance of property, marriage and "ownership" of the children was made under well defined customary law rules which depended on the type of kinship lineage, as we shall discuss in Chapter Two.

A similar system of administration of justice obtained in the parts of the country which were organised on unit tribal basis as it was in the forest area. In the absence of kingdoms in that part of the country, individual villages constituted distinct political entities, under the leadership of "chiefs", with less traditional authority than the "fons" and "Emir".[36] Nevertheless, chiefs were a symbol of political and administrative authority in their respective villages. Assisted by traditional councils made up of elders in the individual villages, these tribal units had well defined, political, judicial and social structures.[37]

As rudimentary as these pre-colonial structures were, they formed the foundation upon which colonial administration was established.

B. COLONIAL CAMEROON: POLITICAL:

"The acquisition of territory in Cameroon, whether by Germany, Britain or France followed a well defined pattern. First, travellers, traders and missionaries came in as visitors.

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(34). This is analogous to what obtains in modern government in which administrators in various parts of the country account to the various ministries and the Presidency for revenue from their respective administrative units.

(35). See, ANYANGWE, op. cit., note 5: pp. 11-19.

(36). The authority of the "fons" and "Emirs" was sacred. See, NZEKA, op. cit., note 10: pp.28-29, 79-83; EYONG-ETAH and BRAIN, op. cit., note 6: p. 26. Cf. EYONGETAH et al., op. cit., note 1: p.11.

(37). See, ARDENER, op. cit., note 11: pp. 21-53, 68-74, 102-106. Cf. ANYANGWE, op.cit., note 5: pp. 14-15.

Such temporary visits were followed by treaties of commerce and friendship. Thereafter, a kind of protectorate, concealed under a form of an unequal alliance between German traders on the one hand, and British traders and missionaries, on the other. This lead to delimitation of spheres of influence and a declaration of the rights of priority over the spheres."[38] Germany was the first European country to administer Cameroon, having declared a protectorate over the "territory" in 1884.

The declaration of a German protectorate in Cameroon marked the end of a period of long-stretched rivalry for territorial gains between Britain and Germany.[39] Although a discussion on German Cameroon is not intended in this work,[40] some salient points about German administration are worth mentioning. Especially as the embryo of modern system of government in Cameroon, was first laid down by the Germans.

The first Western administrative and economic institutions found in today's government in Cameroon were established during German administration. The large plantations that were opened, factories, railways, roads and administrative houses that were built by the German administrators survived the colonial era. Some are still in use today.[41] The same is true as regards the two - tier judicial and legal systems the country has.

Although a Court of Equity applying some sort of English law had been set up by Alfred Saker in the place he named Victoria as far back as 1858,[42] a structured judicial

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(38). See ANYANGWE, ibid., p. 3.

(39). Germano-British rivalry over Cameroon stretched from 1880-1884. See, ARDENER, op. cit., note 22: pp. 19-25; LE VINE, op. cit., note 1: pp.17-43; RUBIN, op. cit., note 1: pp. 17-43.

(40). For an account on English-German rivalry and German rule in Cameroon, see ARDENER, ibid., pp. 19-25 and 31-40; RUDIN, ibid., pp. 17-43 and Ch. 1, pp. 43-72; EYONGETAH et al., op. cit., note 1: Chs. 15, 16, 17 and 18.

(41). The Prime Minister's Lodge in Buea, which has since unification been used as the residence of the Governor of South West Province, and other administrative buildings in Buea, were built by the Germans. Furthermore, the Botanical Garden in Limbe town, and the plantations now managed by the Cameroon Development Corporation were initially plantations owned by German individuals, nationalised when Britain took over that part of Cameroon which was hitherto, part of German Cameroon. See generally, FIELD, M., The Prime Minister's Lodge Buea, Government Printer, Buea 1960. Cf. ARDENER, E., Historical Notes on the Scheduled Monuments of West Cameroon, Government Printer, Buea, 1965. Cf. EYONG-ETAH and BRAIN, op. cit., note 6 : Ch. 5; RUBIN, op. cit., note 1: Ch. 6.

(42). See generally, ARDENER, op. cit., note 22: pp. 13 and 19. Cf. RUDIN, op. cit., note 1: Ch. 5.

system applying foreign law as the general law of the land did not exist until it was set up by the Germans. S. 4 of the colonial law passed in the German Reichstag in 1900 vested the Kaiser with the power to legislate for its foreign possessions. This law and another law passed in April the same year dealing with consular jurisdiction, provided for the application of German law in its foreign possessions. By 1900 German Civil and Criminal Codes which came into force in Germany in 1896 and 1871 respectively, became applicable in European courts in German Cameroon. Customary law was retained to be applied in intra-native disputes and in certain disputes between "natives" and Europeans. The novelty in this area was Customary Courts which were set up for the first time by Germans for the application of customary law.[43] The two-tier system of administration of justice was the origin of the dual legal and judicial systems the country has today.

Similarly, practical forces were behind the introduction of "Indirect Rule"[44] as an administrative technique in the inaccessible hinterlands of German Cameroon. This administrative policy was inherited partly for the same reasons by the British when Cameroon was divided between Britain and France during the first world war.

The Partition of Cameroon: British Cameroon:

Thirty years of German rule in Cameroon ended with allied defeat of Germany at the end of 1916. With the signing of the treaty of Versailles[45] and later, the establishment of the League of Nations in 1922,[46] Britain and France became the colonial administrators of Cameroon. The treaty of Versailles mandated German surrender of its territories and vested Britain and France with the power to possess them. However, full international legal and administrative powers were only conferred when Cameroon was officially made League of Nations' Mandate under Britain and France per Article 22 of the League of Nations'

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(43). For a discussion on administration of justice in German Cameroon, see, ANYANGWE, op. cit., note 5: pp. 33, 59-60 and Ch. 3. Cf. RUDIN, ibid., pp. 200-206.

(44). This involved administering Cameroon through native rulers and traditional institutions as will be discussed later in the Chapter.

(45). For a discussion on the Treaty, see, LE VINE, op. cit., note 1: pp.125; EYONG-ETAH and BRAIN, op. cit., note 6: p. 95.

(46). For an account on the establishment of the League of Nations and the setting up of the mandate system, see, WIGHT, M., British Colonial Constitutions 1947, Oxford, 1952, p. 265; EYONG-ETAH and BRAIN, ibid., pp. 98-100.

Covenant. The League of Nations regulated the administration of former German colonies by the new powers through a mandate system. The mandate system entailed international supervision of British and French administration of their respective mandates to ensure that the administering powers complied with their responsibility in the Mandate Agreement. They were to administer their respective territories and lead them towards development and eventual self-government.[47]

The end of German rule, and the colonisation of Cameroon by Britain and France, gave birth to two disproportionate[48] mandate "territories" of Cameroon. From then onwards, each sector was administered by a different European country, the administrative policies of which were dictated by circumstances present and experience in colonial administration. Indeed, the history of Cameroon for almost half a century was an integral part of French West African history and that of British Nigeria.

The consequence of this was the development of separate and distinct politico-administrative, economic, legal and judicial institutions in the two parts of Cameroon, each modelled on the institutions of the colonial administrator's home government. Our concern in the discussion that follows and in the rest of the work is on the developments that took place in the part of Cameroon which was under British mandate.[49]

British Colonial Administration:

There is a lot of material available on the British colonial administration of Cameroon.[50] However, in view of the limited space we have for that discussion, we propose to concentrate on the legal and judicial developments in British Cameroon. We will, nevertheless, summarise British colonial policy in Cameroon before looking at the legal and

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(47). Article 2 will be reproduced later, post, p. 13.

(48). The proportion was 1:5 for British Cameroon and French Cameroon respectively. This ratio is a legacy which remains in the current political divisions.

(49). For an account of the administration of French Cameroon, see, GARDENER, D.E., Cameroon United Nations Challenge to French Policy, Oxford University Press, London, New York, Nairobi, 1963, ch. 3; LE VINE, op. cit., note 1: ch. 4.

(50). See generally, CROWDER, M., West Africa Under Colonial Rule, Hutchinson & Co. Ltd., London, 1968; MORRIS, H. F., and READ, J.S., Indirect Rule and the Search for Justice, Clarendon Press, Oxford, 1972; EYONGETAH et al., op, cit., note 1: Chs.10-27; The Report by Her Majesty's Government on the Cameroons for the year 1948, op. cit., note 21: pp. 14-46; cf. RUBIN, op. cit., note 1.

judicial developments.

British Colonial Policy:-

Britain was to administer its part of Cameroon as a mandated territory under the administrative and legislative powers vested in her by article 9[51] of the Mandate Agreement. The article 9 power was to enable the mandatary to discharge the international obligation vested in it under article 2 of the Mandate Agreement. Article 2 provided as follows:

> "The mandate shall be responsible for the peace, order and good government of the territory and for the promotion of the utmost and material well-being and progress of its inhabitants."[52]

British rule in Cameroon from mandate to independence can summarily be described as "passive". Two points are put forward to justify this assertion. First, the colonial government decided to rule British Cameroon as an integral part of Nigeria in which British rule had long existed.[53] The second justification, also connected with the first, is the British colonial policy of ruling its part of Cameroon through indigenous institutions and traditional rulers. These two elements in British colonial rule of Cameroon make up British colonial administrative policy which was referred to as "Indirect Rule". Whereas generally, Indirect Rule simply referred to British administration of its "colonies" through "native rulers" and traditional institutions,[54]in British Cameroon, it comprised the two elements mentioned above. By the provision of the Cameroon under British Mandate Order-in-Council of 1923,[55] British Cameroon was administered as an integral part of two Nigerian Regions. The northern part of British Cameroon was divided and integrated into three Northern

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(51). We shall state the full provision later, post, p. 18.

(52). It became article 76 of the United Nations Trusteeship Agreement when the United Nations Organisation was formed in 1946. When the second world war started in 1935, it was an indication of the failure of the League as a world peace keeping body and marked the end of it. The United Nations Organisation was the international peace keeping body that was formed in 1946 after the war. Under this body, the League of Nations' Mandate territories became Trust Territories under the administration of the former mandataries.

(53). Nigeria had been under British rule since 1862. See, post, Ch. 2, p. 89.

(54). "Native Rulers" and traditional institutions here means those who were charged with traditional political authority, for example, the "chiefs", "fons" or the "Emir" and ruled through indigenous institutions, as seen in an earlier discussion.

(55). Cameroon Under British Mandate Order-in-Council No. 1621 of June 1923.

Nigerian Provinces, while the southern part was an administrative entity in the Eastern Region of Nigeria.[56] This division formed the basis of Indirect Rule in Cameroon, for it was strict in the northern part of British Cameroon and of a hybrid nature in the southern part.

Indirect Rule Stricto Sensu:-

Integrated in the Northern Nigerian administrative system, Northern British Cameroon remained within the pre-colonial traditional administration in the Sokoto Empire. The traditional rulers retained administrative authority exercised through indigenous traditional institutions. Hence, administrative decisions, for example, collection of taxes for the treasury, the responsibility of organising the people for public works (construction of roads and railways) remained the duties of the traditional leader in the kingdom.[57] The "Emirs", the leaders of the administrative units of the Sokoto Empire, were also charged with the duty of providing health services and to maintain peace and security in their areas of jurisdiction. However, colonialism occasioned some changes in the pre-colonial traditional rule of the people.

Unlike in pre-colonial times, an Emir's administration was subject to supervision by colonial administrators resident in the kingdom.[58] However, the role of the colonial administrators in this northern part was solely advisory. Supervision was to ensure that the traditional ruler was advised to teach his subjects that it was in their interest to respect colonial administration. Furthermore, the complete control that the Sultan in Sokoto had over the proceeds in the "treasury" of the various kingdoms in the Empire, was curtailed during Indirect Rule.

Before colonial rule, the "Emirs" were responsible to the Sultan of the Sokoto Empire for the "taxes" collected. During colonial administration, supervision of the finances in the Kingdoms was no longer done by the Sultan. Rather, it became the duty of Colonial administrators resident therein. Colonial residents determined the amount of taxes collected; that to be retained by the "Emirs" as their administrative budget, and the amount that was for the central treasury of the British administration. Colonialism, therefore, engendered a major

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(56). See, article 3 of the Order-in-Council 1923.

(57). See generally, EYONG-ETAH and BRAIN, op. cit., note 6: pp. 36-41.

(58). This refers to the colonial Residents in the Provinces, under whom, were the British District Officers of the three Districts into which northern Cameroon was integrated. There were District Officers resident in each District. See, MORRIS and READ, op. cit., note 50: p. 84; CROWDER, op. cit., note 25: p. 205.

shift in power in the Empire. Power was transferred from the Sultan on whom power was traditionally concentrated, to the "Emirs" who hitherto exercised only the authority delegated to them by the Sultan.

By contrast with the pre-colonial administration in North Cameroon, the "Emirs" became subject to the control of British colonial administrators during colonial rule. In turn, they left daily administration to the "Emirs", subject only to advice from the District Officers. The "Emirs" thus, became semi-autonomous rulers of the respective kingdoms in the Sokoto Empire.[59] This was not the case in the southern part of British Cameroon.

Indirect Rule of a Hybrid:-

Unlike the rulers in Northern British Cameroon, the chiefs in the southern part, especially, in the forest region, were seen as representatives of the colonial government rather than their people. Indirect Rule in that part of British Cameroon was more an administrative principle necessitated by shortage of personnel and resources.[60] Although colonial administrators ruled the people through the chiefs, administrative policies and decisions were made by the colonial administrators and dictated to the local chiefs who were obliged and even coerced[61] to execute the decisions. The position of these rulers as stooges was exacerbated by the fact that some of the "chiefs" were artificial colonial creations.

"Chiefs" were appointed by the colonial administrators to be the native rulers in the areas where Native Authorities had been set up by British administrators as new political units.[62]

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(59). For an account on Indirect Rule in northern Part of British Cameroon, integrated in three northern Nigerian Districts, see generally, CROWDER, op. cit., note 25: pp. 217-218; EYONG-ETAH and BRAIN, op. cit., note 6: Ch.18. Cf. RATTRAY, R.S., Ashanti Law and Constitution, London, 1929, p. ix.

(60). See, MORRIS, H. F., "The Framework of Indirect Rule in East Africa," in MORRIS and READ, op. cit., note 50: Ch.1; See also, ANYANGWE, op. cit., note 5: p. 59.

(61). Chiefs in Southern British Cameroon were stooges. They were dictated on policy matters by the District Officers and were susceptible to flogging if they refused to carry out the District Officers' orders. This trend that started under German rule continued under the British. See, ANYANGWE, op. cit., note 5: p. 27.

(62). Many native administrative units were created by the colonial Residents. Native Councils were set up and one of the members was selected from the councillors to preside over the council as "chief". Such "Chiefs" were given political authority by the colonial administration. See, CROWDER, op. cit., note 25: p. 226. Cf. CHANOCK, M., "Paradigms, Policies and Property: A Review of Customary Law of Land Tenure," in MANN, K., and RICHARDS, R., (eds) Law in Colonial Africa, Heinemann, Portsmouth, N H James Curry Ltd., London, 1991, p. 61 at 64-66.

Consequently, "chiefs" existed who had no traditional status and authority.[63] This explains why the political authority of the administratively appointed "chiefs" was derived from the Native Authority Ordinances[64]under which the Councils[65] were set up, rather than traditionally.[66]

The existence of a hybrid form of Indirect Rule in Southern British Cameroon engendered the political, legal and judicial changes that had occurred in this part of British Cameroon by 1961 when it gained independence. Institutions of modern government modelled on British policies and legal principles had emerged in Southern British Cameroon by the wake of independence.[67] Cameroonian legal and judicial systems which are a reflection of colonial presence are the focus of our discussion in the rest of the Chapter.

C. COLONIAL CAMEROON: LEGAL AND JUDICIAL DEVELOPMENTS:

The current legal and judicial systems in Cameroon emerged from colonialism. On attaining independence as a Federal Republic, dual systems of administration of justice and a two-tier legal system were inherited. These were on the one hand, a legal system made up of Western-type laws and customary law. On the other hand, a court structure made up of Western judicial institutions and Customary Courts. In the discussion that follows, we intend to examine two main issues. First, we shall briefly trace the development of the judicial system. Second, we will treat the legal machinery in Cameroon. Our examination of the second point will not be a general discussion on the laws that make up the legal system. Rather, the discussion shall be based on received English laws and the effect of such

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(63). For, chieftaincy in these tribes is acquired by succession. See, ARDENER, op. cit., note 11: pp. 73-74 and 79-80.

(64). For example, the Native Authority Ordinance 1923.

(65). Established councils which formed multiple administrative units made up what was known as Native Authorities through which colonial administrators ruled. The powers of the Native Authorities were stated in the Native Authority Ordinance. Supra, note 64.

(66). For discussions on Indirect Rule in Southern British Cameroons, see earlier references at note 50.

(67). For an account on the constitutional developments, see, EYONGETAH et al., op. cit., note 1: Chs. 24, 25, 26; MONIE, J.N., The Development of the Laws and Constitution of Cameroon, Ph.D Thesis, University of London, 1970, Chs. II and III (Unpublished). See also, NTAMARK, P.Y., Constitutional Development of the Cameroons since 1914. Ph.D Thesis, University of London, 1969, Ch.7. (Unpublished).

reception on customary law.

Development of the Cameroonian Judicial System:

The annexation and colonisation of Cameroon by Germans, British and French respectively, distorted the pre-colonial system of administration of justice, which was based on customary law and indigenous informal procedure. Colonialism engendered the presence of foreigners in an area which in pre-colonial times, was inhabited by the "natives" whose customs formed customary law(68) which governed the people. Having acquired international powers to administer Cameroon, the colonial countries brought with them their laws and judicial institutions.

The vestige of German law(69) which was the first attempt at introducing national law during almost thirty years of German rule, was wiped out during French and English colonial rule in Cameroon. The development of today's judicial institutions and the legal system took place during British and French colonial rule in Cameroon between 1924 and 1954. Undoubtedly, the judicial system in Cameroon today, is modelled on the institutions of France and Britain.

The legal basis for the importation of the British and French institutions and legal principles was article 9(70) of the Mandate Agreement on Cameroon under British and French administration. It provided as follows:

> "The mandatary shall have full powers of administration and legislation in the area subject to the mandate. The area shall be administered in accordance with the laws of the mandatary as an integral part of its territory. ... The mandatory shall, therefore, be at liberty to apply its laws to the territory under the mandate subject to the modifications required by local conditions ...."

On the basis of this provision, British and French law, as well as judicial institutions

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(68). For a definition of customary law as that emanating from tribal customs, see, ALLEN, op. cit., note 26: pp. 69 and 70 at note 1.

(69). For an account on the influence of German law in Cameroon see, MONIE J.N., "The Influence of German Law in Cameroon," Annales de la Faculté des Droit et des Sciences Economies, Universite de Yaounde, Vol. V., 1973, p. 3.

(70). This became art. 5 of the United Nations Trusteeship Agreement on Cameroon Under British and French administration. See our earlier summary on this change, supra, note 52.

were introduced in Cameroon.[71] In British Cameroon, this was done in the form of Orders-in-council, and English statutes re-enacted in the "territory" by the Governor[72] as local legislation. Although the article was silent about the status of already existing customary law,[73] the mandatary allowed the continuous application of customary law subject to the repugnancy and consistency tests, which will be discussed later in the Chapter.

Hence, a two-tier system of administration of justice was developed. European courts were established in which English law was primarily[74] applied and native courts were exclusively for the application of customary law. The following discussion will trace the development of this double court system.

The Judicial System:

A major change that occurred in the domain of administration of justice in colonial Cameroon was the introduction of formal judicial institutions. Formally structured courts were set up to dispense European and "native" justice. Today's court system which was initially set up in 1924, reached the stage of maturity that was inherited on independence after four changes had been made in the judiciary in British Cameroon and Nigeria. This took place between 1924 and 1961. Two types of courts were developed by the mandatary. These were: Western-type courts on the one hand, and, Customary Courts, on the other.

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(71). Cf., ANYANGWE, op. cit., note 5: p. 46 , paras. 4 and 5.

(72). The Governor stationed in Lagos in Nigeria was the representative of the British Government in Nigeria and the British Trust Territory, Southern Cameroon. For an account on the administrative structure, and law-making by the Governor, see, CROWDER, op. cit., note 25: pp. 205, 215-217; WIGHT, op. cit., note 46: p. 83. See also, ANYANGWE, op. cit., note 5: p. 58.

(73). Cf. Article 5 of the Mandate Agreement: "In framing of laws relating to holding and the transfer of land, the mandatary shall take into consideration native laws and customs and shall respect the rights and safeguard the interests of the native population." Cited in ANYANGWE, ibid., p. 64.

(74). The European courts were ordered to take account of customary law in a case where a native was involved. For example, disputes between natives and Europeans were decided in European courts if it appeared that it will be unjust for the European if it was tried in a Customary Court. See, S. 27 (1) (2) (3) of the Southern Cameroons High Court Law 1955. We shall return to the Southern Cameroons High Court Law later, post, p. 44.

Evolution of Customary Courts:-

Customary Courts[75] in British Cameroon were set up under the Native Courts Ordinance No. 5 of 1918, although they did not exist till 1924. The ordinance laid down the basic structure of[76] and procedure to be followed in Customary Court hearings, as well as the law applicable.[77] Thus established, the basic structure of Customary Courts remained unaffected by subsequent changes made in the judicial system that were made between 1924 and 1954. However, there was a gradual reduction of the civil and criminal jurisdiction of these courts which was brought about by judicial re-structuring.

Although, Customary Courts that were set up under the 1918 Native Courts Ordinance were classified into grades A, B, C and D, no Customary Court of grade A had been established in British Cameroon by 1933.[78] The limited jurisdiction of Customary Courts in British Cameroon is, therefore, explained by the lower legal status of the Customary Courts that until 1933 existed there. Grade C and "D"courts had limited jurisdiction than Grade B courts. In criminal matters, Grade B courts had jurisdiction over offences punishable by imprisonment of up to one year, a fine of up to £50 and whipping of up to twelve strokes. In civil cases, their jurisdiction was over cases involving a claim for up to £100. By contrast, the jurisdiction of Grade C and D courts in criminal matters (in cases of theft of food stuff and live stock, Grade C courts could imprison for up to twelve months) was limited to offences punishable with imprisonment of not more than six months and three months respectively or a fine of up to £10 or whipping of up to twelve strokes for Grade C courts, and a fine of up to £5 or whipping of up to twelve strokes for Grade D courts.[79]

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(75). Customary Courts before 1964 were commonly referred to as "Native Courts." The Adaptation of Existing Laws Order 1963, substituted the name "Customary Courts" for Native Courts", and "Customary Courts Ordinance" for "Native Courts Ordinance." This Order was brought into operation by West Cameroon Legal Notice No. 23 of 1964.

(76). The Courts that were set up in Nigeria and Cameroon were of Grades A, B, C and D. However, there were no courts of Grade A in British Cameroon. Grade B courts were native appeal courts and decisions of Customary Courts were subject to review by the resident administrative officer. See, ANYANGWE, op. cit., note 5: p. 71.

(77). See generally, ALLOTT, A.N., EPSTEIN, A.L., and GLUCKMAN, M., Ideas and Procedures in African Customary Law, Oxford University Press, 1969, pp. 14, 32-24.

(78). By 1933, sixty-four Customary Courts of grades B,C and D had been established. See, ANYANGWE, op. cit., note 5: p. 71.

(79). Ibid., pp. 71-73.

Grade B courts were mainly appellate courts for appeals from Grade C and D Customary Courts. From Grade B courts, further appeals lay to the District Officer, then to the colonial Resident in Buea. The Governor in Lagos was the ultimate appellate jurisdiction for Customary Court cases.[80] Customary Courts were also required to keep records of their proceedings even before the Native Courts Ordinance of 1948 was enacted. Hence, keeping of record was introduced in Customary Courts and in consequence, the use of such records as evidence in Customary Court proceedings.[81]

The Native Courts Ordinance (Cap 142 of the Laws of the Federation of Nigeria) 1948, is the legal basis under which Customary Courts that were inherited in British Cameroon at the wake of independence were set up. The Southern Cameroons Customary Court Law 1956, that was to provide an independent legal basis for the operation of Customary Courts in British Cameroon after 1956 never came into force.[82]However, recommendations made therein, such as, the change of name from "Native Courts" to "Customary Courts" and the new Customary Court structure envisaged in the 1956 Law which has been discussed earlier,[83]were put into operation.[84] Therefore, the Native Courts Ordinance (Cap 142 of the Federation of Nigeria) 1948, continued to apply in British Cameroon even after an independent judiciary had been established[85]in British Cameroon in 1954.[86] Although,

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(80). Ibid., p. 71. Cf. Report by His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland on the Administration of the Cameroons Under British Mandate for the Year 1936, H.M.S.O., London, 1937, p. 56. It will be referred to hereinafter simply as "Report by His Majesty's Government on the Cameroons for the Year 1936".

(81). Each court was required to keep a Judgement book, a Cash book and, a Cause book. We shall return to this later in the Chapter.

(82). On the development of an independent legislature for Cameroon in 1956, the Southern Cameroon Customary Court Law 1956 was assented to but never came into force. It was never published in the Gazette, which was a condition precedent to its entering into force as provided in S. 1 of the 1956 Law. See, ANYANGWE, op.cit., note 5: p. 75. Cf. Report by Her Majesty's Government in the United Kingdom of Great Britain and Northern Ireland to the General Assembly of the United Nations for the Year 1956, H.M.S.O., London, 1957, pp. 35-36. Reference to subsequent volumes of this report will simply be "Report by Her Majesty' Government on the Cameroons for the Year..."

(83). Supra, note 82.

(84). See, Report by Her Majesty's Government on the Cameroons for the Year 1960, H.M.S.O., London, 1961, p. 25 at para. 117.

(85). This was confirmed in the decision of Jesco Manga-Williams v. The President, Native Court, Victoria, (1962-64) W.C.L.R. 34.

therefore, the 1954 judicial reorganisation created a new legal basis for the application of English law in statutory courts, as will be discussed, Customary Courts which had been newly restructured,[87] remained within the legal framework of the Native Court Ordinance (Cap 142).

The Native Court Ordinance (Cap 142 of the Laws of the Federation of Nigeria) 1948 was retained in the newly created judicial system in British Cameroon by the Adaptation of Existing Laws (Customary Courts Ordinance) Order 1963.[88] Another significance of the 1963 Order was that it substituted the name "Native Courts Ordinance" with "Customary Courts Ordinance". This was to conform with the change in name from "Native Courts" to "Customary Courts" which, as stated earlier, was already in operation. The Customary Courts Ordinance as amended,[89] is now found in the Customary Courts Manual for Practice and Procedure of Court Clerks, Volume 1. The provisions in the Manual are now referred to as the Customary Court Rules 1965, which will be discussed in Chapter Three. The Manual is in the possession of all Customary Courts in the part of Cameroon which was under British rule.

Customary Court Procedure:-

A major characteristic of colonial Customary Courts is the absence of trained legal personnel in Customary Court procedure. This feature is today a colonial legacy in the

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(86). Post, p. 24.

(87). Under the new structure, Customary Courts were divided into Grade A, B, and C. In civil matters, such as marriage, land and succession issues, all three Grades of courts had jurisdiction over matters with a suit value of up to £200, while matters with suit values of up to £100 and £50 were under the jurisdictions of Grade B and C courts respectively.

In criminal matters, the jurisdiction of Grade A courts was over offenses punishable by imprisonment of up to one year, six strokes or fine of £50 or its equivalence in customary law. Grade B courts had jurisdiction over cases attracting a penalty of six months imprisonment, six strokes or a fine of £30. For Grade C courts, the jurisdiction of Grade B courts was reduced by half, with the exception of strokes which remained six. See, ANYANGWE, op. cit., note 5: p. 76. Cf. Report by Her Majesty's Government on the Cameroons for the Year 1956, op. cit., note 82: p. 36, para. 167.

(88). The Order was brought into operation by West Cameroon Legal Notice No. 119 of 1965.

(89). By the Customary Courts (Amendment) Law No. 5 of 1959.

Customary Courts in the part of Cameroon which was under British colonial administration.[90] It has been advanced that the determination to avoid prolonged and complicated Customary Court proceedings underlies the decision of the British colonial government to exclude trained legal personnel from these courts.[91] Colonial Customary Courts were, thus, presided over by British administrators. For example, the District Officer sat in sessions with two assessors who were "natives". Proceedings were brief and customary law was proven by oral evidence from experts in local customs. These were mainly village elders who were seen to possess a good deal of knowledge of their tribal customs and who by virtue of their long and uninterrupted stay in their natal villages, are likely to have witnessed the happening of many events. Sometimes, opinions of village chiefs were sought. Documentary evidence was also admissible[92] in proof of customary law, except in such matters over which the courts were required to take judicial notice.[93]In this regard, S. 58 of the Evidence Act of the Federation of Nigeria 1948 provides: "In deciding questions of native law and custom, the opinions of the native chiefs or other persons having special knowledge of native law and custom and any book or manuscript recognised by the natives as legal authority are relevant."

Jurisdiction of Customary Courts:-

Classified into Grades A, B and C, the civil and criminal jurisdictions of Customary Courts varied depending on the grade, with Grade A courts having jurisdiction in matters of a more serious nature. All three grades, however, had full jurisdiction in matters relating to land inheritance, testamentary dispositions, administration of estates and matrimonial cases. The civil jurisdiction of Customary Courts did not, however, extend to matrimonial matters if they arose from or were connected with christian marriages. Furthermore, Customary Courts did not have jurisdiction to try certain crimes, such as, homicide, treason, sedition, counterfeiting, trial by ordeal, slave dealings, child stealing, obtaining goods by false

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(90). See, ANYANGWE, op. cit., note 5: p. 73. This information is supplemented by my observation during field work in the Customary Courts of Kumba, Kombone, Mbonge, Tombel and Bekondo in 1990.

(91). Ibid., p. 77.

(92). See generally, ALLOTT., et al., op. cit., note 77: pp. 14, 23-24; ANYANGWE, op. cit., note 5: pp. 240-241.

(93). S. 73(1)(2) of the Evidence Act of Nigeria 1948, provides for judicial notice.

pretences, offences against public revenue, offences relating to the post and telegraph or railway, official corruption, rape, defamation, perjury.[94] The criminal jurisdiction of Customary Court was limited to simple offences. Basically, nearly all offences had been brought under the jurisdiction of statutory courts.

Throughout the colonial period, Customary Courts were left with more limited criminal jurisdiction than they had had in pre-colonial times. Even in its diminished state, the criminal jurisdiction of Customary Courts only lasted till 1977, ten years after the introduction of national criminal law.[95]Ordinance No. 72/4 of August 1972 which re-organised the Cameroonian judiciary after unification, introduced a uniform courts system in the country. S. 26 (as amended by Ordinance No. L.B 344/Vol/1/69 of February 1973) provided that all crimes committed in the country were to be brought under the jurisdiction of national law and statutory courts. To date, crimes committed in villages are subject to official reports to the nearest police station.

In practice, however, many offences committed in villages are still settled by village chiefs and village elders in trials held in the village Hall or chief's house. Whereas some of the offenses are trivial, others are serious crimes, such as, rape and even murder. The writer was a witness to a rape trial in the house of the Chief of Matoh Butu village during field work in June 1990. An adult male was brought before the village Council and charged with the rape of a girl aged ten. The victim was present in the trial, accompanied by her mother and her mother's sister. After much pressure, the accused man admitted having raped the victim and pleaded for mercy and forgiveness. This was an offence which had to be reported to the nearest police station in the town of Kumba (some hundred kilometres away). The initial reaction of the chief and his Council after the "defendant" pleaded guilty was to take him to the police station. Nevertheless, this intention was not materialised. This was partly because the village Council did not have money, as reported by its treasurer, to enable transportation of the "defendant" to the town were the police station was. Another reason was that the victim's impoverished mother wanted immediate financial compensation. After

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(94). See generally, ANYANGWE, op. cit., note 5: p. 76.

(95). The Cameroonian Penal Code, Book II came into force in 1967. Although there is no specific provision in the Code repealing the criminal jurisdiction of Customary Courts, in principle, they ceased exercising it in 1967. For the controversy on this issue, see, ANYANGWE, op. cit., note 5: p. 78.

conferring with his Council, the then Chief Elangwe Titus sanctioned the "defendant" to pay a fine of 5.000frs. CFA (until the recent devaluation of the franc CFA, was about £10). This was the amount demanded by the victim's mother. On paying the fine, the offender was warned not to offend again and was set free.[96]

Development of Statutory Courts:-

Statutory courts existing in Cameroon today are modelled in structure and procedure after the courts in Britain and France.[97]The reason being that statutory courts were introduced during colonial administration of Cameroon by Britain and France. The judicial system, since 1972, when a unified court system was introduced in Cameroon is made up of a hierarchy of statutory courts. Starting with courts of appellate jurisdiction, the four[98] courts include: The Supreme Court in Yaounde, the Court of Appeal situated at Provincial headquarters[99] the High Court set up at Divisional levels, and the Court of First Instance or Magistrates' Court. This structure which is now provided in S. 12 of the 1972 judicial organisation Ordinance, had been established in British Cameroons by 1954 when the last colonial re-organisation of the judiciary was made.

The Nigerian Constitution Order-in-Council of 1954 regionalised the judiciary in Nigeria and British Cameroon. It created an independent judiciary in British Cameroon which before the 1954 constitutional change,[100] was under Nigerian judiciary.[1] Hence, the High Court

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(96). The discussed reality of settling crimes in villages is not peculiar to Cameroon. Other writers have had similar eye-witness experiences elsewhere in Africa. See, SEVAREID, P., "The Future of Customary Law," (1983) xiv: 1 Africana Journal 34 at pp. 39-40.

(97). For an account on the presence of the French judicial system in Cameroon, see, ANYANGWE, op. cit., note 5: Ch.7, p. 94.

(98). These courts are courts with ordinary jurisdiction. See generally, ANYANGWE, ibid., pp.164-175. There are also, courts with special jurisdiction restricted to certain classes of people. Ibid., pp. 176-179.

(99). There is one court situated in each Province. Hence, the two Provinces in ex-British Cameroon have two Courts of Appeal.

(100). The Nigerian Constitution of 1954 (Littleton Constitution) gave Southern Cameroons quasi-federal status and it became known as "the Southern Cameroons". It had a House of Assembly and an Executive Council and, six Southern Cameroonians now sat in the Nigerian House of Representatives. See, EYONG-ETAH and BRAIN, op. cit., note 6: Chs. 20 and 21. Cf. Report by Her Majesty's Government on the Cameroons for the Year 1956, op. cit., note 82: p. 33 at para. 153.

(1). Southern Cameroon was under the jurisdiction of courts in the Eastern Region of

and Magistrates' Courts that existed in British Cameroon at the wake of independence were established in 1955. The two types of statutory courts were set up under the Southern Cameroons High Court Law of 1955 and the Magistrates' Courts (Southern Cameroon) Law 1955, respectively. These two enactments formed the legal basis for the operation of the High Court and Magistrates' Courts in former British Cameroon in the post - independence era before unification in 1972.

The High Court and Magistrates' Courts exercised original jurisdiction concurrently, depending on the level of damages involved or the gravity of the crime.[2] Crimes of a more serious nature or civil matters involving high damages were under the jurisdiction of the High Court. The jurisdiction of the Magistrates' Courts was limited to civil and criminal cases which were not within the jurisdiction of the High Court. These concurrent original jurisdictions of the two courts exist to date. However, in addition to the High Court's original jurisdiction, it was appellate court for appeals made from Magistrates' Courts.[3] The appellate jurisdiction of the High Court no longer exists.[4] Similarly, Magistrates' Courts which, under the legal framework established in 1955, were vested with appellate jurisdiction over appeals from Customary Courts, no longer have that jurisdiction. Appeals from Customary Courts are currently heard in the Court of Appeal in the Province where the Customary Court is situated in accordance with S. 22(1) of the 1972 Ordinance on judicial organisation. Similarly, appeals from the High Court now lie in the Court of Appeal in the Province where the High Court is situated. Appeals from the Court of Appeal are heard in the Supreme Court in Yaounde as provided by S. 5 of Law No. 72/26 of December 14 1972 which modified certain provisions of the 1972 Ordinance on judicial organisation.[5] This was not the case when the High Court was established in 1955.

Despite the creation of an independent judiciary in Southern British Cameroons in 1954, appeals from the High Court in Southern British Cameroons were entertained in the

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Nigeria. before the 1954 change.

(2). See ANYANGWE, op. cit., note 5: pp. 78-79.

(3). The Southern Cameroons High Court Law 1955 and S. 54 of the Southern Cameroons Constitution Order-in-Council, 1960. See, The Report by Her Majesty's Government on the Cameroons for the Year 1956, op. cit., note 82: p. 34.

(4). We shall be discussing the High Court later.

(5). In practice, however, the two Courts of Appeal in the two Provinces in ex-British Cameroon may be said to be the final appellate jurisdictions for appeals from the two Provinces respectively. See, ANYANGWE, op. cit., p. 2, note 5: p. 169.

Federal Supreme Court in Nigeria. The Privy Council[6] was the final court of appeal.[7] The Supreme Court in Nigeria retained jurisdiction over appeals from Southern British Cameroons until independence and unification in 1961, when a Supreme Court was set up in the newly created state of West Cameroon. Ordinance No. 62/OF/9 of October 1961 created the new Supreme Court of the State of West Cameroon and, the High Court which had been set up by the Southern British Cameroons High Court Law 1955 was absorbed into it.[8]

The court structure discussed above was the result of a lengthy period of judicial development that took place for about thirty-two years during colonial rule. The first set of statutory courts were set up in 1924 under the legal framework of the Supreme Court Ordinance No. 6 of 1914 and the Provincial Courts No.7 of 1914. The two ordinances created the Supreme Court of Nigeria[9]and the Provincial Courts respectively. None of these courts was established in Southern British Cameroons. However, the Provincial Court for the Eastern Nigerian Region in which Southern British Cameroons was a political entity had original jurisdiction over civil and criminal matters[10] occurring in Southern British

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(6). The Judicial Committee of the Privy Council was a superior court which acted as the final Court of Appeal for cases from all courts in the British Empire, excluding those from, England, Scotland and Northern Ireland. For an account on the Privy Council, see, BARNETT, H., Colonial Justice, the Unique Achievement of the Privy Council's Committee of Judges, Bowes & Bowes, London, 1961, cited in ANYANGWE, ibid., p. 82; RANKIN, G., "The Judicial Committee of the Privy Council,"(1939) 7 Cambridge Law Journal 2.

(7). No Cameroonian appeals are known to have been made to the Privy Council since very few appeals were even made to the Nigerian Supreme Court. Hence, the then High Court in Buea (the capital of the state of West Cameroon) was the final Court of Appeal. This was engendered by practical reasons. See, ANYANGWE, ibid., p. 82. Cf. The Report by His Majesty's Government on the Cameroons for the Year 1936, op. cit., note 80: p. 55 at para. 143. Cf. Report by Her Majesty's Government on the Cameroons for the Year 1956, op. cit., note 82: p. 33 at para. 153.

(8). ANYANGWE, op. cit., p. 2, note 5: p. 146.

(9). Established in Lagos with original jurisdiction limited to Lagos, its appellate jurisdiction was limited to areas branded as Supreme Court Areas, which did not cover Southern Cameroons.

(10). By SS. 11 and 12 of the Provincial Courts Ordinance, 1914, the Provincial Courts exercised complete jurisdiction over natives and non-natives. With no legal practitioners allowed, and presided over by the Resident of each Province, the civil jurisdiction of these courts was limited to cases in which damages payable did not exceed fifty pounds. In criminal matters, their jurisdiction was over cases attracting a sentence of up to two years imprisonment or fifty pounds fine. See S. 22 of the Ordinance, (cited above) which required confirmation from the Governor by these courts before passing certain sentences. See, ANYANGWE, op. cit., p. 2, note 5: p.

Cameroons. This structure lasted till the 1933 ordinances were passed which re-organised the judiciary.

The four Ordinances of 1933[11] abolished Provincial Courts, replacing them with the High Court and the Magistrates' Courts. These new courts were set up under the Protectorate Courts Ordinance No. 45 of 1933. The court system was thus, composed of the Supreme Court, on the one hand, and the High Court and the Magistrates' Courts, both referred to in the Ordinance No. 45 of 1933 as Protectorate Courts. The High Court and the Supreme Court were superior courts with concurrent original jurisdictions.[12] Appeals from Magistrates' Courts were made to the High Court, whereas those from the High Courts lay to the West African Court of Appeal.[13] Before 1943, none of these courts existed in Southern British Cameroons. Cases in Southern British Cameroons which fell under the jurisdiction of statutory courts (these were civil and criminal matters which were out of customary court jurisdiction) were heard in one of the Protectorate Courts, depending on the type of offence or the level of damages. In addition, District Officers in each District had full powers of a Magistrate. Other administrative officers had limited powers over minor offences.[14] Judicial re-structuring in 1943 led to the setting up of a statutory court in Southern Cameroons. The Magistrates' Courts Ordinance No. 24 of 1943 abolished the High Court,[15] creating a chain of Magistrates' Courts. Unlike the Magistrates' Courts established in 1933, the new Magistrates' Courts had a magisterial district in Southern British Cameroons. The

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(11). They were: The Supreme Court (Amendment) Ordinance No. 46 of 1933; the Protectorate Courts Ordinance No. 45 of 1933; the West African Court of Appeal Ordinance No. 47 of 1933, and the Native Courts Ordinance No. 44 of 1933.

(12). Probate, matrimonial causes, admiralty divorce suits, were reserved to the Supreme Court which was largely confined in Lagos. The High Court tried indictable offenses, in particular, with a jury of twelve. Unlike the Supreme Court and the High Court, the Magistrates' Court was a court of summary jurisdiction. In civil matters, its jurisdiction was limited to cases with a suit value of a hundred pounds and in criminal cases, to imprisonment of up to one year or a fine of a £100. See, ANYANGWE, op. cit., p. 2, note 5: p. 72.

(13). West African Court of Appeal Ordinance No. 47 of 1933.

(14). See, Report by His Majesty's Government on the Cameroons for the Year 1936, op. cit., note 80: p. 49 at paras. 130 and 132.

(15). The 1933 judicial reorganisation was unsatisfactory as it created a High Court which, although distinct from the Supreme Court, had the concurrent jurisdiction. See, ANYANGWE, op. cit., p. 2, note 5: p. 73.

Magistrates' Courts Ordinance No.24 of 1943 also extended the appellate jurisdiction of the Supreme Court in Nigeria to Southern British Cameroons.[16]

The new Supreme Court was a superior court in which appeals from Magistrates' Courts lay. The West African Court of Appeal retained jurisdiction over appeals from the Supreme Court, with the Privy Council as the final appellate court.[17] Hence, from 1943, the judiciary had a hierarchy of two courts: The Supreme Court in Nigeria as appellate court for appeals from Nigeria and Southern British Cameroons, on the one hand. The Magistrates' Courts, on the other hand, set up in Districts in Nigeria and Southern Cameroons, exercised original jurisdiction. This structure remained till the 1954 judicial re-structuring which created an independent judiciary[18] in Southern British Cameroons. The court structure after 1954 re-organisation has been discussed earlier. The 1954 changes re-established the High Court as a superior court of record.

The High Court:-

The constitutional powers of the High Court in the English-speaking part of Cameroon are based on the Southern Cameroons High Court Law 1955, under which law the High Court of Southern Cameroons was set up.[19] SS. 7 and 8 of the Southern Cameroons High Court Law 1955[20]vested the High Court with the following powers:

> To exercise "all the jurisdictions, powers and authorities, other than admiralty jurisdiction vested in or capable of being exercised by her Majesty's High Court of justice in England."

These included all the civil and criminal jurisdictions respectively which were exercisable by the High Court in England before the 1955 High Court Law was passed.

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(16). The appellate jurisdiction of the Supreme Court did not extend to cases concerning land tenure, family status, guardianship of children and testamentary dispositions under customary law.

(17). The Privy Council entertained as of right Appeals from the West African Court of Appeal in cases which involved a pecuniary value of over £500.

(18). For an account on the judicial developments in ex-British Cameroon, see, ANYANGWE, op.cit., p. 2, note 5: Ch. 6.

(19). Despite the development of a unified judicial system in 1972, as discussed earlier, the two parts of Cameroon which united retained their pre-unification judicial institutions. See, post, p. 30.

(20). The Southern Cameroons High Court Law 1955 will hereinafter be referred to simply as "the 1955 High Court Law".

At the centre of the Southern Cameroons High Court civil jurisdiction under S. 7 were and still are issues relating to probate, divorce and matrimonial causes arising from statutory marriages. The High Court did not have original jurisdiction over such matters if they arose from a customary marriage, as such matters fell under the original jurisdiction of Customary Courts. The original jurisdiction of the High Court in civil matters was, therefore, limited: it did not extend to issues such as marriage, family status, guardianship of children, inheritance or disposal of property on death, if they arose from a customary marriage. The civil jurisdiction of the High Court was further limited by the exclusion of land under the High Court's original jurisdiction in S. 7. Matters dealing with title to land were left to be regulated by customary law.[21] However, S. 9 of the 1955 High Court Law provided an exception to the limitation placed on the High Court's original jurisdiction in civil matters.

Under S. 9 of the 1955 High Court Law, the High Court could entertain matters excluded from its original jurisdiction which were under the original jurisdiction of Customary Courts, if they were transferred from a Customary Court. Beyond such cases of transfer, the High Court could only deal with customary matters under its appellate jurisdiction. The High Court had appellate jurisdiction over appeals from Customary Courts. In exercise of its appellate powers and its original jurisdiction over customary issues in cases of transfer, the High Court was given two directives. When dealing with customary matters transferred from Customary Courts, the High Court was directed to observe customary law. Similarly, in exercising its appellate jurisdiction over customary matters, the High Court was enjoined to enforce the observance of customary law. In this regard, S. 27(1) of the 1955 High Court Law provides thus:

> "The High Court shall observe and enforce the observance of every native law and custom which is not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication, with any law for the time being in force, and nothing in this law shall deprive any person of the benefit of any such native law or custom."[22]

Customary law was applicable in matters where the parties were "natives". It was also applied in matters between "natives" and non-"natives" if it appeared that substantial injustice would

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(21). See, The Report by Her Majesty's Government on the Cameroons for the Year 1956, op. cit., note 82: pp. 33-34, para. 154.

(22). The discussion on S. 27(1) shall be pursued later in the Chapter.

be done to either party by a strict adherence to the rules of English law. The High Court could apply English law in such cases only if it appeared expressly or impliedly from the transaction that the parties had agreed that the particular transaction be strictly regulated by English law, or still, if it appeared that the particular transaction was unknown in customary law.[23]

Besides the exceptions discussed above, the High Court's original civil jurisdiction was limited to matters arising from statutory marriages. The original jurisdiction of the High Court over statutory marriage divorce; custody and other matrimonial causes arising from statutory marriages continued to exist after independence. Article 46 of the 1961 Constitution of the Federal Republic of Cameroon stipulated the continuous application of pre-unification laws which were in force in East and West Cameroon and had not been expressly repealed by federal law. On the creation of a uniform judicial system in 1972 when Cameroon became a United Republic, article 38 of the 1972 Constitution replaced article 46 of the 1961 Constitution. The High Court's civil jurisdiction under the 1955 High Court Law was thus, kept alive under Article 38 of the unitary Constitution. This High Court jurisdiction is currently provided in 16(1) of the Law No. 89/017 of July 28 1989.[24]

Divorce and custody matters in Cameroon are under the original jurisdiction of Customary Courts and the High court depending on the nature of marriage. Statutory marriages fall under the original jurisdiction of the High Court, the law governing it being statutory law of Western origin. The introduction of statutory law and its effect on indigenous customary law is our next topic for discussion.

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(23). See, The Report by Her Majesty's Government on the Cameroons for the Year 1956, op. cit., note 82: p. 34 at para. 154.

(24). The Ordinance amended certain provisions of the 1972 Ordinance on judicial reorganisation. For an account on the current operation of the High court in Cameroon, see, ANYANGWE, op. cit., p. 2, note 5: pp. 166-167.

The Cameroonian Legal System:

The body of law that makes up the Cameroonian legal system is a combination of Western law and customary law.[25] Western law includes Western-type laws and received Western laws. The Western-type laws are locally enacted laws. For example, parliamentary legislations,[26] presidential ordinances,[27]decrees and regulations,[28] and case law. Western received laws are constituted of applicable English and French laws.[29] Also are included international conventions to which Cameroon is a signatory.[30] Customary law obtaining in the various tribes co-exists with the Western-type laws and Western received laws in the legal system. Despite the survival of customary law in the legal system, the introduction of a national law of Western origin effected changes in indigenous Customary law and the pre-colonial system of administration of justice.[31] These changes will be elaborated on later in the Chapter.

The purpose of this discussion is not to make an exposition of the laws that make up the legal system.[32] Rather, it is to analyse the mechanism by which foreign law was introduced and the impact of this received law on indigenous customary law.

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(25). The term customary law refers to the body of indigenous tribal laws which were known during the colonial period as "native law and customs". We shall be treating customary law later in the Chapter.

(26). Article 20 of the 1972 Constitution of the Republic of Cameroon as subsequently amended empowers the National Assembly to make laws in specific areas indicated there in. See, ANYANGWE, op. cit., p. 2, note 5: pp. 207-208.

(27). Article 21 of the 1972 Constitution makes provision for the National Assembly to delegate its legislative powers under article 20, to the President of the Republic to make laws even in the domain under the legislative authority of the Assembly.

(28). Article 9(9) of the Constitution as amended subsequently empowers the President of the country to issue as decrees, statutory rules and regulations in the areas reserved for the Assembly, under delegated legislative powers in article 21.

(29). French received laws are in force in ex-French Cameroon. For a discussion on this, see, ANYANGWE, op. cit., p. 2, note 5: pp. 224-227.

(30). For coverage of local statutory laws, see, FONKAM, A. S., State Regulation of Private Insurance in Cameroon, Ph.D. Thesis, University of London, 1980, ch. 2. (Unpublished); ANYANGWE, ibid., Ch. 13.

(31). ALLOTT, A. N., "The future of African Law," in KUPER, H., and KUPER, L., African Law: Adaptation and Development, Berkeley and Los Angeles, 1965, p. 211 at 220; ALLOTT, A N., New Essays in African Law, Butterworths, London, 1963, p. 11.

(32). This has been treated in a work cited earlier, supra, note 30.

Reception of English Law:-

Article 9 of the Mandate Agreement for Cameroon Under British and French Mandate was the legal basis for importation of English and French laws in Cameroon. In order to administer their "territories", Article 9, which had been reproduced in an earlier discussion,[33] gave the mandatary legislative powers. The implication of such powers was to extend the laws of the mandate power to the mandated territory. Southern British Cameroons received English law through Nigeria, to which country British Cameroons was integrated. The imported law was to provide uniform territorial rules, based on universalistic norms, which apportion rights and obligations as consequences of specific transactions rather than fixed statuses. These are some of the features of modern national law[34] which are absent in customary law, the only law that existed in pre-colonial Cameroon.

Before 1955, there was no basis in specifically Cameroonian legislation, for the application of English law in British Cameroons. The Nigerian Supreme Court Ordinance No. 6 of 1914 made provision for application of English law in Nigeria. This included British Cameroons as it was part of the Eastern Region of Nigeria. By 1955, British Cameroons had an independent judiciary and the 1955 High Court Law became the new legal basis for the application of English law in Southern British Cameroons. Hence, it was the first Cameroonian legislation to enable the application of English law in British Cameroons.

The content of applicable English law, and the circumstances under which it was to be applied were stated in sections 10, 11, and 15 of the Southern Cameroons High Court Laws 1955. These provisions are to date, in force in the English-speaking part of Cameroon.

Content of received English law:-

Section 11[35] of the Southern Cameroons High Court Law 1955 is generally referred to as the enabling clause. It provided the quantum of English law which was received in Cameroon by virtue of colonialism. Section 11 states as follows:

"Subject to the provisions of any written law and in particular of this

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(33). See page 18.

(34). Cf. GALANTER, M.,"The Displacement of Traditional Law in Modern India,"(1968)4 Journal of Social Issues 65, at p.66.

(35). This section was a re-enactment of S. 14 of the Nigerian Supreme Court Ordinance No. 6 of 1914.

section and sections, 10, 15 and 22 of this law...

a) the common law,

b). the doctrines of equity; and

c). the statutes of general application which were in force in England on the first day of January, 1900 shall so far as the legislature of the Southern Cameroons is for the time being competent to make laws, be in force within the jurisdiction of the court."

Section 11, like similar provisions in the legal systems of other former British African colonies south of the Sahara,[36] has interpretation problems with regards to its application. The interpretation problems inherent in S. 11 are generally not relevant in this work. However, it is an essential part of the thesis to define the quantum and content of English law which was received. For, received English law forms a large part of Cameroonian law regulating statutory marriages and divorce. The concept of custody which is the subject matter of this thesis is entirely based on received English law. Therefore, the interpretation placed on the reception clause is vital in order to understand the quantum of English law which was received. It is in this context that the interpretation problems in S. 11 are discussed. It is not certain what is the exact content of English laws that were received. Three problems are generated by the drafting of section 11.

First, it is not clear whether the limitation date of January 1 1900 refers to the three types of English laws mentioned in the section. The views of writers as regards the effect of the limitation on the received laws are not unanimous. Park posits in this regard, that the limitation date applies solely to statutes of general application.[37] Thus, English statutes of general application which came into force after that date would not be part of the Cameroonian legal system. By contrast, common law and doctrines of equity as they change from time to time in England[38] would be applicable in Cameroon following Park's interpretation. Following from the above, English cases decided after January 1 1900, would not be law in Cameroon if they are based on an English statute which came into force in

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(36). For similar provisions in other African Countries south of the Sahara, see, ALLOTT, New Essays, op. cit., p. 31, note 31: pp. 18, 21-27 and 61.

(37). PARK, A. E. W., The Sources of Nigerian Law, Sweet & Maxwell, Lagos, 1963, pp. 9-21.

(38). There are arguments on the question of which common law and doctrines of equity is referred to. We shall treat this later in the Chapter.

England after that date. The reverse is true as regards post-1900 English decisions which are based on a pre-1900 English statute. They would constitute part of the legal system. This interpretation is endorsed by other writers.[39] By contrast, Nwabueze,[40] holds an extreme view. He advances that neither common law in force in England in 1900 nor common law in force for the time being was received. This view is based on the argument which will be discussed later, concerning received common law and doctrines of equity mentioned in S. 11.

The second problem that arose from the drafting and interpretation of section 11 is the absence of any form of definition of "statute of general application" mentioned in the section. The presence of the phrase in that section has also been the focus of various interpretations by writers on the meaning and effect of that phrase on received statute law.[41] In practice, however, the phrase "statutes of General application" has not posed problems, as decision-makers have resorted to a wholesale importation of English statutes.[42] In other words, any English statute which was a public general act was seen as a statute of general application.[43]

The third area of controversy in section 11 is the absence of any reference to English law in the parts of section 11 which mention common law and doctrines of equity as part of received law. Hence, the question of whether it was English common law and doctrines of equity that were referred to in section 11 has been the subject of academic bickering.[44]Contemporary writers have advanced that it is undoubtedly, English common law and doctrines of equity that were being referred to in section 11, notwithstanding, the absence of express reference. Legal history is advanced to support this interpretation. At the time the Southern Cameroons High Court Law 1955 was enacted, Southern British Cameroons was still a British colony and it already had in existence, English legal and judicial systems.

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(39). See, ANYANGWE, op. cit., p. 2, note 5: p. 222; ALLOTT, New Essays, op. cit., p. 31, note 31: pp. 31-32.

(40). NWABUEZE, B. O., The Machinery of Justice in Nigeria, Butterworths, London, 1963, pp. 19-22.

(41). ALLOTT, op. cit., p. 31, note 31: pp. 36-54. See also, ALISON, R., Legal Drafting and Forms, 4th ed., London, 1938, pp. 20-21.

(42). ALLOTT, ibid.

(43). ANYANGWE, op. cit., p. 2, note 5: p. 222.

(44). See, ALLOTT, New Essays, op.cit., p. 31, note 31: p. 36-54. See also, EKOW DANIELS, W. C., "The Influence of Equity in West African Law,"(1962)II International Comparative Law Quarterly 31.

still, the Southern Cameroon legislature established in 1955, when Southern British Cameroon had an independent judiciary, was a colonial House of Assembly under British rule. It cannot, therefore, be said that the courts in British Cameroons were directed to apply the common law and doctrines of equity of some other country other than England.[45]

Despite these uncertainties, no local legislation has been enacted to clarify decision-makers and counsel on the question of the specific English laws that were received under section 11. The complication is exacerbated by the provision of section 15 of the Southern Cameroons High Court Law 1955, which introduces an exception to the 1900 limitation on applicable statutes. Section 15 provides:

> "The jurisdiction of the High Court in probate, divorce and matrimonial causes and proceedings may, subject to the provisions of this law and in particular of section 27 and to the rules of court, be exercised by the court in conformity with the law and practice for the time being in force in England."

This provision is to the effect that in cases of probate, divorce and matrimonial causes, post-1900 English statutes, as well as decisions based on post-1900 English statutes are applicable in Cameroon. Support for this view is drawn from the interpretation made by a colonial court of a similar provision to S. 15 in a Nigerian statute. It is apt to cite the cases in question as Cameroon was part of Nigeria and till 1955, it had the same legal system as Nigeria. The following interpretation by the West African Court of Appeal of S. 16 of the Nigerian Supreme Court Ordinance (Cap 3 of the Laws of the Federation of Nigeria) 1923, (now S. 16 of the High Court of Lagos Act (Cap 80 of the Revised Laws of the Federation of Nigeria) 1958), is illuminative. S. 16 of the Supreme Court Ordinance 1923 provides:

> "... regard to probate, divorce and matrimonial causes jurisdiction was to be exercised in conformity with the law for the time being in force in England."

The West African Court of Appeal had the occasion to construe S. 16 above in the case of Taylor v. Taylor[46] in which the judge made the following pronouncement:

> "... From this it is clear that in probate causes and proceedings, the law and practice in Nigeria change as the law and practice in England change."[47]

This pronouncement is not in line with the view held in the same court in the case of Godwin

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(45). See, ANYANGWE, op. cit., p. 2, note 5: pp. 222-223.
(46). (1935) 2 W.A.C.A 348.
(47). At p. 349.

v. Crowther,[48] decided some nine months earlier. Called upon to interpret a similar provision to section 16 in a Sierra Leonian statute, the court stated that the "the law for the time being in force" meant the law for the time being in force at the time of the reception clause. According to this interpretation, the High Court would not apply English statutes or cases based on English statutes enacted after the limitation date in the reception clause, even in matters of probate, divorce and matrimonial causes. If this was the case, applicable English law in the mentioned areas would not include laws enacted after 1955 and cases decided on them.

It is inconceivable that the drafters of S. 15 of the 1955 High Court Law and similar provisions like S. 16 of the Nigerian Supreme Court Ordinance 1923, could have intended application of English law in the mentioned areas to be that restrictive. It is logical to infer that matters of probate, divorce and matrimonial causes were taken out of the limitation date in the general reception clause in S. 11 for the purpose of enabling English law in these areas to be applied as it changes from time to time. The reasoning in Taylor v. Taylor[49] is plausible. This interpretation has also been endorsed by writers in African law.[50]

On the basis of the foregoing discussion, it is apt to state that in matters of probate, divorce and matrimonial causes, English statute law as it changes from time to time, and decisions based on these statutes form part of the Cameroonian legal system. This explains why the English Matrimonial Causes Act 1973 as amended by Matrimonial and Family Proceedings Act 1984, is applicable in Cameroon, inspite of its being a post-1900 statute.

In practice, however, it is not easy to ascertain which post-1900 English statutes and cases based on them are applicable in divorce and matrimonial causes in Cameroonian statutory courts. This is due to the haphazard application of post-1900 English statutes and cases based on them.[51] In the absence of any Cameroonian law which re-enacts the body of applicable English law in Cameroon, the decision as to which post-1900 English statutes

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(48). (1934) 2 W.A.C.A 109.

(49). Supra.

(50). KASUNMU, A. B., and SALACUSE, J. W., Nigerian Family Law, Butterworths, London, 1966: pp. 11-13. Cf. PARK, op.cit., p. 34, note 37: p. 17. Cf. ALLOTT, Essays, op. cit., p. 31, note 31: p. 203.

(51). The response of ten barristers spoken to in the towns of Kumba, Buea, Mutengene and Muyuka in the month of May 1990. Their responses were in line with the writer's personal experience as an undergraduate and postgraduate law student in the University of Yaounde.

and case law based on such statutes are applicable is left to judges' discretion. Decision-makers pick and choose which post-1900 English statutes and the decisions of cases based on them they apply in divorce and custody adjudication. Statutory law in the Cameroonian legal system regulating divorce and custody in Cameroon is predominantly English law. English law is applied in the absence of Cameroonian legislation covering statutory divorce and custody of children from such marriage after divorce.

When is English law applicable?:-

Section 10 of the 1955 High Court Law contains the following provision:

"The jurisdiction vested in the High Court shall, so far as practice and procedure are concerned, be exercised in a manner provided by this law or any other written law, or by such rules and orders of court as may be made pursuant to this law or any other written law, and in the absence thereof in substantial conformity with the practice and procedure for the time being of Her Majesty's High Court of justice in England."

The section authorises the High Court to have recourse to English practice and procedure on any matter the court is seised of which is not covered by the 1955 High Court Law or any other written law. In the absence of any Cameroonian law dealing with High Court practice and procedure, and in the absence of any such provision in the 1955 High Court Law, English rules of practice and procedure are to be applicable. This explains why practice and procedure in the Cameroonian High Court is based on the English Matrimonial Causes Rules 1977, which are now the Family Proceedings Rules 1991. The original petition in the case of Thomas John Enie v. Ruth Fese Enie[52] was struck out of the case list by Inglis, J., because it failed to state whether the petition was for divorce or judicial separation. It did not comply with Appendix II and Rule 9 of the Matrimonial Causes Rules 1977. As S. 10 simply states "practice and procedure", Cameroonian courts would not be acting legally, if it is assumed, as is the case,[53]that substantive English law is applicable on the basis of S. 10 alone.

There is no Cameroonian legislation or any provision in the 1955 High Court Law regulating private law areas, such as divorce and related matters arising from statutory

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(52). Suit No. HCSW/65^{mc}/83. Unreported.

(53). See, ANYANGWE, op. cit., p. 2, note 5: p. 224. Cf. KASUNMU and SALACUSE, op. cit., p. 36, note 50: pp. 8-9.

marriages.[54] Besides customary law which regulates family matters arising from customary marriages, there is no substantive Cameroonian family law. This is the situation despite the existence of the Civil Status Registration Ordinance of 1981, which regulates marriages. This Ordinance will be discussed in the next Chapter. The Civil Status Registration Ordinance deals with marriage only as far as the conditions precedent to the existence of a valid statutory marriage are concerned. It has no substantive provisions to provide a legal solution to matrimonial issues, such as those mentioned above,[55] a common phenomenon in other ex-British colonies in Africa.[56]

This legal vacuum can only be closed by applying received English law. For that to happen, S. 10 of the 1955 High Court Law has to be read together with other provisions: SS. 7 and 8, the jurisdictional provisions, and S. 11 which defines the content of English law which was received under the 1955 High Court Law. While recourse to English law dealing with court practice and procedure is made under S. 10, SS. 7 and 8 vest the High Court with all (except admiralty) powers, authorities and jurisdictions that are exercised by the High Court in England. In exercise of the granted powers, authorities and jurisdictions, the Cameroonian High Court necessarily has to apply English law if it is to decide on an issue which is not regulated by Cameroonian law or by any provision in the 1955 High Court Law. The content of English law to be applied, in this regard, is stipulated in S. 11 of the 1955 High Court Law. The plausible conclusion is that a joint reading of the aforementioned sections permits the Cameroonian High Court to follow English practice and procedure as well as applying English law where the need arises. To conclude otherwise would mean that the High Court is left with no law to apply if it is to decide on an issue on which there is no Cameroonian legislation as it is with divorce and custody. Therefore, Cameroonian statutory law on custody in this thesis will be based on English law and how it is applied in Cameroonian statutory courts. The impact of received English law on indigenous customary law will be examined before that discourse.

Customary Law and Received English Law:

The term, "customary law", in reference to the various tribal laws, emerged after 1961.

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(54). We shall return to this issue later in Chapter Four.
(55). This is inferred from the Ordinance.
(56). See, KASUNMU and SALACUSE, op. cit., p. 36, note 50: pp. 7-8.

The new terminology was the appellation introduced in 1961, to replace the colonial term, "native law and customs". This was the name given by the colonial administration to the indigenous tribal law which was the law that existed in pre-colonial Cameroon. In view of the controversial implication of the term "native law and customs",[57] an agreement was reached in a conference on African law in 1961 to substitute the name, "customary law" for "native law and customs".[58]

As discussed earlier, customary law was the only body of law that existed in pre-colonial Cameroon and other black African tribes. It has also been discussed that it provided the machinery for administration of justice in all areas of life for the pre-colonial people. The rest of the Chapter deals with customary law and the effects of colonialism.

Customary law: ideological considerations:-

The existence of law in pre-colonial black African societies has been overlooked by writers who portray pre-colonial African societies as stateless and lawless.[59] Academic writings on African law in the 60s and 70s were dominated by arguments on the non-existence of law in pre-colonial African societies.[60] Indeed, to state that pre-colonial African societies were lawless, is tantamount to a denial of the legal validity of African customary law. This is an image which legal positivism has been instrumental in creating. Customary law does not fit in the Austinian theory of law which regards law solely as a command from the sovereign.[61] This implies that, there was no law in pre-colonial African

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(57). For a discussion on the reasons for rejecting the name, ALLOTT, New Essays, op cit., p. 31, note 31: p. 156.

(58). See ALLOTT, A.N., "The future of African Law in Africa," in Record of the proceedings of the London Conference, December 28 1950-January 1960, 1960, Ch.1 cited in ALLOTT, ibid., pp. 155-156.

(59). See, HOEBEL, F. A., The Law of Primitive Man, Harvard University Press, Cambridge, Mass, 1964, p. 24; SAWER, op. cit., p. 7, note 26: Ch. 3, CHANOCK, op. cit., p. 7, note 26: Ch. 2 at p. 28.

(60). Cf. MENSAH-BROWN, A. K., Introduction to Law in Contemporary Africa, Crouch, New York, 1976, p. 22; ALLOTT, New Essays, op. cit., p. 31, note 31: pp. 148-150; GONIDEC, op. cit., p. 7, note 27: p. 7.

(61). AUSTIN, J., The Province of Jurisprudence Determined, Weidenfeld & Nicolson London, 1965, pp. 1, 9 and 15; BURNS, J. A., Jeremy Bentham, Collected Works - Principle of Legislation, The Anthlone Press, London, 1970, Ch. 2; BLACKSTONE, W., Commentaries on the Laws of England, 15th ed., vol. 1, Strahan, London, 1809, p. 44. Cf. KELSEN, H., General Theory of Law and State, 1961, pp. 114, 149-150.

societies, since they were not organised as sovereign states, as seen in an earlier discussion. It was stated earlier in the Chapter that law in pre-colonial African societies was not a command from the sovereign as it is the case in the post-independent African states.

A similar connotation is given by the theory which associates the existence of law with presence of formal judicial institutions. If judges and the courts are those who state the law, as Gray posits,(62) it implies that pre-colonial African societies in which there were no such institutions and judges had no law. Nevertheless, arguments put forward as regards the non-existence of law in pre-colonial African societies are now confined to the past. Mutilated expositions on the legal state in pre-colonial African societies have been rectified and clarified by informed jurisprudence on African law.(63) In other words, the existence of pre-colonial African law is no longer the issue in contemporary African customary law discourse. Rather, originality in contemporary customary law is the focus of today's debate on African customary law. We shall be discussing this later in the Chapter.

Customary law operated in pre-dominantly illiterate societies. Thus, the unwritten nature which has been stereo-typed as a characteristic of customary law,(64) was pragmatic. Justice was dispensed in an informal manner. There were no formal judicial institutions. Similarly, the procedure for adjudication was, and penalties exacted were traditional, as discussed earlier in the Chapter. Despite the informal nature of pre-colonial customary law, it provided a legal framework for the pre-colonial people, which was allowed to continue in a regulated form by colonial administrators. Colonialism distorted indigenous African customary law(65) contrary to what some writers argue.(66) These changes are to be considered next.

Effects of colonialism and received English law on customary law:-

The 80s were dominated with academic bickering by evolutionist and revisionist

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(62). GRAY, J. C., The Nature and Sources of Law, 2nd ed., Peter Smith, Gloucester, Mass., 1972, p. 84.

(63). See, MENSAH-BROWN, op. cit., p. 39, note 60. See also, GONIDEC, op. cit., p. 7, note 27: p. 7.

(64). See, ANYEBE, A. P., Customary Law: The War Without Arms, 4th Dimension Publishers, ENUGU, 1985, pp. 21-22; NUABUEZE, op. cit., p. 34, note 40: p. 2. Cf. ANYANGWE, op. cit., p. 2, note 5: p. 240.

(65). Infra, note 69.

(66). Infra, note 67.

writers on the question of authenticity of contemporary African customary law. The evolutionists see contemporary African customary law as the uncontaminated customary law of pre-colonial times, unaffected by colonial influences.[67] By contrast, the revisionist scholarship has a more pragmatic perspective of contemporary African customary law. Revisionists recognise the changes[68] effected in contemporary African customary law by European colonisation. Revisionists posit, therefore, that contemporary African customary law is a colonial creation.[69] Our discussion on the effect of colonialism on contemporary African law will be made against this background.

There is common ground between the revisionist and evolutionist arguments. Unlike pre-colonial customary law, contemporary customary law is applicable in two separate milieus: it is applied in Customary Courts and, in the villages. Application of customary law in Customary Courts is formal, with regard to the structure of the institution in which it is applied, the personnel administering customary law in courts and procedure. This new structure, which will be elaborated on later in the Chapter, is a colonial creation. Hence, to this extent, the argument of revisionists is plausible. By contrast, application of customary law in the villages is extra-judicial and it is as informal as it was in pre- colonial times. It is in this context that we evaluate the argument of evolutionists. We shall discuss the effects of colonialism in light of its application in these two domains, a distinction which Woodman has referred to as lawyers' and sociologists' customary law respectively.[70]

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(67). See, NGUGI Wa THIONGO, Petals of Blood, London, 1977, p.17; See also, CHANOCK, op. cit., p. 7, note 26: Ch. 3, pp. 54-58 and 60-61.

(68). These changes will be discussed later in the Chapter.

(69). See, CHANOCK, op. cit., p. 7, note 26: Ch. 2, pp. 25-41; FITZPATRICK, P., "Traditionalism and Traditional Law",(1984) 28 Journal of African Law, 21; RANGER, T., "The Invention of Tradition in Colonial Africa," in HOBSBAWN, E., and RANGER, T., (eds) The Invention of Tradition, Cambridge University Press, 1983, p. 211; SNYDER, F., "The Creation of Customary Law in Senegal," in GHAI, Y., LUCKMAN, R., SNYDER, F., (eds) The Political Economy of Law, Delhi, Oxford University Press, Bombay, Calcutta, Madras, 1987, p. 144. Cf. A recent account on the creation of African customary law in African systems (the cases of Ghana and Nigeria) which has vividly been made by Woodman is illustrative. See, WOODMAN, G. R., "How State Courts Create Customary Law in Ghana and Nigeria," in FINKLER, HARALD, W., (compiler, 1983). Paper of Symposia on Folk Law and Legal Pluralism, Xith International Congress of Anthropological and Ethnographic Sciences. Vancouver, Canada, August 19-23, 1983: Commission on Folk Law and Legal Pluralism at p. 297.

(70). See WOODMAN, ibid., pp. 299-319.

Extra-judicial application of contemporary customary law:-

Dispute settlement in villages is still extra-judicial. The procedure is reflective of the pre-colonial procedure discussed earlier in the Chapter. It remains unwritten, with no records of proceedings. Decision-makers are the village chiefs and village councils; "quarter-heads" and lineage heads,[71] in accordance with the customs of the particular tribe. Viewed from this perspective, customary law remains largely traditional law. However, it will be an overstatement to say that even in extra-judicial application, customary law remains entirely unaffected by colonial presence. The traditional dispute settlement role in the villages discussed above, is restricted to civil matters. Unlike in pre-colonial times, customary law no longer has jurisdiction over criminal matters, as seen in a previous discussion. Hence, extra-judicial application of customary law is limited to civil matters, in particular, private disputes. For example, customary law is applied extra-judicially to matrimonial disputes arising from customary marriages, and other matters of a civil nature occurring in the villages.[72] The changes in the application of contemporary customary law become more apparent when one considers its application in Customary Courts, the High Court and Court of Appeal. Since 1972, the High Court's appellate jurisdiction is exclusively on the Court of Appeal as per S. 22(1) of the Ordinance No. 72/4 of August 26 1972.

Application of customary law in the courts:-

Customary Courts are the institutions vested with original jurisdiction over matters reserved for customary law. However, under S. 27(1) of the 1955 High Court Law, which will be elaborated later, the High court is charged with the responsibility of observing and enforcing the observance of customary law. This High Court jurisdiction is currently vested in the Court of Appeal as appeals from Customary Courts now lie to the Court of Appeal. The application of customary law in formal courts supports the revisionists who argue that contemporary customary law is a colonial creation. A number of changes effected in customary law as a result of colonialism will be advanced to justify this argument. They include: the establishment of structured judicial institutions and the change of customary law

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(71). See, ANYANGWE, op. cit., p. 2, note 5: p. 15.
(72). See our earlier discussion on pp. 23-24.

into a law that is applicable in courts; the personnel charged with dispensation of justice; changes in the means of proof; and the introduction of writing in customary transactions. These changes shall be discussed under two headings. First, the change in content, occasioned by introduction of customary law into courts will be treated. Second, the others will be discussed under one heading.

Establishment of judicial institutions for application of customary law: effect on content:-

It had been discussed earlier in the Chapter that by contrast with the informal nature in which customary law was applied in pre-colonial Cameroon, the colonial administration established Customary Courts. These courts became a judicial forum for application of customary law. Hence, when British Cameroon had an independent judiciary, Customary Courts that were set up under the Native Courts Ordinance (Cap 142 of the laws of Nigeria) 1948, retained permanent original customary law jurisdiction. Similarly, the High Court was charged with the duty to observe and enforce the observance of customary law. Section 27(1) of the 1955 High Court Law provided as follows:

> S. 27(1): "The High Court shall observe and enforce the observance of every native law and custom which is not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication, with any law for the time being in force, and nothing in this law shall deprive any person of the benefit of any such native law or custom."

The situation under which the High Court was required to assume jurisdiction over matters which were otherwise under the jurisdiction of Customary Courts has been treated under our discussion on the High Court earlier.[73] It is within the context of the High Court jurisdiction discussed earlier in the Chapter that it was called upon in S. 27(1) to observe and enforce the observance of customary law. In this regard, two changes were introduced by the establishment of courts for the application of customary law. First, the fact that customary law became applicable in formal judicial institutions was a colonial creation. Second, the High Court, which is a Western-type court, and manned by judges trained in Western legal skills was vested with the discretion to decide whether a particular customary law should be

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(73). See pp. 28-30.

enforced or not. This is the purport of section 27 stated above.

Unlike in pre-colonial times when every customary law norm was applied, therefore, application of customary law in courts since the colonial period is subject to conditions. First, customary law would be applicable and enforced by the High Court only if it is not repugnant to natural justice, equity and good conscience. Second, customary law would also not be enforced if it impliedly or expressly contradicts any written law in force. By this is meant, in case of any conflict between customary law and national law, the latter prevails.

Hence, if a Customary Court case is transferred to the High Court or, if, as it is likely to happen more since independence, a Customary Court decision is appealed against to the Court of Appeal, a valid customary law rule which does not satisfy the repugnancy and consistency conditions in section 27(1), will be held unenforceable. The colonial case of Edet v. Essien [74] provides the earliest example. This was an appeal against the decision of a Provincial Court in favour of the plaintiff/respondent on a claim by him, for the return of two children held by the defendant/appellant. The two children were off-springs of the plaintiff/respondent and a woman (one Inyang Edet) he had married with the consent of her parents and relevant customary marriage formalities performed. The defendant/appellant who had also celebrated a child marriage with the mother of the children he detained, claimed that the two children in his possession were his. The basis of his claim was that the dowry he paid to marry the children's mother, who was a minor then, (though she decided to marry a man of her choice when she became of age) had not been returned. The defendant/appellant contended that under customary law, she was still his wife as long as the dowry paid on her subsists and any children she has by another man are, in customary law his. Accordingly, the "Native" Court had found for the defendant/appellant and held that the two children were his in customary law. The case was transferred to the Provincial Court on the request of the plaintiff/respondent. Although much evidence was adduced and many witnesses were seen to prove the existence of the customary law advanced by the defendant/appellant, the Commissioner concluded that their evidence was inconclusive to found the defendant/appellant's claim over the two children. The Court found for the plaintiff/respondent and ordered that the children be handed over to him. The defendant/appellant appealed. The Provincial Court's decision was upheld and the appeal dismissed on the grounds that the

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(74). (1932) 1 Nigerian Law Report 47.

alleged customary law was not established. On the issue of checking repugnant customary law, Carey J., pronounced as follows:

> "... even assuming that the native law and custom alleged by the appellant had been definitely established, I am inclined it should properly have been over-ruled in this case as being repugnant to natural justice, equity and good conscience having regard to the circumstances."[75]

By concluding the judgement with the phrase "having regard to the circumstances", one is inclined to inquire if the judge's pronouncement on the issue of repugnancy of the customary law alleged by the defendant/appellant in the case, would have been otherwise under different circumstances. For example, if, rather than performing a child marriage, the defendant/appellant had married the woman when she had been old enough to give her consent; or if the plaintiff/respondent had not completed the marriage formalities; or still, if the woman or her lineage had claimed custody. Each of this scenario will be treated separately.

If the appellant had married the woman when she was old to give her consent, the customary law position with regard to the children she had with the plaintiff/respondent would have been the same as long as the bride price paid by the defendant/appellant on marriage had not been returned. Where the customary law alleged by the defendant/appellant exists, a marriage does not come to an end until bride price has been returned. Hence, even under these circumstances, there would have been no blood link between the defendant/appellant, who in customary law would be the children's father, and the children, nor would there be a psychological relationship between them. Hence, the moral grounds on which the Court of Appeal declared such a customary law rule unenforceable in the Edet case is the same. Even assuming that the defendant/appellant had been married to the children's mother when she was old to give her consent, therefore, the customary law which the defendant/appellant based his appeal on, could have been declared repugnant to natural justice, equity and good conscience. It would have been held unenforceable. The colonial judge stated in the Edet case that a customary law giving custody of a child to the man who had paid bride price for the child's mother instead of it being granted to the child's natural father was repugnant to natural justice, equity and good conscience. Hence, it could have been held unenforceable even if it

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(75). At p. 48.

had been proven. The same may be said about the second scenario.

If the plaintiff/respondent had not completed the marriage formalities, for example, if bride price had not been paid, the woman in customary law would have remained the defendant/appellant's wife of a child marriage. This was, of course, the woman's status in the Edet case, notwithstanding the fact that the plaintiff/respondent had completed marriage formalities. For, in customary law, the marriage ceremony made between the defendant/appellant and the woman's kin-group when she was young subsists as long as the bride price had not been returned. This by itself, however, could not change the fact that the children were the plaintiff/respondent's by blood. Although, therefore, the customary law rule regarding paternity of the children would have remained the same even if the plaintiff/respondent had not completed marriage formalities, the courts' decision would have been the same. It is unlikely that the Provincial Court and the West African Court of Appeal would have upheld the defendant/appellant's claim over the children on the basis that the return of his bride price was still pending. There still would have been no blood link or a psychological relationship between the defendant/appellant and the children. Hence, the same moral considerations would have been used by the courts to declare the alleged customary law rule unenforceable even if it had been proven. If, however, custody of the children had been claimed by the woman or her lineage rather than the defendant/appellant, the decision may have been different.

The woman or her lineage would have a valid claim over her children against the plaintiff/respondent if he had not completed the marriage formalities. The customary law rule in patrilineal societies regarding children born by a daughter with a man she is not recognised in customary law as having been married to is thus: the children belong to their mother's father and his lineage. In matrilineal societies, they belong to their mother's lineage.[76] If, therefore, the plaintiff/respondent had not completed the marriage formalities, the children would have been regarded in customary law, as children born out of wedlock. If the children's mother and/or her lineage had claimed, it is unlikely that the Court of Appeal could have upheld the decision of the Provincial Court. The children, under these circumstances, derive status for succession and inheritance rights, from their mother's lineage rather than from their biological father. Children born out of wedlock are affiliated into the lineage of their mother's

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(76). This discussion will be returned to in Chapters 2 and 3.

father and the right to filiate children into one's lineage passes unto the biological father only if he was married to the children's mother. If, however, the plaintiff/respondent was validly married to the children's mother, he would not simply be their biological father, but also, the father into whose lineage the children are filiated. Natural justice, equity and good conscience under these circumstances, could have demanded that the mother's claim independently or with her lineage fail.

The pronouncement of the judge in Edet v. Essien with regard to repugnant customary law was followed by the West Cameroon High Court[77] in deciding an appeal of the Kumba Customary Court case of Ngeh v. Ngome.[78] The Customary Court in Kumba had, in accordance with Bakossi Customary law, given custody of three children of the plaintiff/respondent's ex-wife by the defendant/appellant to the plaintiff/respondent. Although the marriage between the plaintiff/respondent and the children's mother had been terminated extra-judicially, his bride price had not been returned as agreed. Until it had been returned, the children's mother remained the plaintiff/respondent's wife under Bakossi customary law. Hence, under that law, the plaintiff/respondent has a claim over any children she may have by another man. This customary law rule was the basis of the decision of the Kumba Customary Court, against which the defendant/appellant appealed. The West Cameroon High Court overturned the Customary Court decision. Pronouncing that it was contrary to natural justice, equity and good conscience for the plaintiff/respondent to claim another man's children on the basis of unreturned bride price, the High Court allowed the appeal. The West Cameroon High Court adopted the view of the colonial court judge in the Edet case by deciding that such customary law was unenforceable because it is repugnant to natural justice, equity and good conscience. Would the decision of the West Cameroon High Court have been otherwise, if, for example, the defendant/appellant had not completed marriage formalities or if the defendant/appellant was deceased and the claim was made by his kinsmen?

As discussed under the Edet case, rights to filiate children into their biological father's lineage only arise on celebration of a valid customary marriage. Failing that, a man's children with a woman in respect of whom customary marriage requirements have not been completed to earn him title of the woman's husband, are in customary law natural children. Their status

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(77). The pre-1972 High Court in ex-British Cameroon was known as the West Cameroon High Court, as that part of Cameroon then was the State of West Cameroon.

(78). (1962-1964) W. C. L. R. 32.

both in patrilineal and matrilineal societies has been discussed already. In a patrilineal society as the Bakossi tribe, the custody position if the defendant/appellant had not completed marriage formalities would be the same as discussed for the similar situation under the Edet case. Furthermore, it is likely that the West Cameroon High Court could have been guided by the same considerations as discussed under the Edet case - the defendant/appellant would have no grounds to claim as he would not have any filiation rights. In consequence, the conclusion as regards repugnancy would be the same as that made under our discussion of the possibility of the claim having been made by the children's mother and/or her kin in the Edet case. If, however, the defendant/appellant had validly married the woman with all formalities performed and he was deceased, the position would be different if his kinsmen claimed custody, as it happened in Asoh John v. Esther Manojoi[79]

The plaintiff in this case was the brother of the defendant's deceased husband who under customary law of the Mbo tribe, was designated to inherit the widow[80] on his brother's death. The defendant refused to be inherited thus, denying to become the plaintiff's wife. Instead, she opted to terminate the marriage and moved out of her deceased husband's lineage compound taking with her the five children of their marriage. The plaintiff instituted proceedings in the Customary Court of Kumba to have possession of the children. Under Mbo customary law, as with the tribes under discussion in this thesis, the children were affiliated to their deceased father's lineage as he was validly married to their mother. This status does not change on divorce, as shall be seen in Chapter Three. On the basis of this customary law position, the court ordered that the children be handed to the plaintiff. This decision meant that the children were denied their mother who was the only surviving biological parent they had. This decision was contrary to the view expressed by Carey J., in the Edet case and the decision of the West Cameroon High Court in Asoh v. Ngome discussed earlier. However, it can be reconciled with a colonial case in which the court ruled that the customary law on which this decision was based was not repugnant.

In the 1949 Nigerian case of Re Agboruja,[81] it was pronounced in the Provincial Court that the customary law rule to the effect that "on death of a father, his next male relative and not his wife becomes the legitimate guardian of his legitimate children" was not

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(79). Case No. 84/85-86. Unreported.
(80). Widow inheritance shall be discussed in Chapter Two.
(81). (1949) 19 N. L. R 38.

repugnant. This view is premised on the acclaimed advantages which accompany filial status in Customary law, at the centre of which are succession and inheritance rights.[82] The pronouncement of the court in this case suggests that the West Cameroon High Court would have held the same if the children's father in Ngeh v. Ngome had been deceased and custody was being claimed by his kinsmen and not the plaintiff/respondent as it was. Under these circumstances, the decision is not based solely on the bride price which has not been returned. The practice of widow inheritance and the advantages for the off-springs, associated with it is considered.

Although certain advantages are said to accrue to children through customary law affiliation rules, such do not out-weigh children's need for their one surviving and usually concerned parent. The customary law which was the basis of the court's decision in Asoh John v. Esther Manojoi, supra, as in Re Aboruja, was against natural justice, equity and good conscience. It ought to be unenforceable but no appeals were made against the decisions. These decisions are likely to have been overturned if they had been appealed against, hence, could have been held unenforceable.

The discussion shows that colonialism created a framework for control of application of customary law in courts. Furthermore, application of customary law in state created courts also affects substantive norms of customary law. For example, applying statutory law rules relating to claims for damages, remedies and modes of enforcement narrows down the body of existing customary law. It is so if one considers the restrictive forms in which claims in statutory law may be made, the types of remedies available and the modes of enforcing the remedies.[83] This contrasts with the position in indigenous customary law under which a wide range of redress exists for every breach. Redress could be social, cultural, economic penalties or corporal punishment.[84] Indeed statutory courts pick and choose norms of indigenous customary law which are to make up part of the legal system.[85] The establishment of courts also engendered other changes in the customary law domain which we are about to treat under one heading.

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(82). This discussion will be elaborated on in Chapter Two.

(83). For discussion of these changes, see, See, WOODMAN, op. cit., p. 41, note 69: pp. 299-304. See, PHILLIPS, A., "Report on Native Tribunals," cited in SEVAREID, note 96: pp. 38-39. His view has not been entirely uncritical. Ibid., p. 40.

(84). WOODMAN, Ibid., pp. 301-303.

(85). Ibid., pp. 298 and 304-305.

Structural and procedural changes occasioned by the application of customary law in courts:-

The creation of Customary Courts led to the appointment of Customary Court personnel to apply customary law. The appointment procedure of these court personnel does not reflect the customs of the people. Customary Court "judges" are administratively selected from the various local councils,[86] which are political divisions. Among the people selected as "court judges" are retired civil servants, who usually, have lived and worked all their lives out of their tribal areas.[87] These "judges" cannot be regarded as personally knowledgeable in their tribal customary law. The current body of Customary Court personnel is a colonial heritage. Colonial Customary Courts were presided over by British administrators with the assistance of assessors who were natives. In place of assessors, the personnel of Customary Courts contains "court members"[88] who are seen to be well versed in their respective customs. The elders in the villages who possess a certain amount of knowledge of their customs by virtue of their ages and long uninterrupted stay in the villages, are left out of the system of application of customary law in courts.[89]The change in the means of proving customary law in evidence is explained within this context.

Application of customary law by people who are not versed in the customs, gave rise to the need to proof the existence of a customary law rule prayed in aid. This was true of colonial Customary Courts as it is now. Oral evidence was admissible from experts in customary law, who were mainly elderly people in the villages. To facilitate proof and introduce certainty, additional means of evidence, extraneous from indigenous pre-colonial customary law, were introduced. These were documentary evidence, and evidence by judicial

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(86). On the recommendation of the District Officers in the respective regions, the Ministry of Justice selects six members from the applicants in every council area, to be judges in the Customary Court of the area. Information given to me by Pa Ngoh Dibo and Mr. Nguti Bernard, (both registrar and court clerk in the Customary Court of Kumba); The registrar of the Customary Court in Kombone, and Mr. Stanislaus, "Judge" in Tombel Customary Court during interviews conducted between June-August 1990.

(87). Information obtained from my interviews, cited above, supra, note 86.

(88). Each court has four court members, who must be present during sessions. For the source of this information, see interviews cited above at note 86.

(89). Unless one is called up to tender expert evidence in proof of customary law as discussed earlier.

notice.

The introduction of documentary evidence in Customary Courts arose, as discussed earlier in the Chapter, from the fact that customary transactions became evidenced in writing during colonial rule. Hence, documents became admissible in Customary Courts.(90) Besides, certain areas of customary law have been codified in some parts of Cameroon(91) and other African countries.(92) Where customary law has so been re-stated in writing, the document may be tendered in court as evidence.(93)

Furthermore, courts were directed to take judicial notice of "all general customs, rules, and principles which have been held to have the force of law and have been recorded in any such court."(94) This was also a measure to dispense with expert evidence where a customary law rule of great notoriety was in issue. Similarly, recording of Customary Court cases, keeping of financial records and the issuance of writs of summons by Customary Courts as part of trial procedure were all initiated during colonial administration, as seen in a previous discussion. In addition, service of summons to defendants and witnesses as part of Customary Court trial procedure were initiated during colonial administration. Furthermore, Customary court "judges" since the colonial period are required to write out judgements for their decisions for which a register is kept in each court.(95) Enormous changes occurred in the area of customary law on land and holding of property too.

Pre-colonial land tenure was a system of loose land holdings. Land was abundant for every one to grow subsistence crops. The colonial period introduced a capitalistic economy in which land became a primary asset to the governments on the one hand, and to individuals

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(90). See, S. 58 of the Evidence Act of Nigeria 1948. See our earlier discussion on p. 22.

(91). For example, the Order of May 26, 1934, which codified the customary law on non-muslim marriages in Francophone Cameroon. For a discussion of family law in francophone Cameroon, affecting women's status generally, see, NKOUENDJIN, Y.M., Le Cameroon la à Recherchè de son Droit de la Famille, Tome xxv, Paris, 1975.

(92). COTRAN, E., The Restatement of African Law, vol. 1, Sweet & Maxwell, London, 1968; ALLOTT, New Essays, op. cit., p. 31, note 31: Appendix D.

(93). See pp 21-22.

(94). S. 73(1) of the Evidence Act of Nigeria 1948. For an example of ordinances in African legal systems in which the doctrine of judicial notice has become operational, see, ALLOTT, New Essays, op. cit., p. 31, note 31: pp. 27-28 and Appendix D.

(95). Information obtained during my interviews cited earlier on p. 50, note 86. Confirmed by my observation from Customary Court records inspected personally during my field work in 1990.

on the other. There was the colonial government's need for ownership of state land to be used for economic, administrative and political purposes and individuals' need to acquire huge land holdings to grow cash-crops. These two competing interests had to be balanced with traditional land tenure rules which did not permit individual ownership of land. Hence, European land law was introduced and consequently, this was the beginning of a system which made acquisition of land title and transfer of such titles through purchase, subject to legislations intended to create areas of land in which imported land law did not apply. Even in such areas reserved for traditional land tenure, a colonial vision was introduced that: "land was held in some form of communal tenure and could not be sold by individuals and that everyone had a more or less equal right to land."[96] The chiefs, some of whom were administrative creations, as discussed earlier in this Chapter, were portrayed in this colonial land tenure vision as holders of land, in whom rights of allocation and administration of land were vested. In consequence, the conception was developed that land titles were acquired solely by political allegiance, which meant individual subjects' allegiance to the chiefs. Thus started a policy towards land which remains a legacy in common law African Countries. Land is under state control, with administrators at various government levels acting as trustees. In towns and cities today, Mayors occupy the position which chiefs had during the colonial period as far as control over land is concerned. Mayors and other municipal administrators have state powers to approve land titles on purchase. Land is under state jurisdiction regulated by national land law which is of Western origin.[97]

These changes, including the reduction of the areas in which customary law has jurisdiction, discussed earlier, were introduced by colonialism. It is, thus, plausible to say that contemporary customary law is a colonial creation. This statement is supported by the presence of the Customary Court Rules, mentioned earlier, as the legal framework within which Customary Courts are to operate. The Customary Court Rules are statutorily drawn

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(96). See, CHANOCK, M., "Paradigms, Policies and Property: A Review of Customary Law of Land Tenure," in MANN, K., and ROBERTS, R., (eds) Law in Colonial Africa, Heinemann, Portsmouth; N H James Curry Ltd., London, 1991, p. 61 at 63.

(97). For a discussion on changes brought in the area of land as a result of colonisation, see, ibid., pp. 61-84. Cf. WOODMAN, op. cit., p.41, note 69: pp. 303-309; MAYER, P., and MAYER, I., " Law in the Making," in KUPER and KUPER, op. cit., p. 31, note 31: p.51 at 52-55. Cf. ALLOTT, A. N., "The Future of African Law," in ibid., p. 216 at 221-222. Cf. SEVAREID, op. cit., p. 23, note 96: p. 42.

rules, which set standard procedure and rules to be followed in Customary Court custody adjudication. These Rules which will be elaborated on in Chapter Three, make the English welfare principle the standard for making custody decisions in Customary Courts. By contrast, indigenous customary law does not make the child the focus of decisions regarding post-divorce upbringing of children, as shall be discussed in Chapters Three and Four. This is a principle of Western law on divorce and custody, part of which will be our discussion in the proceeding Chapters.

CONCLUSION:

European colonialism in Cameroon transformed the traditional system of administration of justice. It affected the well established legal framework, based on informally applied customary law, which regulated all areas of life. As a colonial legacy, Cameroon, like other African Countries, inherited a legal system consisting of Western-type laws, on the one hand, and customary law of the various tribes. This importation of Western law and ideologies was not accepted by the "natives" without reservation,[98] contrary to the claims of proponents of the law and modernisation theory.[99]

Hence, the area of divorce and custody, as in other civil matters, ceased to be entirely under the jurisdiction of customary law since colonial administration. Rather, the introduction of Western law to be applied concurrently with customary law, makes the application of customary law dependent on the nature of the marriages, as shall be discussed in Chapter Two. Customary law jurisdiction even in family matters is reduced to cases arising from customary marriage. Statutory marriages are under statutory law of Western origin. The complications that surround the existence of these two types of marriages are the topic for discussion in the next Chapters.

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(98). Information from fifteen parents interviewed in each of the villages of Matoh Butu, Barombi Kang, Butu Mbonge, Kombone and Mbonge between June-August 1990. The common response was, "Bakala bâ foni itafo éni ya maluki li wa, i se ba kobâ lo se iyoa." (Mbonge dialect) In English this is translated as "divorce is a European thing. We did not have it before colonialism."

(99). See, FITZPATRICK, P., "Law, Modernisation and Mystification," in SPITZER, S., (ed.) Research in Law and Sociology, A Research Annual, vol. 3, 1980, p. 161.

CHAPTER TWO

MARRIAGES AND THE LAW OF MARRIAGE IN CAMEROON

Cameroon has a dual form of marriage regulated by two distinct bodies of law. As in other ex-European African colonies,[1] they are: statutory marriages and customary marriages, under the jurisdictions of statutory law and customary law respectively. This is a colonial heritage, explainable within an historical context. European marriage law was introduced by colonialists into societies in which customary marriage regulated by customary law was the only known form of marriage. Writers are not unanimous in their views regarding the reasons for the importation of the Western concept of marriage and marriage law.[2]

The introduction of a Western form of marriage meant that two strange concepts of marriage - marriage as understood in christendom and the traditional African concept of marriage were to co-exist. As with the legal and judicial systems generally, therefore, two forms of marriages and marriage laws exist in Cameroon as in other ex-colonial African countries south of the Sahara. These two concepts of marriage - customary and statutory marriage are the topics for discussion in this Chapter. Customary marriage regulated by customary law will be treated in Part A. Rather than treat customary marriage generally, the intention is to concentrate on specific aspects of this marriage form which highlight the peculiarity of an African customary marriage and at the same time, demonstrate its sanctity as a legal marriage. Part B will deal with statutory marriage under statutory law jurisdiction. In this part, the objective is to trace the mechanism by which Western marriage law was introduced and the effect it has on marriage law and marriages in Cameroon today. We also intend to establish that English marriage law based on the English concept of marriage is not suitable for mutatis mutandis importation into Cameroon.

A. CUSTOMARY MARRIAGE UNDER CUSTOMARY LAW.

Pre-colonial Cameroonian tribes as in other black African societies had a marriage institution, the ideals of which were informed by social values, beliefs and customs of the

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(1). See, PHILLIPS, A., and MORRIS, H. F., Marriage Laws in Africa, Oxford University Press, London, New York, Toronto, 1971; ANYEBE, A.P., Customary Law: The War Without Arms, 4th Dimension Publishers, Enugu, 1985, p. 1. KASUNMU A. B., and SALACUSE J. W., Nigerian Family Law, Butterworths, London, 1966.

(2). See, this issue discussed in KASUNMU and SALACUSE, ibid., note 1: pp. 84-85. Cf. MONIE, J. N., The Development and Constitution of Cameroon, Ph.D Thesis, University of London, 1970, (unpublished), p. 726.

people. This form of marriage which was referred to by the colonialist as "marriage under native law and custom", and became known later as customary marriage, is as important as ever. Customary marriage will be treated under three broad sub-headings. First, an attempt to define a customary marriage shall be made. This will basically involve discussing the nature of customary marriage from an anthropological perspective, past and present. The discussion will be followed in the second sub-heading by a discourse on celebration of customary marriages. The third sub-heading will look at the legal validity or the position of customary marriage today in the Cameroonian legal system.

Defining a Customary Marriage:

The discussion starts with an acknowledgement of Prof. Phillips' summary about the reality of researching on African customary marriage. Writing on marriage laws in Africa, he calls attention to the following facts about investigating African Marriage law:

> African law which derives from custom has not developed to a stage at which it can be isolated (to the extent possible in more advanced legal systems) from its social context. Hence, investigating marriage laws in Africa constitutes a field of research lying on the frontiers of law and anthropology. For the student of African law is at present largely dependent for his "raw material" on the work of anthropologists.(3)

The following discussion on the nature of African customary marriage will thus, be done within the frontier of law and anthropology. Being a legal thesis, however, great efforts shall be made to situate the discussion more in a legal context.

It is difficult for one to make a comprehensive definition of an African customary marriage, in other words, one which will encompass all the cultural, moral, legal and the economic features of a customary marriage. Attempts that have been made in this direction have attracted criticisms in one form or the other. In his discussion on Bangwa marriage, Brain defines marriage in customary law as:

> "A union between a man and a woman in which their relationship to one another is jurally defined and which establishes the legitimacy (i.e entitlement of full filial rights) of the children born to the woman."(4)

Kanga, a Cameroonian jurist discussing the impact of European law on the customary law of

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(3). PHILLIPS, A., Marriage Laws in Africa, in PHILLIPS and MORRIS, op. cit., note 1: p. 63 at 69.

(4). BRAIN, R., Bangwa Kinship and Marriage, Ph.D thesis, University of London, 1967, reproduced in MONIE, op. cit., note 2: p. 719.

the Bamileke tribe, defines marriage in customary law as:

> "The acquisition by a man by means of payment of a sum of money, several goats and sheep of one or several women who become his exclusive property."[5]

The two definitions convey the message that, as any other marriage institution, an African customary marriage necessarily has conditions precedent to its legal validity from which flow all the incidents of a legal marriage. Nevertheless, they have both been criticised for being far from encompassing all the features of a customary marriage in African law. The second definition attracts even further criticism for giving the impression that a man can marry more than one wife in a single marriage ceremony. Whereas on the contrary, a man's relationship with his wives is regulated by as many separate marriage contracts as the number of wives he has, running concurrently. It has also been criticised for concluding that women are bought and sold, a discussion we shall pursue later.[6]Still, another attempted definition by Chinwuba, writing on family law in southern Nigeria, is centred solely on the traditional aspect of indissolubility of a customary marriage and the involvement of the whole kin group. He defines it thus:

> "The union of a man and woman for the duration of the woman's life being normally the gist of a wider association between two families or sets of families."[7]

This definition of customary marriage which only reflects indissolubility and kinship involvement is, like the first two, not a comprehensive definition. These attempted definitions and criticisms show the difficulty of having a definition which embodies all the characteristics an African customary marriage.

The question as to what constitutes an African customary marriage institution may receive a more satisfactory answer by aiming at identifying and describing elements which characterise customary marriages rather than by way of a definition. In this regard, a variety of factors have been identified as distinctive features of an African customary marriage. They include: its potentially polygamous (polygyny) nature; the payment of bride price or dowry so fundamental to its validity generally; the practice of widow-inheritance and the levirate and child marriage as valid customary marriages; the involvement of the lineage in bringing the marriage into existence and the presence of the kin-group in the ensuing marriage throughout

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(5). KANGA, V., Le Droit Coutumier Bamiléké au Contact des Droits Europeens, Imprimerie du Governement, Yaounde, 1959 reproduced in MONIE, ibid.

(6). For these criticisms, see, MONIE, ibid., pp. 719-720. Cf. OBI, S. N., CHINWUBA, Modern Family Law in Southern Nigeria, Sweet & Maxwell, London, 1966, p. 155.

(7). CHINWUBA, ibid., p. 155.

its subsistence; the distinctive formalities which bring the marriage into existence. An African customary marriage is further seen as: a union which brings together and unites both parties' kinsmen, and which may have been entered into without spousal consent; a union in which customary rules relating to kinship ties and relationship determine matrimonial property, succession to titles and inheritance of property; a union in which emphasis is primarily laid on procreation of children who at all times are affiliated to the wider kin-group as the main end of marriage; a union in which children are seen as elements of continuity of the lineage.[8]Of the variety of features enumerated above, three have been the main interest of anthropologists: The significance of lineage in an African customary marriage; the bride price and the element of polygamy. The institution of bride price will be treated under the discussion of celebration of customary marriages, while polygamy will be examined when dealing with the nature of statutory marriages later in the Chapter. The other characteristics will also be discussed where need arises in the Chapter in order to minimise repetition. The discourse that follows is on the significance of lineage.

Kinship and Customary Marriage:-

Much emphasis, perhaps too much, has over the years been laid on the significance of lineage or kin-groups in describing African customary marriage. It has been said that in African customary law, marriage is not so much a union between the two persons getting married. Rather, it is very much a union of their lineages. This attitude is summarised in the words of Prof. Allott quoted in the following passage:

> "Marriage is a much less important social institution in Africa than in Western society, though all African societies have such an institution which is often sharply differentiated ... linguistically, socially and legally from irregular or informal unions. Ties created by birth often matter more, as being more permanent, than those created by marriage, and a woman may feel closer to her brother than her husband. All tribes have broad organisation into families groups of various types (lineages or kindreds, extended families, households, etc), and such family groups have much to say in the lives and property of the members. ... Marriage was often not so much a union between one man and one woman as between two family groups expressed through

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(8). See, PHILLIPS, A., "An Introductory Essay," in PHILLIPS and MORRIS, op. cit., note 1: p. 1 at 5-9; MAIR, L., African Marriage and Social Change, Frank Cass & Co. Ltd., London, 1969, pp.1-2. Cf. MONIE, op. cit., note 2: p.721; CHINWUBA, op. cit., note 6: p.156.

conjunction of spouses, and the relationship between the spouses might have been entered by them involuntarily... ."[9]

Apart from highlighting the stressed significance of lineage, the passage gives a summary of African customary marriage as has been portrayed by the group of anthropologists referred to by Burnham as "descent theorists" of the 50s. Their analysis of African customary marriage is dominated by discussions on rules of unilineal descent and corporate lineages. From this perspective, the importance of a customary marriage lay in its ability to create new elementary family units, the universal building block of kinship structures. The analysis of "descent theorists" also stressed the role of kinship structure in legitimising children to provide social continuity for lineages.[10]

Approached from this angle, analysis of African customary marriage was totally dissociated from practical problems existing in these marriages which needed to be studied and exposed. As Burnham puts it, "attention was directed away from patterns and processes of competition, inequality, conflict and exploitation within domestic groups and most particularly, family units which were portrayed as the unproblematic atoms of kinship."[11]

Recent research on African marriage, however, is turning away from the structural descent analysis, towards a perspective of such a marriage as an alliance. The work of Copet-Rougier among the Mkako tribe of Cameroon is indicative of this trend. She talks of changes in the notion of customary marriage, such as, women refusing to accept their parents' choice of husbands and making theirs; breaking engagements and subverting the traditional aims behind bride price and using it for their own social advancement.[12] Parties enjoy greater freedom now in the choice of their spouses, as we shall see later in the Chapter. Far from

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(9). ALLOTT, A. N., Essays in African Law, Butterworths & Co. Ltd., London, 1960, pp. 213-214. For other citations in which an African customary marriage has been echoed as a union of kin-groups rather than of individuals, see, RADCLIFFE-BROWN, A. R., "Introduction," in RADCLIFFE-BROWN, A. R., and FORDE, D., (eds) African Systems of Kinship and Marriage, Oxford University Press, London, New York, Toronto, 1950, p. 1 at 46; PHILLIPS, op. cit., note 8: p. 7. Cf. MITTLEBEELER, E. V., African Custom and Western Law, Africana Publishing Co., New York, London, 1976, p. 40.

(10). See, BURNHAM, P. "Changing Themes in the Analysis of African Marriage," in PARKIN, D., and NYAMWAYA, D., (eds) Transformations of African Marriage, Manchester University Press, Manchester, 1987, p. 37 at p.37. Cf. RADCLIFFE-BROWN, A. R., and FORDE, D., ibid. Cf. RADCLIFFE-BROWN, A. R., Structure and Function in Primitive Society, Cohen & West Ltd., London, 1952.

(11). BURNHAM, ibid., p. 38.

(12). See, COPET-ROUGIER, E., "Etude de la transformation du Marriage chez les Mkako du Cameroun," in PARKIN and NYAMWAYA, op. cit., note 10 : p. 75 at p. 92.

making the significance of descent or lineage in African customary marriage the main focus of their discourse, alliance theorists, portray lineages as a way in which groups can be differentiated and engage in marital alliances.

Still, other anthropologists have approached the study of African marriage almost isolated from such considerations as descent or lineage and kinship nomenclatures. Instead, they are focusing attention on problems related to polygyny, bride price, divorce and separation rates, child custody, women's rights in marriage.[13] This is in response to the dwindling significance of lineage due to social and economic changes which will be discussed in the next Chapter. This is not, however, to deny the traditional significance of lineage.

Traditionally, there was an inextricable link between lineage and land upon which one's survival depended. Land which was the base of traditional economy was indivisible and customary land tenure rules did not permit individual ownership of land. It was identified with lineages or descent groups once the foundation stone on a particular piece of land had been laid down by an ancestor to whom it was apportioned. Children were born in the ancestral compound, grew up there, had their own family units with wives and children. Eventually, children, brothers and their children and grand children formed separate units on lineage land. In order, therefore, to acquire a piece of land for subsistence farming and even for habitation, one had to be identified as a kin in a particular lineage of descent. In patrilineal societies, which all the tribes under discussion in this work are, legitimate children are affiliated into their father's lineage. Descent is traceable on the father's side. As land was owned by a kin-group as a whole rather than individuals, it was justified for kinship rules to determine who had the right to use a particular piece of land, who had what right to inherit land and who could succeed to which titles and ranks. It was reasonable, therefore, for children to be seen as belonging to particular lineages, ascribing them status at all times. Unlike sons who at all times belong either in their father's lineage if in patrilineal societies or their mother's if in matrilineal societies,[14] a daughter becomes incorporated into her husband's lineage on marriage.

Attachment of children to specific kin-groups at all times enabled them to stay in the

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(13). See, generally, PARKIN, D., and NYAMWAYA, D., "Transformations of African Marriage: Change and Choice," in PARKIN and NYAMWAYA, op. cit., note 10: p. 1 at 2. Cf. BURNHAM, op. cit., note 10: pp. 38-39.

(14). See, AYISI ERIC, O., An Introduction to the Study of African Culture, Heinemann, London. Ibadan. Nairobi, 1972, p. 23. Cf. OTTENBERG, S., Double Descent in an African Society: The Afikpo Village Group, University of Washington Press, Seatle, London, 1968, Chs. 2 and 3.

compounds they were raised in and became fathers and grand fathers too. This was essential for continuity of the family name. It was also reasonable to develop customary law rules which incorporated a wife into the kingroup in which she is married, as will be discussed later. The husband who acquires the rights of the bride's father on marriage is himself primarily identified as part of a kin-group than as an individual. It is expected, therefore, that a man's wife becomes part of that group which remains influential in determining many issues in their matrimonial life. Besides, the lineage members' role in bringing the marriage into existence is very significant. This discussion will be returned to later in the Chapter.

Kinship ties were, and are still at the centre of socio-cultural organisation. This is reflected in matrimonial units which are the embryo of social organisation. This is why on marriage, the spouses owe to each other, a duty of taking proper care of the other spouse's relatives or kin as Ardener observed among the Bakweri of Cameroon in the 50s.(15) Furthermore, there is an obligation of mutual help between members of the same kin-group. Traditionally, it involves: jointly working in each member's farm; providing other forms of physical assistance, such as building of houses and bands. kinsmen also assisted each other, as they still do, to pay bride price when a member of the group is getting married. With the development of commercial economy, financial assistance between kinsmen also became very significant. This obligation of mutual help survives even when members of the group leave the compound to reside in another village or town.(16)

Generally, relatives who leave the villages for the cities maintain the link with their kin through letters, visits during week-ends and holidays, and information brought in by people travelling between the villages and towns and cities. During such visits, migrants take the opportunity to arrange kinship matters in which they are concerned. Such visits are also reciprocated by members of the kin-group who visit their relatives in the towns and cities. Even amongst the kin who live in the towns, the obligation of mutual assistance survives. Migrants help younger relatives to get jobs, provide them with money to start work or training, provide money for academic education of their kin. The younger ones in turn provide physical help, such as running of errands, helping in household chores and baby-sitting.

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(15). See, ARDENER, E., "Social and Demographic Problems of the Southern Cameroons Plantation Area," in SOUTHALL, A., (ed.) Social Change in Modern Africa, Studies Presented and Discussed at the First International African Seminar, Makerere College, Kampala, January 1959, Oxford University Press, London New York Toronto, 1961, p. 83 at p. 88.

(16). This will be elaborated on in Chapter Three.

Generally, the older kin in the cities and towns assume responsibility to look after the younger ones who live nearer them.[17] The strength of kinship in African customary marriage was also acknowledged in a study Ardener conducted jointly with his wife in the Bayang tribe of Cameroon.[18] Goody made similar observations from her study of tribes in Ghana.

Goody noticed the strength of kinship and inter-dependence between members of kin-groups. She acknowledges the presence of kinship fostering: a system which either involves a father transferring his obligation to educate his child(ren) to a lineage member who is financially equipped for the task. Children thus fostered grow up away from their parents who, nevertheless, retain parental authority. Whether in academic education, or learning professional skills or a trade, the children maintain the link with their parents through letters, messages and occasional holidays.[19] The kin on whom such financial responsibility to educate or train a relative is vested, generally (there are some exceptions), willingly discharges it. Especially, as in most cases, he may have been brought up and educated through kinship assistance. The advantage of this system is that intelligent children who without such support would not get the benefits of education because their parents are financially incapable, are given the opportunity by able and willing relatives. In turn, they are not only expected to do the same for other young kin but also to provide financially and otherwise, for the older relatives who are no longer able to work and provide for themselves. This is indeed, a secure system of social insurance which helps to reduce poverty levels in

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(17). See, ARDENER, op. cit., note 15: P. 88. Cf. ARDENER, E., and ARDENER, S., Plantation and Village in the Cameroons: Some Economic and Social Studies, Oxford University Press, 1960, pp. 243-245; SOUTHALL, A. W., "Kinship, Tribalism and Family Authority," in SOUTHALL, op. cit., note 15: p. 31 at 31-43. Cf. LLOYD, P. C., Africa in Social Change, 5th ed., Penguin Books Ltd., Harmondsworth Middlesex, England, 1972, pp. 184-188. Cf. MITTLEBEELER, op. cit., note 9: p. 39; GEARY, M. C., On Legal Change in Cameroon: Women, Marriage and Bridewealth, Boston, 1986, p. 14.

(18). ARDENER and ARDENER, ibid.

(19). See, GOODY, E. N., "Delegation of Parental Roles in West Africa and the West Indies," in GOODY, J., (ed.) Changing Social Structure in Ghana: Essays in Comparative Sociology of a New State and an Old Tradition, International African Institute, London, 1975, p. 137 at 137-151. Cf. GOODY, E. N., Parenthood and Social Reproduction, Cambridge University Press, Cambridge, 1982, Ch. 8. Cf. LLOYD, op. cit., note 17: pp. 186-188.

specific lineages.[20]

Despite the discussed significance of lineage in an African customary marriage, social and economic changes affecting directly or indirectly the significance of kinship in African customary marriage are taking place. These changes will be discussed in the next Chapter.[21] By deviating from a structural approach to the study of African customary marriage, current research acknowledges socio-economic changes which in turn have an effect on cultural values. There is increased realisation of the inequalities, conflict and exploitation in customary marriage relationships epitomised by customary law rules of kinship which determine matrimonial issues. It is important, therefore, for contemporary customary marriage discourse to focus on relevant matters dealing with the content of the matrimonial unit created, such as, custody of children; matrimonial property; polygamy (polygyny) and the relationship between half-siblings vis-a-vis inheritance and succession. This is the context within which customary marriage is intended to be discussed in the thesis with custody of children of customary divorce as the main focus. In the discussion that follows, the celebration of and the legal validity of customary marriage in Cameroon will be treated.

CELEBRATION OF A CUSTOMARY MARRIAGE:

We intend to start this discussion with a definition of a customary marriage for the purpose of this work, having in mind the difficulty of making a comprehensive definition of a customary marriage, as discussed earlier. Regardless of the influence of lineage or extended family or the kin-group on a customary marriage, at the base of that social unit is the couple who get married. On marriage, therefore, an institution is created which gives rise to rights and obligations between the spouses. These rights and obligations form the legal basis of a valid customary marriage.[22]For example, a husband in a customary marriage acquires the right to sexual intercourse; right to the woman's domestic services and the right to filiate the

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(20). See, ARDENER, op. cit., note 15: pp. 83-92; ARDENER and ARDENER, op. cit., note 17: pp. 242-244; SOUTHALL, op. cit., note 17: pp. 31-43. Cf. SOUTHALL, A.W., "The Position of Women and the Stability of Marriage," in SOUTHALL, op. cit., note 15: p. 46 at 46-50. Cf. MAIR, L., An Introduction to Social Anthropology, Clarendon Press, Oxford, 1965, ch. 5. Cf. LLOYD, op. cit., note 17: pp. 176, 177-178, 184-188. Cf. MAIR, op. cit., note 8: p. 2.

(21). Post, p. 119.

(22). See, AYISI, op. cit., note 14: pp. 7-8.

children who must[23] be given to him by the wife, into his kingroup on marriage. Similarly, a customary marriage wife acquires the right of protection from co-wives and relatives; right to sexual intercourse; right to gifts made to herself and her relatives by her husband on marriage.[24]These rights accrue from the relationship of husband and wife. Furthermore obligations towards each other, such as, wife's duty to cook for her husband and his relatives who visit, duty to respect each other and each other's kinsmen, are duties which arise from their relationship as husband and wife. A wife's relationship with the kinsmen of her husband arises first from her position as the wife of her husband. The same is true of a husband's relationship with her wife's kin. Before viewing a customary marriage as an instrument of social re-structuring, bringing together two or more kin-groups, therefore, it should be seen first, as a relationship between two people. Mair expresses this view, and correctly too, in the following excerpt:

> "African marriage, like that of the Europeans, is an association between two persons for mutual support and the creation and rearing of children. But also usually ... the wider aspect of alliance between groups of kin."[25]

This applies to polygamous marriages as well, for such a marriage is made up of as many households as there are wives. A polygamous husband has distinct marriage contracts with each of the wives. Each marriage contract gives rise to rights and obligations between the polygamist and each of his wives. The bringing together of the kin-groups of the spouses is incidental to the marriage. We will, therefore, define an African customary marriage as:

> "A relationship entered by one woman exclusively to one man, who may himself have more than one wife, creating a unit in his kingroup, and by the same token, giving rise to recognised customary rights and obligations between the parties, primarily aimed at procreation of children in order to secure legitimate descendants."

A customary marriage as an institution presents features which, as stated earlier, are reflective of dominant social and cultural values in African tribes.

These features are peculiar to the customary law institution of marriage,[26] and they may

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(23). Children are the chief end of marriage. See, MAIR, op. cit., note 8: p. 1. Cf. LIENHARDT, G., Social Anthropology, Oxford University Press, London New York Toronto, 1964, p. 122.

(24). See, WAMBUI WA KARANJA, "Outside Wives and Inside Wives in Nigeria: A Study of Changing Perceptions in Marriage," in PARKIN and NYAMWAYA, op.. cit., note 10: p. 247 at 249-250.

(25). See, MAIR, op. cit., note 8: p. 4.

(26). PHILLIPS, op. cit., note 8: p. 6.

explain why those evaluating the African marriage institution from the perspective of the Western ideology of marriage have been wary to characterise them as marriages. References have been made to African customary marriage as "unions". This was the view of Hamilton C.J., in 1917 when he made the following pronouncement in the East African case of Rex v. Amkeyo[27]

> "... In my opinion, the use of the word "marriage" to describe relationships entered into by an African native with a woman of his tribe according to tribal custom is a misnomer which has led in the past to confusion of ideas..."

Contrary to this expressed judge's opinion, African customary marriages are valid marriage institutions[28] which have condition precedents to their coming into existence.

There are formalities and capacity requirements, as in statutory law, which have to be met for an African customary marriage to exist.[29] A valid customary marriage is preceded by protracted marriage negotiations. Discussions take place between close relatives of both parties and such talks constitute part of the formalities for celebrating a valid customary marriage in the various tribes.

Significance of Capacity to Marry in Customary Law:-

As with a statutory marriage, for a customary marriage to be valid, the parties must have the capacity to marry. In customary law, capacity basically refers to the age of the spouses to-be, the consent of the parties and that of their parents. Another capacity requirement parties have to satisfy is the rule of exogamy. Even if there is capacity, the

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(27). (1917) 7 E.A.L.R 14, cited in PHILLIPS, op. cit., note 8: p. 3 at note 2.

(28). Ibid., pp. 3-4 at note 2.

(29). For an account on celebration of customary marriage, see, RUBIN, N. N., "Matrimonial Law Among the Bali of West Cameroon: A Restatement," (1970)14 Journal of African Law, 69 at pp. 75-89; ARDENER, E., Coastal Bantus of the Cameroons, International African Institute, 1956, pp.62-64. Cf. BRAIN, op. cit., note 4: pp. 117-119; M'BAYE, K., Le Droit de la Famille en Afrique Noir et a Madagascar, Paris, 1968, pp.125-130; CHINWUBA, op. cit., note 6: pp. 161-179. Cf. ELIAS, T. O., The Nigerian Legal System, Routledge & Kegan Paul Ltd., London, 1954, pp. 290-295.

formalities for celebration as required by the various tribal laws[30] have to be met for a valid customary marriage to be contracted. These requirements which we are about to examine, portray the peculiarity of African customary marriages.

Age and consent in customary marriages:-

Age:-

The age at which capacity to marry is acquired under statutory law, as will be discussed later in the Chapter, is fixed. By contrast, there is no fixed age for capacity to marry in customary law. This reality arises from the use of the concept of puberty as a determinant of majority.[31] Persons in customary law, cease to be minors once they have reached puberty for which there is no general age in respect of every individual.[32] With the exception of cases of child betrothal, which will be explained later, puberty had to be reached for capacity to marry to be acquired. In consequence of the variation in puberty ages, capacity to marry in customary law varies depending on when puberty is attained.

The use of puberty as a determinant of age at which capacity to marry is reached in customary law was dictated by the socio-cultural circumstances that were attendant to the pre-colonial people. The illiterate status of the people and the traditional system of

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(30). There are minor variations in the different tribes in matters of detail. However, the three stages of marriage which will be discussed later in the Chapter are the common formalities involved in celebrating an African customary marriage. See, ELIAS, ibid., p. 290. Cf. Report by Her Majesty's Government in the United Kingdom of Great Britain and Northern Ireland to the General Assembly of the United Nations for the Year 1956, H.M.S.O., London, 1957, p. 37 at para. 172. Reference to this report hereinafter will simply be "The Report by Her Majesty's Government on the Cameroons for the Year 1956".

This information was confirmed during my interviews with village elders, members of the village councils and the chiefs in the villages of Matoh Butu, Butu Mbonge, Kombone Bakundu, Mbonge, Barombi Kang and Kokobuma-Bafaw between June-August 1990.

(31). See, KASUNMU, A.B., "The Law of Husband and Wife in Western Nigeria," in Integration of Customary Law and Modern Legal Systems in Africa, Africana Publishing Corp. New York, and University of Ife Press, Ile-Ife, Nigeria, 1971, p.330 at 336. This was confirmed by information from my interviews, cited earlier, supra, note 30. Cf. The age of marriage under English canon and common law. See, BROMLEY, P. M., and LOWE, N. V., Bromley's Family Law, 8th ed., Butterworths, London, Dublin, Edinburgh, 1992, p. 43.

(32). The puberty ages are stated by some African writers as, 14 for females and 17 years for males. See, KASUNMU, ibid. Cf. The stated puberty ages under English canon and common law are 12 for females and 14 years for males. See, BROMLEY and LOWE, ibid.

administration during the pre-colonial period explains the significance of puberty in determining majority age in these societies. It was impracticable to keep a concise off-hand record of dates of birth in a society where traditional events and symbols[33] served as today's annual calenders. Past events were recollected by these happenings. For example, the birth of a child on the day that a significant event occurred was remembered by that event. Hence, the records were not cumulative. Signs of puberty in a child indicated to one's parents that majority has been attained. Puberty for females is said to be reached when menstruation begins and pubic hair develops. Mature physical characteristics, such as, pubic hair, breakage of voice matched by manifest physical strength in males were indicative of puberty.[34] This is still the case as regards the older people, who are predominantly illiterate in the villages. Even among the younger generation, those with just elementary or no education at all still lack the ability of recollecting events, such as, births and deaths by days, weeks, months and years.[35] This is due to the fact that, generally, births and deaths occurring in these areas are not registered despite the obligation placed on all Cameroonian people to this effect.[36] Therefore, it is rare for parents in villages to possess birth certificates for their children unless delivery took place in a medical establishment. Puberty remains a significant determinant of age at which capacity to marry is attained in customary law.

The variation in age of marriage in customary law is compounded by the practice of child marriage. Child betrothal is a form of customary marriage which entails betrothal of the to-be bride to the to-be groom when she has not yet attained puberty. In some cases, she is a newly born baby. At times too, both prospective spouses could still be very young. Where this is the case, betrothal is entirely made by their parents and kinsmen. The to-be

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(33). The natural environment (moon, sun) and human events, such as the death or enthronement of a chief were significant. For example, sun rise and sun set indicated the beginning of a new day and the end of the day. Also, the size of the moon was indicative and still is of the menstrual cycle. This information was obtained from my interviews cited earlier at note 30. Information on the significance of the moon on menstrual circle was obtained from the women respondents in the selection of fifteen parents spoken to in each of the villages of Butu, Matoh Butu, Kombone Bakundu, Mbonge, Barombi Kang and Kokobuma between June - August 1990.

(34). Information obtained from the interviews cited, supra, notes 30 and 33. Cf. RUBIN, op. cit., note 29: p. 71. Cf. MONIE, op. cit., note 2: p. 726.

(35). Information obtained from the younger mothers and fathers in the interviews cited at note 33.

(36). Part IV, SS. 30-40 of the 1981 Ordinance. Failure to register births in this rural areas is not entirely the fault of the parents involved. It is partly dictated by the shortcomings in administrative policy which will not be discussed in this work in view of limited space.

bridegroom together with his parents and relatives approach the parents of the girl intended to be betrothed to ask for her hand in marriage. If accepted, marriage formalities which will be discussed later, are performed. If, however, betrothal is not followed by performance of the requirements, the bride is legally entitled to marry another man of her choice when she attains puberty. She is not liable to return any gifts which were made during betrothal. The effect of betrothal is that both parties' parents and kin recognise themselves as prospective in-laws. Cohabitation as husband and wife does not begin until she has attained puberty.[37] However, child betrothal is becoming a thing of the past[38]in the tribes studied and in other African tribes as the element of consent of the spouses, especially that of the bride becomes increasingly significant.

Consent: spouses and parents:-

Consent as a capacity requirement in customary marriage is two fold: There is on the one hand, the issue of the consent of spouses-to-be and on the other hand, that of their parents and kinsmen. Traditionally, customary marriages came into existence purely by arrangement between parents and close relatives. A man's parents chose a girl they thought suitable as a bride for their son in another family which was well known to them. The prospective bride's background had to be well known inorder to be certain about her upbringing. With or without discussing it with their son they met the bride's parents with the proposal and if accepted, marriage negotiations followed as arranged.[39] Once that had been done, the spouses, in particular, the brides, were entered into a marriage in respect of which they had no say. Today, this purely traditional approach is changing.

In the tribes studied as in many other African tribes[40]marriages are initiated by the spouses to-be. Generally, if the man sees a suitable woman for a bride, he meets the woman herself with his proposal before telling his dad. Alternatively he approaches the girl after he has discussed it with his dad. Except, therefore, in situations involving uneducated women

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(37). See, ELIAS, op. cit., note 29: p. 290. Cf. GEARY, op. cit., note 17: pp. 11-12.

(38). See MONIE, op. cit., note 2: p. 728. This information was corroborated by the information obtained from the interviews cited at notes 30 and 33.

(39). See, KASUNMU and SALACUSE, op. cit., note 1: pp. 42 and 57. Cf. RUBIN, op. cit., note 29: p. 74.

(40). See, KASUNMU and SALACUSE, ibid., p. 76. Cf. NUKUNYA, G. K., "Family and Social Change," in MAXWELL, O., (ed.) Colonialism and Social Change: Essays Presented to Lucy Mair, Mouton Publisher, The Hague. Paris. New York, 1975, p. 163 at 165. Cf. RUBIN, ibid.

who are likely to be forced into a marriage against their will, brides are instrumental nowadays in initiating their marriage. Nowadays, children complete at least primary education[41] and have learnt to say no if it is a parental arrangement and the choice is not suitable for them. The significance of consent of the parties has in some African tribes been put down in declarations as a requirement before celebration of a customary marriage.[42] This is not to say, however, that the consent of parents is no longer required.

The consent of the parents, in particular, the bride's parents is a necessary requirement because without parental consent, no customary marriage can be celebrated with a woman who has not been married before. However, "marriage" by elopement can come to existence without consent in cases where the parties elope and assume cohabitation. Although marriage by elopement is put forward by writers as a form of African customary marriage in certain tribes,[43] "marriage" by elopement may be described as concubinage. It is a contradiction in legal terms to say concubinage is a marriage as no customary law requirements for celebration of a valid marriage are met. Like "marriage" by elopement widow-inheritance and leviratic marriages do not require parental consent.

Although widow-inheritance has different legal implications from the levirate, both types of marriages arise under the same circumstances. They are marriages in which the bride who is a widow, is inherited by a designated kinsman of her deceased husband. Usually, the deceased's senior brother or a junior brother if there is no senior brother, who is appointed next of kin inherits the widow. No further marriage ceremony is required for this marriage to exist. Nevertheless, the inheriting kin can organise food, drinks and dance to mark the occasion if he chooses to do so. The difference between widow-inheritance and the levirate stems in the consequences that flow from the marriage.

If the marriage is a leviratic one, the kin who inherits acquires no more than sexual rights over the woman and rights to her domestic labour. The inheriting kin does not inherit his deceased brother's right to filiate any of the widow's children. This includes children born before and after he has inherited the widow, although he could be their biological father. He is no more than a fostering parent even as regards children the widow has by him. The

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(41). In 1976, 61% of girls aged between 6-14 were in primary schools as opposed to 68.8% of the total number of boys within the same age group. See, NDONGKO, W. A., and VIVEKANANDA, F., The Economic Development of Cameroon, Bethany Books, Stockholm, Sweden, 1989, p.34.

(42). See, KASUNMU and SALACUSE, op. cit., note 1: p. 76.

(43). See, MONIE, op. cit., note 2: pp. 721-722; RUBIN, op. cit., note 29: p. 75.

children are considered the dead brother's children. They inherit and succeed in the dead brother's name. By contrast, the implication of widow-inheritance is wider.

Widow-inheritance was the most widely practised form of inheritance in the tribes studied as in most African tribes. Unlike in a leviratic marriage, the kin who inherits also acquires on inheriting, the right to filiate children begotten by him with the widow in his name rather than in his deceased brother's name. He is the biological father as well as their customary law father for all intents and purposes. They inherit and succeed in his name.(44)

The advantage of such a system which has been echoed by anthropologists is that it tones down stories of cruel step-mothers, thus protecting the child against the contingency of death of one parent. For on death of the father, the deceased man's children by the widow have as a new parent a kinsman, whom they are likely to have known all their life. In this way, as Bohannan puts it, "the most traumatic aspects of step parent experience are minimised."(45)

Both types of inheritance marriages are based on the customary law rule that a customary marriage subsists until bride price has been returned. Thus, the requirement of parental consent is irrelevant as no new marriage is celebrated. It is a continuation of the marriage which had been celebrated between the deceased brother and the widow, who remains such until the bride price paid on her is returned. If, therefore, the widow refuses to be inherited, she can either remain in her deceased husband's compound (likely to be together with the kin-group) as a widow or resume habitation anywhere. Regardless of where she lives, she is still considered her deceased husband's wife as long as the bride price subsists and any children she has by another man are in customary law, her deceased husband's children.(46)We shall return to this discussion in Chapter Three.

It has emerged from the discussion of the three types of "marriages" ("marriage" by elopement which as stated earlier, is concubinage rather than a marriage; the levirate and widow-inheritance) in which there is no requirement of parental consent that they are irregular marriages. "Irregular" in this case means that no celebration is involved to bring them into existence. Leviratic marriage and widow-inheritance, are becoming a thing of the past in the

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(44). For discussions on the levirate and widow inheritance, see, BOHANNAN, P., Social Anthropology, Holt, Rinehart & Winston, New York. Chicago. San Francisco. Toronto. London, 1963, pp. 78-82, 119-120. Cf. MAIR, op. cit., note 20: pp. 84-85.

(45). BOHANNAN, ibid., p. 122. See our earlier discussion on this on pp. 44-49. We shall return to this later, post, Ch. 6.

(46). See, MAIR, op. cit., note 20: p. 85. See the cases discussed in Ch. 1, pp. 44-49.

tribes under consideration in this work[47]as in most African tribes. Parental consent is necessary for a customary marriage to be celebrated.

Parental approval of the choice of a husband or wife remains fundamental in African customary marriage. Both parents' consent is relevant. In practice, however, the consent of the mother (in patrilineal societies) may be dispensed with if they are divorced and the mother or her close kin cannot be reached. Even in such cases, the consent of any member of her lineage is enough. If there is any disagreement between the parents, the father's consent is sufficient. The significance of parental consent stems from the cultural belief that it is essential that the background of both parties to the marriage and that of their parents be investigated. This is done in order to discover any facts which could be an impediment to the marriage or give rise to instability, such as, any history of genetic disease; moral upbringing to avoid any disgraceful behaviour and ensure that relatives will be welcomed and respected in their child's home. This safeguard is important as the bringing together of both spouses' kin-groups is a significant incidence of a customary marriage. The blood relatives and affines in the traditional sense become "family". The absence of one's in-laws on any occasion is very conspicuous and a cause of feud. Furthermore, both spouses' kinsmen, in particular, the bride's expect assistance, financial and otherwise, from the bridegroom, as discussed earlier.[48]The newly established bonds between the kin-groups cannot be properly maintained if the parents or relatives of one or both spouses do not approve of the marriage. Another reason underlying parental consent which shall be discussed below, is that their parents need to be certain that the rules of exogamy are respected. This is to ensure that the parties are not from the same line of descent, in which case they would be related by blood. Although, therefore, commercialisation of bride price[49]may have introduced ulterior motives to the requirement of parental consent (as in a case where parents could refuse to consent because the bride price offered is not agreeable to them, as we shall see later), it had a humble origin. Increasingly, parents try to confine their decision whether to consent or not to the genuine reasons. Even then, they are more willing to reason with the child's request in choosing a partner as there is now a high risk of the child merely eloping with the other to cohabit. This is more degrading to the parents and their kin. Spouses today enjoy greater

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(47). Information from interviews cited at notes 30 and 33.
(48). See pp. 60-61.
(49). Post, p. 74-77.

choice in choosing a partner than it seems to be acknowledged.[50] As mentioned earlier, the rule relating to exogamy also has to be met for the parties to have capacity to marry.

Exogamy:-

For parties to have capacity to marry, they should not be related by blood. Due to the extension of the concept of family through the lineage system, there is a kindred of blood relationship within which marriage between the members belonging to the same such group is prohibited. One must marry out of their lineage. This is known as the rule of exogamy.[51] In customary law, there is no detailed enumeration of the class of persons one may not marry apart from the broad rule against endogamy (opposite of exogamy). Each case is approached individually. It is thus possible for refusal to consent by parents to be based on ulterior motives rather than on the rule against endogamy which, nevertheless, would be advanced as the reason. It could be helpful, therefore, if customary law declarations are made to provide a guide as regards which relationships fall within prohibited degrees of consanguinity, as some African tribes have done.[52]

The discussed capacity requirements are conditions precedent to the performance of formalities required in the various tribes for the celebration of a customary marriage.

Formalities of Marriage in Customary Law:

Under customary law in the different tribes, there are formalities which have to be performed by the bridegroom and his parents and relatives to contract a valid customary marriage. These involve a series of transactions. In all the tribes studied as in other African tribes, there are mainly three stages involved in the celebration of a customary marriage.[53] The first stage is that referred to as "knock door", otherwise known as betrothal (engagement); the second stage is the marriage ceremony and payment of bride price. Escorting the bride is the third phase, although its importance is dwindling in the face of recent social changes which will be discussed in Chapter Three.

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(50). Information from interviews cited at notes 30 and 33. Cf. KASUNMU and SALACUSE, op. cit., note 1: p.73.

(51). See, PARKIN, D., and NYAMWAYA, D., " Transformations of African Marriage: Change and choice," in PARKIN and NYAMWAYA, op. cit., note 10: p. 1 at 3-4.

(52). See, KASUNMU and SALACUSE, op. cit., note 1: p. 80.

(53). Other Cameroonian and African tribes generally have these three sets of transaction as the stages of celebration.

"Knock-door" or Betrothal:-

"Knock-door", called "esosoni" in the Mbonge and Bakundu tribes and referred to as "di kum di eku" in the Bafaw tribe, is the first step taken by the potential groom and his parents and/or close kin. They approach the intended bride's parents in a meeting together with one or two of their close relatives to ask for their daughter's hand in marriage, bringing along 10.000frs.CFA (about £20, prior to the January 1994 devaluation of the Franc CFA). The to-be bridegroom hands the money over to bride who approaches her parents with it and introduces the proposal. If accepted, an acceptance fee of 20.000frs.CFA (until recently, about £40) called "tunge",(in the mbonge and Bakundu tribes) "tung", "efu"(in the Bafaw and Barombi tribe) is demanded for the bride's mother. The same sum is demanded from the intended groom as a token for the intended bride's father, compliance with which is optional. A further 25.000frs.CFA(until recently, about £50) is, or twelve "fowls" are requested by age-mates of the bride's father. These demands are to be met on or before the date set for the ceremony. Another meeting is held to set the date the demanded items are required. This second meeting involves the spouses' parents and all their close relatives who are available. Whether, all the demands are met then or not, important discussions take place in this meeting. First, the expectations of the bride's side as regards size of the bride price to be paid are made known to the bridegroom and his kinsmen. Second, the date of the marriage festival or ceremony is fixed. These discussions could take place in one day. If, however, completion of the talks is delayed, as it could be if the bride price terms are not agreeable on both sides, talks continue for as long a period as it takes for consensus to be reached.[54] Once that happens, the celebration enters the second and crucial stage, which is the ceremony and payment of bride price, usually in part.

The Marriage Ceremony and Payment of Bride Price:-

A successful completion of the "knock door" sets the stage for the marriage ceremony or festival. On this day, members of the kin-groups involved in the celebration together with invitees dance, eat and drink the food and drinks provided by the bridegroom and his kinsmen. Usually, there is contribution from the bride's parents and their kin. The ceremony takes place at the compound of the bride's parents. While eating, drinking and dancing is going on, the most important transaction takes place between the spouses' kin-groups - the payment of bride price.

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(54). Information got from interviews cited at notes 30 and 33.

The Bride Price:-

Despite the objections which have been raised against the term "bride price" in preference to other supposedly more subtle terms, such as, "marriage payments" and "marriage considerations" or "dowry",[55] bride price is used in this work. This choice is not made for the reasons advanced by Prof. Phillips.[56]Rather, the term "bride price" is employed in order to be in line with the view, for which an argument will be made later,[57]that the bride price which is demanded on marriage is purchase price of wives. In the tribes studied, as in many other African tribes, the bride price is by far the most important aspect in a customary marriage. To quote Professor Radcliffe-Brown:

> "In most African marriages... the making of a payment of goods or services by the bridegroom to the bride's kin is an essential part of the establishment of "legality"."[58]

In tribes where bride price is paid, it has been identified as the most significant feature in a customary marriage.[59]

The significance of bride price for the validity of a customary marriage is two-fold. On the one hand, it is a formal requirement for, at least, a portion of the bride price has to be paid during celebration on the day of the marriage festival. That ceremony is not complete without the bride price transaction. On the other hand, its "legal" effect on the marriage is fundamental, affecting and creating status. It establishes the "legal" validity of a customary marriage.[60] Bride price in African customary marriage is an institution which has been the subject of academic writings by anthropologists, lawyers, jurists and historians alike, focusing on different aspects of it. In this work, the intention is to discuss two features of the bride price - the nature and the significance of the institution of bride price. The examination of the nature of bride price will be relevant in making our argument later in Chapter Six, in

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(55). See, MAIR, op. cit, note 20: p. 5. Cf. PHILLIPS and MORRIS, op. cit., note 8: p. 4 at note 3.

(56). PHILLIPS, Ibid.

(57). Post, Ch. 6.

(58). See, RADCLIFFE-BROWN, op. cit., note 9: p. 46.

(59). See, KASUNMU and SALACUSE, op. cit., note 1: p. 77. Cf. GEARY, op. cit., note 17: pp. 5 and 7. Cf. FORTES, M., "kinship and Marriage Among the Ashanti," in RADCLIFFE-BROWN and FORDE, op. cit., note 9: p. : 253 at 253; PHILLIPS, op. cit., note 8: p. 6. Cf. GULLIVER, P. H., "Jie Marriage," in OTTENBERG, S., and OTTENBERG, P., (eds), Cultures and Societies of Africa, Random House, New York, 1960, p. 190 at 196; LIENHARDT, op. cit., note 23: p. 124.

(60). See, LIENHARDT, op. cit., note 23: p. 124. Cf. KASUNMU and SALACUSE, op. cit., note 1: p. 78.

is intended to demonstrate that bride price is a transaction which fundamentally affects the substance of the marriage.

The nature of the bride price:-

Traditionally, bride price involved solely the transfer of named items, such as, cattle, goat, pig, "fowl", and agricultural produce (such as, palm wine and palm oil) to be given by the bridegroom and his kin to the bride's relatives. The requested items, the number of which was standard in each tribe for all brides, were shared in accordance with kinship rules, among the bride's parents and other members of their kin-groups. A fraction of the bride price was reserved for the exclusive use of the bride in her matrimonial home. For example, a female cattle and pig or "fowl" was reserved for that purpose. This provided her nutritional needs such as milk and meat, as well as giving her individual property in her new home. In addition, the transferred cattle into the bride's kin-group had a wider economic significance. It was usually, the beginning of cattle rearing (which till date, is done in smaller scales by most tribal people in villages) in the bride's parent's kin-group as it was unlikely that all the livestock could be killed at once. Livestock was and still is very useful in various ceremonies or festivities as cattle is slaughtered to feed the guests. Besides the benefit of cattle as food during the ceremony, livestock provided a source of milk, eggs and meat for the recipients. Most important of all, other male members of the receiving kin-group had the benefit of using bride price cattle to pay their own bride price demanded from them on marriage.

Apart from being a strong economic force in the kin-group of the bride's parents, therefore, bride price was a symbol of togetherness between the bride and her natal kin-group (despite her physical transfer into her husband's kin-group), hence, security in one another. A brother who used her sister's bride price cattle or other livestock (it could even be those reared from the bride price livestock) to pay his own bride price was expected by custom to give protection to her sister when needed. Thus, even on the death of a wife's parents, she could always count on protection and support from her natal family, which protection would be needed in case her marriage ended. She had her kinsmen to give her asylum in her natal family.[61] This traditional nature of the bride price was identified in other African

(61). Information for this obtained from interviews cited at notes 30 and 33.

tribes.[62]Transfer of livestock as bride price involved performance of rituals which had to do with blessings for child birth and success, bestowed to the newly created unit in the husband's kingroup.

Today, bride price no longer has its traditional character as a result of the introduction of capitalistic economy based on a cash nexus during the colonial period and the consequent transformation of bride price into something payable, mainly in cash and foreign goods.[63]Foreign goods such as, "sanja" (loin cloth)[64]a white shirt and a hat and a bottle of whisky became, and to date, are significant items demanded as part of the bride price. The bulk of bride price was nevertheless demanded in cash. This was the beginning of a transformation of the nature of bride price into something that is now valued solely in terms of money. Today, it is acceptable in the tribes studied for the bride price to be paid entirely in cash. In other words, the cash equivalence of the listed items is accepted.

Although the amount of bride price is fixed in some tribes as in the Bakossi tribe, there is no fixed amount in the rest of the tribes studied. In the Bafaw, Mbonge, Bakundu and Barombi tribes, no amount is stated in the same manner as the mentioned foreign goods. The actual amount of money expected is left to the initiative of the bridegroom and his kin. In deciding the amount, those paying bride price are expected to be reasonable and take into consideration a number of factors, among which, the educational level of the bride and her professional status are very fundamental.[65] This obligation is not expected to be discharged at once.

It is a well known fact that bride price is not paid in a lump sum. It is customary for

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(62). see, NGUMBANE, H., "The Consequences for Women of Marriage Payments in a Society with Patrilineal Descent," in PARKIN and NYAMWAYA, op. cit., note 10: p. 173 at 173-177. Cf. PARKIN, D., "Kind Bridewealth and Hard Cash: Eventing a Structure," in COMAROFF, J. L., (ed.) The Meaning of Marriage Payments, Academic Press London. New York. Toronto. Sydney. San Francisco, 1980, p. 197 at 202 and 207; GULLIVER, op. cit., note 59: p.196.

(63). Information obtained from the interviews cited earlier on at note 30. Cf. NGUMBANE, ibid., p. 179; PARKIN, ibid., pp. 200, 202 and 207. Cf. KASUNMU and SALACUSE, op. cit., note 1: p. 78.

(64). Fabric sewn to tie round the loin. This were formerly imported and exchanged for farm produce, locally made ornaments and later bought with money from European traders. Although fabrics have since been manufactured locally, the imported fabric is still preferred.

(65). Information got from interviews cited at note 30. Cf. GEARY, op. cit., note 17: pp. 5 and 17. See also, KASUNMU and SALACUSE, op. cit., note 1: p. 78. NAGASHIMA, N., "Aspects of Change in Bridewealth Among the Iteso of Kenya," in PARKIN and NYAMWAYA, op. cit., note 10: p. 183 at 195.

only part of the bride price to be paid at the time of celebration. The rest is paid throughout the subsistence of the marriage. This includes any assistance in cash or kind given by a husband to his wife's parents or other relatives. This has given rise to the saying that "payment of bride price never ends", which saying is expressed as follows in the various tribes: "tungè è sa maka" in the Mbonge and Bakundu tribes; "nku è mwalan è se è ma" in the Bafaw tribe and "ngâp è ma è" in the Bakossi tribe. Death of the husband could mark the end of bride price if it brings the marriage to an end as discussed earlier. This protracted payment of bride price has been advanced in support of the view of some writers that African customary marriages are "unions" rather than marriages proper, a point which has been examined in a previous discussion. Writers have put forward that the protracted payment makes it uncertain to know the exact time when a marriage has been contracted.(66)

By contrast with this expressed view, the long period over which bride price is paid does not create uncertainty as to when a marriage has come into existence. Partial payment of the bride price at the time of celebration is sufficient compliance with the requirement.(67) Once part of the bride price is paid and the other formalities have been performed, a customary marriage comes into existence. At that point, rights over the woman are transferred from her father or other kin, if her father is dead, to her husband.

The current nature of bride price indicates that a monetary value is ascribed to women almost in the same way as commercial goods. This gives bride price the appearance of purchase price, an argument to be pursued later in Chapter Six. In addition, monetisation of bride price has tended to individualise the celebration of customary marriage.

Payment of bride price in money reduces the involvement of the kin-groups in the transaction. The money is paid in the presence of the bride's father, mother and a few close relatives from both parents' lineages who they decide to involve. By contrast, livestock and other agricultural produce which were traditionally transferred as bride price were voluminous and necessarily needed the presence of a larger group of kin to keep them under control and to perform the relevant rituals. Hence, in its current nature, many kinsmen whose presence would have been indispensable may not be present at the celebration, or if present, the participation of all would not be needed. The consequence is the possibility of loosening of kinship ties. Furthermore, the economic advantages associated with the traditional nature of

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(66). See, PHILLIPS, op. cit., note 3: pp. 107 and 110.

(67). Information got from interviews cited at note 30. Cf. KASUNMU and SALACUSE, op. cit., note 1: p. 79. See also, RUBIN, op. cit., note 29: p. 79 at para. 78.

bride price discussed previously, have disappeared with change of the nature of the bride price to money. It is unlikely that every kinsman can benefit from the cash paid as it was with livestock and agricultural produce. The part payment is consumed within a few days after it is shared between the bride's relatives, hence, hardly is it available to be used by a bride's brother in payment of his own bride price as before. Although assistance to raise bride price is still had from the lineage, only willing members do assist. Even then, such assistance has not got the same effect which using a sister's bride price cattle by her brother to pay his bride price had. The direct kinship link between a wife and his natal family which guaranteed her protection and security is broken.(68)

Despite the transformation in the nature of bride price, its significance in a customary marriage remains the same. It is still the element which determines the validity of the marriage.

The Significance of bride price in a customary marriage:-

Whether in the form of livestock and agricultural produce as in the old days or in monetary form as it exists today, the bride price is identified with various roles in a customary marriage. Professor Phillips summarises these roles as follows:

> The bride price is variously interpreted as being primarily in the nature of compensation to the woman's family for the loss of one of its members (and that member a potential child bearer); as part of a transaction in which the dominant emphasis is on the formation of an alliance between two kinship groups; as a species of "marriage insurance", designed to stabilise the marriage and/or to give protection to the wife; a symbol, or as a "seal" marking the formal conclusion of the marriage contract.(69)

Writers have echoed the various functions of the bride price embodied in the summary above in illuminating its importance in a customary marriage. The significance of bride price as compensation to the bride's family has been expressed by Radcliffe-Brown. Similarly, writing of bride wealth among the Taita of Southern Kenya, Harris, states as one characteristic of bridewealth that it is a complete and adequate return for rights in a woman. In other words, compensation to her family for her loss. Furthermore, by analysing close

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(68). See, NGUMBANE, op. cit., note 62: pp. 179-180. Cf. PARKIN, op. cit., note 62: p.207-208. See also, GULLIVER, op. cit., note 59: p. 196.

(69). See, PHILLIPS, op. cit., note 8: p. 7.

bonds which develop between the spouses' kin by the end of the bride price cattle transaction in their articles, Gulliver and Ngumbane are highlighting the second significance of bride price in Professor Phillips' summary above. In addition, Ngumbane advances yet the other significance in the summary which is, bride price seen as a source of protection and security from the cattle as well as an economic asset. Last though not the least, the significance of bride price as the feature which gives legal validity, hence, acting as a seal to a customary marriage has been widely acknowledged.[70] Almost all these functions are evident in our earlier discussion on the nature of the bride price. It is true to say, however, that the recent transformation of the nature of the bride price has affected even its functions.

Bride price may be seen as compensation to the bride's lineage for the loss of a potential child bearer. Rather than compensating for such a loss and perhaps, her physical contribution to the kingroup, money in which bride price is now valued, can be seen more as compensation for the expenditure the bride's parents and their kinsmen have incurred to raise the bride. In particular, money spent on education (as it is compulsory for every child to complete at least primary school)[71] as it is easily calculable - school fees, uniforms, books. The fact that the level of education of the bride is an important factor in determining the amount expected by the bride's kin supports this view. Besides compensation for actual money spent, bride price in this sense, is also a contingency fee, compensating for loss of the bride's earnings where she was on a salaried employment already, or earnings that she will eventually be having. This is the effect of education on the traditional economy. Whereas before, a girl was an economic asset (meant an inflow of livestock and other food stuff) in her kin-group, she is now an economic burden (involving an outflow of cash for her education).[72] The change in the nature of bride price may also have an effect on its traditional function as a transaction which cemented the coming together of the kin-groups involved by the end of the celebration.

As discussed earlier, the fact that cattle, "fowl", pigs and other agricultural produce were transferred as bride price in the old days warranted the participation of the a larger

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(70). See, RADCLIFFE-BROWN, op. cit., note 9: p.50. See also, HARRIS, G., "Taita Bridewealth and affinal Relationships," in FORTES, M., (ed.) Marriage in Tribal Societies, Cambridge University Press, Cambridge, 1962, p. 55 at 60. Cf. GULLIVER, op. cit., note 59: p. 196. Cf. NGUMBANE, op. cit., note 62: pp. 172-177. Cf. KASUNMU and SALACUSE, op. cit., note 1: p. 78.

(71). Supra, note 41.

(72). See, NAGASHIMA, op. cit., note 65: p. 195. Cf. NGUMBANE, op. cit., note 62: p. 179.

kingroup throughout the transaction. Some were involved with discussions at the table while others had the physical responsibility over the transferred animals to keep them under control and attend to them as required. In addition, the availability of livestock and necessary ingredients, such as palm oil for preparation of food and lots of drinks (as palm wine was part of the demands) made it possible for the marriage feast to be a bigger and widely publicised event. It guaranteed an increase in supply of food and drink from the budget originally worked on. Publicity was important as there are no customary marriage records as we shall discuss later. Undoubtedly, the kin-groups were brought closer by the end of the transaction and the marriage celebration itself. On the contrary, payment of bride price in cash is inherently a catalyst for feuds.

Bride price money is not easy to raise, hence, it places a burden which is not traditionally characteristic to the bridegroom, his parents and their close kin. By contrast, it is traditional for cattle to be reared for subsistence. Indeed, hardly is there any lineage in which no cattle is reared in the individual households.[73]Rearing is done in the same level as subsistence crops are grown. Thus, it is was a matter of deciding which kin should contribute and what quantity should be contributed by willing kin towards the bride price. This way, even if the parents whose son was getting married did not personally have sufficient cattle, it was easier for a kin who did not want to assist as a member of the kin-group, to lend the bridegroom's parents cattle. He was certain of its return when the borrower's cattle re-generated. Cash has not got the same guarantee.

Owning bank accounts is not a common practice in the villages. Rather, "local money banks", such as, the money meeting groups described by the Ardeners in their discussion of the Bayang tribe in Cameroon and the effects of social change,[74]are relied on. Apart from the fact that not every one in the village saves even in these meeting groups, the general savings even for those who do save, are negligible. It is not common for people in the villages to set aside cash for contingencies. If a marriage is in view, the bridegroom, and/or his parents assisted by willing relatives must look for the money. Unlike cattle, there would be less readiness by kinsmen to lend money as repayment is not certain. If a kin refuses to repay the money borrowed and says he has not got it, one cannot pursue recovery.[75]This puts an unusual pressure to the groom and his close kin who must raise the money.

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(73). Personal observation by the writer during many years of living in and visiting different rural areas and towns.

(74). ARDENER and ARDENER, op. cit., note 17: pp. 244.

(75). See, PARKIN, op. cit., note 62: pp. 206-207.

Besides, the bride price fixing process itself is no more different from bargaining for a commercial good. Although no fixed amounts are stated, as seen in an earlier discussion, there is an acceptable minimum in each case. Situations arise in which the expected bride price is very high, for example, if the girl is very educated. Although part payment of the money at the time of celebration seals the marriage, the financial strain on the bridegroom only begins. Demands for cash by the bride's parents and their kin (even those who may have had nothing to do with the bride's upbringing as a kin) from the husband throughout the subsistence of the marriage is more frequent and expected amounts are high, if the bride price was high. This could lead to a strain in the spouses' relationship as the husband's kin maybe inclined to treat her as some chattel bought by them. She could accept such an attitude or reject it by refusing to accept her husband's relatives in the home or she may decide not to respect them and not to perform the duties towards them which she owes to her husband, such as cooking and entertaining his kinsmen. This is a basis for matrimonial instability as the husband's reaction would be to disapprove of such conduct. The consequence could be breaking-up of the marriage. This brings us to another acclaimed significance of bride price and how the monetary nature of the bride price has affected that function.

The traditional character of bride price was aimed at sealing a marriage contract for life. Once bride price had been paid and the marriage had been celebrated, no return of the transferred items was contemplated. Marriage was for life and indissolubility as will be discussed in the next Chapter, was based on the ideology that once paid, bride price is not refundable. The Bafaws expressed this view in the following saying: "Yom yi è dili, è fiti a etim", meaning "it is impossible to return what has been put into the stomach".[(76)]It operated on the premise that the return of the livestock and other foodstuff which were then the content of bride price could not be demanded as it was assumed that they had been consumed on payment. It meant that a marriage once celebrated was indissoluble. This notion was carried unto cash payments in bride price, as wives were unable to afford bride price money for its return without the assistance of their kinsmen. Such assistance was not readily available since they were not in favour of the idea of dissolution of a marriage even if the motive was entirely selfish - termination would mean they had to each contribute to repay what they were given as bride price. Nevertheless, even this shortcoming could be surmounted if a wife had another suitor already. The bride price money could be returned by the suitor as his own

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(76). Information obtained from my interviews cited at note 30.

bride price. We shall return to this issue.[77]By the 50s economic and social changes found women in a position in which those seeking to break-off from oppressive matrimonial homes could afford to refund their bride price with or without the help of their kin. There are no documents on the upsurge of divorce during this period on any of the tribes under consideration in this work. However, the findings of Ardener among the Bakweri (another Bantu Cameroonian tribe in the coastal area) is illuminative as migration occasioned an outflow of people from other tribal areas into the Bakweri plantation area.

Ardener observed that there was an increased wave of migration of "single" men from other villages into the colonial plantations which were opened in the Bakweri tribal area in search of jobs. Migration occasioned socio-economic changes both in the plantation area and in the migrants' villages of origin. The migrants, some of whom had left their wives and children back in their villages, were "single" in the plantations and had money to give prospective concubines. This made it possible for oppressed wives who became concubines to migrants to divorce their husbands as they were able to repay the bride price with money received from the migrants. In his 1950 study, Ardener found that 40% out of 63% of legitimate unions in a sample study involving one thousand and sixty-two village women ended in divorce. This gave him an average of six hundred and eighty-three divorces per thousand women.[78]Some of the already married migrants who left wives and children in the villages, may never have gone back to them having started to live with concubines in their place of work. Similar changes were observed in other African tribes.

The possibility of upsurge in divorce as a consequence of commercialising bride price is also discussed by Parkin, writing about the Chonyi and Giriamaland tribes of Kenya. He observed that women intending to end their marriages go to Mombassa where they brew beer and practice some sort of prostitution in order to raise money to repay bride price. In this regard, he sees a possible increase in divorce rates caused by the transformation of bride price into a cash transaction, as the following excerpt indicates:

> "It might be inferred that a switch in marriage payments from mainly livestock to mainly cash is one of the reasons likely to bring about a significant increase in the separation and divorce rates."[79]

He posits that the transformation of bride price into cash is a de-stabilising factor in

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(77). Post, Ch. 3.
(78). See, ARDENER, op. cit., note 15: pp. 93-94.
(79). See, PARKIN, op. cit., note 62: pp. 204-205.

customary marriage today contrary to its historical significance of sealing the marriage for life. Still in support of this view, he advances further, the practice of wife bidding, whereby the man who makes the highest bride price offer is the suitor to whom parental and kinship consent for marriage goes to. Apart from unnecessarily increasing the amount of bride price in each individual case, it is a catalyst for divorce. A father is unlikely to resist the advances towards his already married daughter, of a man who offers to give him more bride price than what he was offered by his current son-in-law. For with a higher offer, he and his kin would have enough money to refund the bride price of her present husband and have some extra money to share. This possibility becomes real if one considers how attractive such a temptation is even for a wife who has no source of individual earnings and has to rely on her husband. Obviously, she would prefer a more financially viable husband(although bidding higher would not necessarily be indicative of that). Usually, it is this category of women who may be pressured into consenting to marry a man they do not like by their parents. Brain found the same among the Bangwa of Cameroon.[80]Considered in light of the above discussion, the stabilising function of bride price is disappearing.

Whatever the pros and cons of the bride price in African customary marriage are, it is an institution which, as it seems would not disappear. It remains the sole determinant of legal validity in a customary marriage. Payment of any quantity of bride price brings it into existence, with the "knock-door" and marriage festival as part of the process.
By the end of the marriage festival, a customary marriage has been celebrated. This leads us to the third stage which is escortion of the bride.

Escorting the bride:-

Traditionally, a customary marriage was not complete until the bride had been escorted to her husband's house. She was escorted to their matrimonial home which was her husband's hut in the lineage land, usually consisting of her parents, brothers and their children and other relatives' individual households. This situation remains the same in villages, especially, with regard to lineages without large "family" houses. Descendants build their little houses in various sectors of their lineage land in the village.

The escorting process involves only women - the spouses' mothers, their peers, the bride's age group women and friends who are interested in taking part. They form a large

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(80). Ibid., p. 204. Cf. BRAIN, R., Bangwa Kinship and Marriage, Cambridge University Press, Cambridge, 1969, p. 118.

group carrying the bride's belongings, newly (some gifts and some bought) acquired kitchen equipment, and, together with the bride, they have a long journey to her husband's house, singing all through the journey. This exercise sometimes involves having to trek from one village to another. Nowadays, if the distances between the two villages are too long, the escorting group nowadays sings to the beginning of the village, where selected people board a vehicle to transport them to the other village. Whether the bride was escorted to a house in the same village or to another village, and whether the whole group arrived with the bride or just selected individuals, further feasting takes place there. The husband is expected to welcome the escorting group with drinks and food as his appreciation for their trouble in bringing his wife. The escorting phase ends with a private session between the elderly women in the escorting team and the bride, during which she is given relevant advice as regards, for example, her duties as a wife, her traditional rights against her husband, and her position and duties as a mother.(81)

This stage of marriage is becoming insignificant today in view of economic and social changes and their effect on the traditional life style. People no longer grow-up and die in their natal villages. There is movement of people across distances and accordingly, inter-tribal and inter-village marriages. In some cases, as we shall see in Chapter Three, the husband works in the city or a town miles away from the village where the marriage was celebrated. In such cases, the bride is not escorted. The spouses leave for their matrimonial home in the city or town after the ceremony. The advisory session is held after the festival which effectively becomes the last stage of celebration. In response to these social changes, it can rightly be concluded that a valid customary marriage comes to existence at the end of the second stage.

Legal Validity of Customary Marriage in Cameroon:

It has emerged from the discussion that customary law capacity and formal requirements of marriage have to be met for a valid customary marriage to come to existence. Once it is contracted, a customary marriage gives rise to rights and obligations between the parties. These rights and obligations depend on the spouses' kinship structure. The rights and duties of a husband towards his wife and her kin; the wife's duties towards her husband and his kin and her rights against him; the status of children of the marriage (their rights to inheritance and succession) and the wife's right if any, of ownership of property, are all matters connected with the marriage and are determined by rules of the particular kinship

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(81). Information obtained from the women spoken to in the interviews cited at note 33.

system.

The husband acquires the right to her domestic and extra-domestic work, such as her farm labour. In patrilineal societies, which is the kinship system in the tribes under consideration in this work, the husband also acquires customary law rights over children of their marriage. For example, the right to filiate the children into his lineage or kin-group. Children derive their names and often status from their father in patrilineal societies. Through the father, a child has a claim on the productive resources of the lineage. Similarly, a child is ranked as a noble or a commoner depending on his patrilineage membership.

These spousal rights and obligations which had been treated earlier in this Chapter, cannot be enforced unless there is proof that a valid customary marriage existed. For example, a claimant's right to inheritance or succession would not succeed if the same cannot establish his descent in the particular lineage by proving that his mother was validly married in the particular kin-group. This problem is inherent in indigenous customary law, as there are no marriage documents equivalent to marriage certificates in statutory marriage law. Under customary law, oral evidence given by eye-witnesses to establish that something happened is relied on. Oral evidence could be relied on when there was almost no migration of tribal people from one village to the other and when people did not leave the villages to assume permanent residences in other villages, or town or city as is the case nowadays. With increased migration which will be treated in the next Chapter, less people would be available in villages to witness either births, or marriages. In consequence, availability of such oral evidence is likely to reduce greatly with time.[82] It is in this context that registration of customary marriage will be examined.

Registration of Customary Marriage:-

Legislations regulating family matters in most African governments have since addressed the issue of absence of marriage records in customary law and the problems that difficulty of proving the existence of a marriage could give rise to. Provisions exist in jurisdictions[83] for customary marriages to be registered with the civil status registrar. Under Cameroonian statutory law, registration of customary marriage is done as per S. 81(1) of the Civil Status Registration Ordinance 1981 (which we shall be dealing with later in the Chapter). It provides as follows:

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(82). See, PHILLIPS, op. cit., note 3: p. 109.
(83). Ibid: pp. 109-112.

"Customary marriages shall be recorded in the Civil Status Registers of the place of birth or residence of one of the spouses."

This involves declaration of the marriage in a Magistrates' Court and using the certificate issued thereof to obtain a marriage certificate from the civil status registrar of marriages. Despite the good legislative intent, this provision in practice, has given rise to complications and it has by no means served to provide concise records of celebrated customary marriages. Policy has not been directed towards the realisation of this provision. Magistrates' Courts and civil status registries in which customary marriages are to be declared and registered are all located mainly in towns and cities. By contrast, customary marriages are mainly celebrated by people who live in villages, which areas are inaccessible due to poor transport network. In some places, there are no motorable roads to connect the inhabitants of these areas to the towns and cities where the facilities are. Yet, the problems that would be faced by spouses from the remote areas in complying with section 81 are yet to be appreciated by policy-makers.(84)

There is no doubt, therefore, that customary marriages celebrated in the villages are not registered in national marriage registers. Hence, it is unlikely that the records of celebrated marriages (statutory and customary) over the years in the civil status registry represent the actual fact.(85)

The legal significance of registration of customary marriages:-

Registration of customary marriages could be misconstrued to have a legal effect on the nature of the marriage. It could be thought that a registered customary marriage in respect of which a certificate is issued is converted into a statutory marriage on issue of a certificate after registration. This would imply that customary marriage spouses who comply with the registration provision, acquire rights and obligations under statutory law other than those which accrued in customary law when the marriage was contracted. Especially, as the same certificate issued to parties who legally contract statutory marriages are issued to those who celebrate customary marriages and get them registered as per S. 81 above. Indeed, there are

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(84). Information obtained from the interviews cited at note 33. Cf. GEARY, op cit., note 17: pp. 19-20.

(85). On going through the marriage register in the Council Offices in Kumba, Muyuka and Buea, no records were found on registered customary marriages. The registrars of marriages showed no awareness when interviewed (August 1990) of the fact that their records ought to contain registered customary marriages.

Cameroonian legal scholars who share the view that registration of customary marriages changes the nature of the marriage and elsewhere in Africa, registration provisions have been so misconstrued.[86]

To uphold what has been discussed above as the effect of registration would be to say that mere registration of a customary marriage converts it into a statutory one, hence, subjecting it to the jurisdiction of statutory law and courts. If this was true, it would mean that unregistered customary marriages are not recognised as valid marriages under statutory law. Fortunately, this is not so because Cameroonian statutory law recognises two types of legal marriage - statutory and customary marriage, each deriving its origin and validity from the law under which it was celebrated. Hence, a customary marriage derives its validity from the customary law in accordance to which it was celebrated. Subsequent registration is mere public notification that a customary marriage has been celebrated between the registering spouses in case need for such records arises in the future. This view which has been expressed regarding registration provisions and their effect in other African jurisdictions,[87]was expressed by Bawak J, in the Buea Court of Appeal case of Temple-Cole v. Temple-Cole.[88]Addressing the issue of the effect which registration of the customary marriage in question was alleged to have had on the nature of the marriage, he pronounced thus: "the statement that the marriage settlement was established by the civil status laws of Cameroon does not remove the fact that the marriage was celebrated in accordance with native laws and custom." In other words, the marriage certificate issued on registration of customary marriages simply evidences the validity of a customary marriage.

Similarly, the Kumba High Court case of Akweshi Dorothy v. Christopher Teghen[89] is illuminative. A marriage certificate had been issued to the parties, on the registration of a purported customary marriage for which all the customary formalities were not met. The preliminary customary formality of "Knock-door" was accompanied by a church ceremony. The wife petitioned for divorce to the High Court, which jurisdiction the respondent challenged claiming that no marriage existed between them. The respondent's contention was that there would have been a customary marriage between them if the formalities had been completed but they were not. He further contended that the marriage certificate was mere

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(86). PHILLIPS, op. cit., note 3: pp. 112-113.
(87). Ibid. Cf. KASUNMU and SALACUSE, op. cit., note 1: p. 89.
(88). Samuel Esukise Temple-Cole v. Francisca Enanga Temple-Cole, suit No. CASWP/CC/63/87. Unreported.
(89). Suit No. HCK/27^{mc}/88 (unreported).

evidence of the purported customary marriage which in fact never existed. The judge found for the respondent and declared the marriage a nullity. It follows that the marriage certificate was mere evidence of the purported customary marriage which did not actually exist since the formalities were not completed.

Having celebrated a valid customary marriage with all the formalities performed and bride price paid, rights and obligations accrue in customary law to the parties. Customary law, therefore, regulates matrimonial matters arising from the marriage, for example, matrimonial property, inheritance, succession, divorce and custody of children, as we shall see in Chapter Three. Whether registered or not, the legal status of customary marriages does not change and the marriage certificate in the hands of the spouses is irrelevant in this respect. They remain customary marriages under the jurisdiction of customary law. By contrast, the marriage certificate in a statutory marriage is prima facie proof that a statutory marriage was contracted.

B. STATUTORY MARRIAGE AND MARRIAGE LAW:

The discussion on statutory marriage will be done in three parts. First, the mechanism by which statutory marriage was introduced will be treated. Second, we shall look at the law dealing with preliminaries to celebrate a statutory marriage. Thirdly, a comparative analysis shall be made of capacity and formal requirements of marriage under Cameroonian and English law. The purpose of such analysis is to establish the difference that exists in the laws as far as preliminaries to marry are concerned. Therefore, to show that a wholesale importation of English marriage law as the law applicable when deciding an issue arising from a statutory marriage as it is now, is inappropriate.

Introduction of Statutory Marriage and Marriage Law:-

The history of marriage law in the English-speaking part of Cameroon, like other areas of the legal system is inextricably bound with the history of statutory marriage law in Nigeria. This is a colonial accident which has been discussed in Chapter One. The introduction of statutory marriage law in British Africa was an administrative response by the British colonial government to dissenters in the British Empire. Protestants, Roman Catholic christians and non-christians in the British Empire dissented against English marriage laws which existed in the Empire before 1836.

Until the 1836 Marriage Act was passed in England, marriage in English law was still under ecclesiastical jurisdiction. With the exception of Quaker and Jewish marriages, the two

sects which were still permitted to celebrate marriages according to their usages, a marriage in England could only be contracted in accordance with the rites of the church of England. This meant that non-Anglican christians and non-christians had to go through Anglican church marriage rites to celebrate a marriage in England or elsewhere in the British Empire. As far as marriages contracted in England were concerned, this anomaly was made good by the enactment of the 1836 Marriage Act which introduced for the first time a secular jurisdiction of marriage. Thereafter, one had a choice in England, either to undergo a civil marriage ceremony under the 1836 Act, or to contract it in accordance with the rites of the church of England. The situation in the colonies, however, remained the same as before 1836. The 1836 law which was an English Act of Parliament had no extra-territorial application to the colonies. Hence, marriages other than customary marriages could still solely be contracted in accordance with the rites of the church of England. This could be done solely by an episcopally ordained priest as was stated in R. v. Millis.(90) This doctrine was not followed two years later in Caterall v. Caterall(91) where it was stated that a common law marriage as adapted for the colonies could be celebrated simply by exchange of consents(92) without the necessity of an episcopally ordained priest. The legal problem, however, remained unsolved as no other christian rites of celebration were permitted and no legislation had been made for contracting civil marriages in the colonies.

There was, therefore, an urgent need for a law regulating marriage in the colonies. In this regard, Sir Frederic Rogers'(93)letter of March 21 1851 to the Colonial Land and Immigration Office was instrumental in the framing of marriage laws for the colonies. The letter contained basic principles of colonial marriage policy which were adopted by the Colonial Office for St. Helena, the first colony in the British Empire in which a local marriage law was enacted. This was the St. Helena Ordinance No. 3 of 1851, which was based on Sir Frederic Rogers' letter after approval by the Colonial Office.

Although Sir Frederic Rogers' letter (the draft of the Ordinance) followed closely

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(90). (1847) 10 C. & F. 534, 8 E.R. 844.

(91). (1845) 1 Rob. Ecc. 580, 163 E.R 1142.

(92). Exchange of consent to the intended marriage either in the future or in the present was all that was needed to celebrate a common law marriage in England before the 1753 Lord Hardwicke's Act was passed. See, BROMLEY and LOWE, op. cit., note 31: p. 40. See also, CRETNEY, S. M., and MASSON, J. N., Principles of Family Law, 5th ed., Sweet & Maxwell, London, 1990, p. 12. Cf. O'DONOVAN, K., Sexual Divisions in Law, Weidenfeld & Nicolson, London,, 1985, pp. 42-43.

(93). He (later became Lord Blanchford) was in the Colonial Land and Immigration Office.

English marriage law, it eliminated celebration of marriage in accordance with the rites of the church of England as an independent means of contracting a marriage. It completely secularised colonial marriage policy. Although, therefore, christian rites could still be performed in the course of contracting a marriage, all marriages regardless of which christian rite had been performed were to fulfil the requirements for celebration laid down in the 1851 Ordinance. Under secular law, a marriage registrar alone had the right to solemnize a marriage in respect of which a marriage certificate had to be issued to the spouses. If the parties went through a christian marriage ceremony in addition, such a ceremony had no legal effect on the marriage. The St. Helena Ordinance 1851 provided the structure of colonial marriage ordinances in British colonies in Asia and Africa.

It was followed in Ceylon and Hong kong in framing their marriage ordinances. In turn, the Marriage Ordinances of these colonies provided the models for the Gold Coast Ordinance No. 14 of 1884. This Ordinance was applicable in Nigeria, since the Lagos colony as it was then called, and its surrounding territory were administered as part of the Gold Coast since 1862. In 1886, however, Lagos became a separate colony with its own administration at the head of which was a Governor. The Marriage Ordinance of the Gold Coast Colony and Lagos automatically became the Marriage Ordinance of the Colony of Lagos. Subsequently when Nigeria was formed by the union of the Colony of Lagos with the Protectorates of Southern and Northern Nigeria, it became effective throughout Nigeria. Eventually, Nigerian marriage ordinances became applicable in Cameroon when it became a British mandated and later trust territory in the eastern region of Nigeria.[94]

In British Cameroon, the applicable statutory marriage law was the Nigerian Marriage Ordinance (Cap 68 of the Laws of the Federation of Nigeria) 1923, as the 1914 Marriage Ordinance of the Lagos Colony and its Protectorates became known after the federation.[95]The Ordinance as amended by the Nigerian Marriage Ordinance (Cap 115 of the Revised Laws of the Federation of Nigeria) 1958, regulated statutory marriage in the English-speaking part of Cameroon until 1968. That year saw the enactment of a Cameroonian marriage law which became the first law dealing with statutory marriage in the Federal Republic of Cameroon. This was the Civil Status Registration Ordinance of 1968 which was effectively, a reproduction of the statutory marriage law which had been in

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(94). For a detailed account on this marriage history, see, ZABEL, S., "The Legislative History of the Gold Coast and Nigerian Marriage Ordinances,"(1969)I: 13 Journal of African Law 64.

(95). Ibid., p.66.

operation in the Republique du Cameroun, the independence name of ex-French Cameroon. In 1972, Cameroon became a unitary state, hence, in the face of constitutional changes a new marriage law was imperative. The new law had to be a compromise between English marriage law present in the Nigerian Marriage Ordinance which applied in anglophone Cameroon before 1968, and French law principles which were contained in the Ordinance of 1968. Thus, Ordinance No. 81/02 of June 29 1981 was passed as the Civil Status Registration Ordinance 1981. Till date, this law regulates statutory marriages as well as registration of births and deaths.

Cameroonian statutory marriage law , as those of other ex-British African colonies, reflects, therefore, features of the colonial marriage ordinances. The Civil Status Registration Ordinance 1981 makes emphasis on the need for publicity of statutory marriages contracted under statutory law.[96]This is contrary to the situation in customary law. Publicity of an intended marriage and availability of records as evidence that a valid statutory marriage was contracted are issues to which priority is given in the 1981 Ordinance. Hence, it provides the requirements for celebrating a statutory marriage.

This statement that the 1981 Ordinance regulates celebration of statutory marriages is not intended to ignore the possible ground of argument that the 1981 Ordinance regulates customary marriage as well. This is partly because it also contains in Part V1, chapter V, provisions dealing with customary marriage. One is also tempted, as some legal scholars do, to dwell on the fact that the ordinance also mentions polygamy as a recognised form of marriage, which is characteristically, a feature of customary marriage. The two factors may be seen as the basis for saying that the 1981 Ordinance regulates customary marriage as well. However, there are reasons for holding a contrary view. As regards the first, which is the presence of customary law provisions in the 1981 Ordinance, the law simply makes it clear that bride price in marriage is not recognised as far as statutory marriage is concerned. Similarly, with regard to the presence of polygamy in statutory marriage, statutory law was responding to a social reality by making it possible to celebrate a statutory polygamous marriage. We shall be elaborating on this issue later in the Chapter.

The importance attached to the necessity of publicity in a celebrated statutory marriage is a feature discernible from colonial marriage ordinances, which as discussed earlier, were modelled, with certain adaptations, after the 1836 English Marriage Act. The need for

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(96). The Civil Status Registration Ordinance of 1981 shall hereinafter be referred to simply as "the 1981 Ordinance."

publicity in celebrating an English marriage arose from the adversities caused by clandestine marriages contracted under canon law prior to 1753.[97] This led to the enactment of Lord Hardwicke's Act in 1753, which laid down, for the first time, a formal procedure for celebration of marriages by church Ministers. The purport was to ensure available publicity of an impending marriage celebration. This same spirit guided the framers of colonial marriage ordinances as the following excerpt indicates:

> "The principal points to be considered in such a law appear to be the giving sufficient publicity to the notice of the marriage - the securing such solemnization as shall leave no doubt that marriage has actually been contracted - and such registration as shall secure available evidence of it - and the determining what marriages shall be void."[98]

We should, however, be wary of overstating the similarity between colonial marriage ordinances, which are reflected in the legal systems of ex-British colonies and English law of marriage. Besides the differences in content which we shall examine later in the Chapter, the different origins of marriage law in England and Cameroon (as in other ex-British colonies) explains a fundamental dissimilarity that exists between the English and Cameroonian law on legal validity of marriages.

In Cameroon as in other ex-British colonies, statutory marriage is entirely under secular law. A statutory marriage can only be contracted under statutory law as laid down in the 1981 Ordinance. Church weddings have no legal validity on statutory marriage in Cameroon. By contrast, there was no secular law of marriage in England until the nineteenth century as discussed earlier. Thus, English marriage law is based on the christian concept of marriage which is exemplified in the classic definition of marriage in English law stated by Lord Penzance in Hyde v. Hyde[99] Although secular marriage law was introduced by Acts

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(97). For an account on the solemnization of clandestine marriages, the disadvantages which were inherent and in the consequence, the need for publicity in contracted marriages, and Lord Hardwicke's Act 1753, see, O'DONOVAN, op. cit., note 92: pp. 42-50; BROMLEY and LOWE, op. cit., note 31: pp. 40-41. See also, CRETNEY and MASSON, op. cit., note 92: pp. 6-7. Cf. METEYARD, B., "Illegitimacy and Marriage in Eighteenth Century England," (1980) x: 3 Journal of Interdisciplinary History, 479.

(98). ZABEL, op. cit., note 94: p. 72.

(99). (1866) L.R.1.P & D 130 at 133.

of Parliament,[100] the church retains the power to celebrate legally valid marriages concurrently with other authorities in whom secular law vests the power to contract marriages.[1]We shall examine in detail these differences when discussing the capacity and formal requirements later in the Chapter.

Preliminaries to Marry Under the Civil Status Registration Ordinance 1981:-

Unlike the rather informal manner in which a customary marriage is solemnized, a statutory marriage is brought into existence by the pronouncement of a civil status registrar of marriages to that effect. This is provided for in S. 48 of the 1981 Ordinance which states thus:

> "A marriage shall be celebrated by the civil status registrar of the place of birth or residence of one of the spouses to be."

The ceremony must take place in one of the premises designated as a civil status registry. S. 68 of the 1981 Ordinance provides to this effect:

> "Upon a month of publication of banns and ascertaining that no objection or obstacle exists or that any objections which may have been formulated have been withdrawn, the civil status registrar shall proceed with the marriage ceremony in the premises intended for this purpose at the civil status registry."

Under the 1981 Ordinance, a statutory marriage cannot be celebrated in any place other than a civil status registry. This implies that a person incapable of reaching the registry cannot celebrate a statutory marriage. For example, house-bound patients at home and in hospitals, those detained in prison or any other place where one is detained, are incapable of contracting a marriage under the 1981 ordinance on a strict interpretation of the S. 68 provision. It is unlikely that a dangerous prisoner would be given leave off prison to celebrate a marriage. Even if it was possible, it would be dangerous for the society in case of an escape. A similar gap which existed in English law until 1983 was closed by the Marriage Act 1983. S. 1 and Schedule 1[2]of this Act enables house-bound patients and detained persons to be married in the place where they are for the time being. The gap remains in Cameroonian statutory law. These classes of persons are incapable of celebrating a marriage under the 1981 Ordinance.

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(100). By 1949, the law relating to formalities of marriage could be found only be reference to about forty statutes. The 1949 Marriage Act was enacted to consolidate the previous laws into one, repealing about twenty completely and most of the rest in parts. That Act as subsequently amended by later Acts remains the marriage law. See, BROMLEY and LOWE, op. cit., note 31: p. 42.

(1). Ibid., pp. 44-49.

(2). Amended S. 78 of the Marriage Act 1949. See, Ibid., p. 53.

The ordinance further provides that the celebration ceremony at the registry must be witnessed by at least two people, one for each spouse as per S. 69(1), clause 3 which states thus:

> "The following persons shall of necessity be present at the marriage celebration - at least two witnesses of full age, one for each spouse."

Before the marriage is celebrated at the registry, banns in respect of the intended marriage must be published on registry notice-board one month before the day of celebration in order to notify the public of the marriage in compliance with S. 53 of the 1981 Ordinance. The section provides as follows:

> "At least one month before the celebration of the marriage, a declaration mentioning the full names, occupation, residence, age and place of birth of the spouses-to-be and their intention to contract a marriage shall be lodged with the civil status registrar."

S. 54(1) provides for the display of the notice by the registrar on the registry notice board. By the provision of S. 52(1), "no marriage may be celebrated if such a marriage is not preceded by publication of banns." However, this is subject to the exception in S. 55 which reads thus:

> The state counsel may, for serious reasons demanding immediate action, grant a total or partial waiver of the publication of banns."

This exception was necessary to provide relief in certain cases, such as, satisfying a dying person's need to get married immediately.

After the marriage has been contracted, it is recorded in the marriage register and two original copies of a marriage certificate out of the three which are completed and signed by the parties, the witnesses and the registrar, are given to the parties. Unlike the significance of a marriage certificate in the hands of spouses in a registered customary marriage, a marriage certificate issued to spouses who contract a statutory marriage is evidence of that marriage. In the hands of the spouses, the certificate indicates that the parties' marriage is legally bound by statutory marriage law. A caveat must, however, be entered in stating the significance of a statutory marriage certificate in light of judicial practice. To understand this reservation, a discussion on the nature of statutory marriage under 1981 Ordinance is apt.

The Nature of a Statutory Marriage in Cameroon - Defining a Statutory Marriage Under Cameroonian Law:-

If one was to define what a statutory marriage is in general, as it exists in other

common law African legal systems,[3]the definition would be simple - marriage between one man and one woman for life to the exclusion of all others. This is the definition of a monogamous marriage, which is the only form of marriage that can be celebrated under statutory marriage law in some jurisdictions, such as Nigeria.[4]The scope of the term "statutory marriage " under Cameroonian law is, however, not so clear cut. This is why it is necessary to discuss the meaning of a statutory marriage under the 1981 Ordinance. For the term statutory marriage under that law, does not necessarily mean a monogamous marriage.

The 1981 Ordinance makes it clear that there are two types of statutory marriages that can be contracted under statutory law: these are, statutory monogamous and statutory polygamous marriages. These two types are in practice, either preceded or followed, as in other African common law jurisdictions[5]by customary law formalities of marriage generally, and in most cases by a religious marriage ceremony as well. As discussed earlier, the legality of a statutory marriage is derived from the 1981 Ordinance, hence, from the civil status ceremony. The other two ceremonies merely have a cultural and moral significance respectively.

The only provision relied on in making this distinction between statutory monogamous and statutory polygamous marriages is S. 49, clause 8 of the 1981 Ordinance. The section states the content of a marriage certificate.

S. 49 - "The marriage certificate shall specify the following:

- the name of the civil status centre;
- the full name, date and place of birth, residence and occupation of the spouses;
- the consent of each of the spouses;
- the consent of the parents in the case of minor children;
- the full names of the witnesses;
- the date and place of celebration of the marriage;
- where applicable, the mention of the existence of a marriage contract: co-ownership or separation of property.
- *the mention of the type of marriage chosen: polygamy or monogamy;

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(3). KASUNMU and SALACUSE, op. cit., p. 54, note 1: p. 7.

(4). S. 35 of the Nigerian Marriage Ordinance 1914 as amended by the Marriage Act (Cap 115 of the Revised Laws of the Federation of Nigeria) 1958, all marriages contracted under the Marriage Act are monogamous. Ibid., pp. 57 and 91-92.

(5). Ibid., pp. 57, 92-93.

- the full name of the civil status registrar;
- the signatures of the spouses, witnesses and the civil status registrar.

As seen from S. 49 reproduced above, clause 8 of that section is the only guide to identifying the two types of marriages that can be contracted under statutory law. Apart from stating that parties should specify whether the statutory marriage is monogamous or polygamous, the 1981 Ordinance does not provide a definition of a statutory marriage anywhere. In addition, there has not been any judicial definition by the Court of Appeal or the Supreme Court to be cited as precedent on this issue. For the purpose of this discussion, therefore, the explanation given on this two types of marriages is based on judicial practice and the interpretations of individual judges.

A Statutory Monogamous Marriage:-

A statutory monogamous marriage is a marriage celebrated under the 1981 Ordinance by a registrar in the marriage registry, in which the spouses choose monogamy as the type of marriage contracted in accordance with S. 49, clause 8. It is the equivalent of a marriage in christendom as defined by Lord Penzance in the nineteenth century case of Hyde v. Hyde[6] where he pronounced as follows:

> "I conceive that marriage as understood in christendom, may ... be defined as the voluntary union for life of one man and one woman to the exclusion of all others."[7]

The definition of a statutory monogamous marriage in Cameroon is, however, not so straight forward in practice. In the absence of any definition of statutory monogamous marriage in the 1981 Ordinance, the meaning that the judiciary has given to this type of marriage is what we are about to discuss.

According to judicial practice, a marriage must pass a dual test for it to qualify as a statutory monogamous marriage. There must be no feature of a customary marriage associated with the statutory monogamous marriage. For example, there should be no evidence indicating that the parties had performed the requirements for celebration of a customary marriage as well. Marriage certificates issued before 1981 made provision for parties to state the

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(6). Supra, note 99.

(7). At p. 133. In the face of recent developments on the issue of recognition of polygamous marriages in English law,(see, BROMLEY and LOWE, op. cit., note 31: pp. 60-62) the continued adherence to this definition has been questioned. See, POULTER, S., "Hyde and Hyde: A Reappraisal,"(1976)25 International and Comparative Law Quarterly 475.

customary law in accordance with which a particular marriage was celebrated. Thus, any indication in the marriage certificate that prior to or after the solemnization ceremony at the civil status registry, the parties performed customary marriage formalities, the statutory monogamous marriage ceases to exist. The following decision by the Buea Court of Appeal in 1989 case of Morfor v. Morfor[8] is illustrative. This was an appeal against a decision of Kumba Customary Court. The appellant alleged that the parties had contracted a customary marriage in 1978 in accordance with the customary law of the Bafawchu tribe. This was followed a year later by a ceremony in the civil status registry of Kumba. A marriage certificate was issued which the parties had completed, stating monogamy in compliance with S. 49, clause 8, as the type of marriage chosen. They also indicated in the certificate that the marriage had been celebrated in accordance with the customary law of the Bafawchu tribe. A petition for divorce was filed to the Kumba Customary Court by the husband (who had himself married two more wives in 1988) on grounds of adultery, claiming custody of the children. Divorce was granted and custody of the six children of the marriage awarded to the petitioner as their legitimate father. The decision was appealed against by the wife. First, counsel for the appellant contested the jurisdiction of the lower court over the original petition on the ground that their marriage certificate stated monogamy as the type of marriage. Thus, it was under the jurisdiction of statutory law and courts. Second, on the same basis, appellant's counsel argued that the other two marriages contracted by the respondent (then deceased) be nullified. Third, counsel argued that there was no sufficient evidence to found the petitioner's allegation of adultery. The appeal was allowed on the third ground of appeal and the Customary Court judgement was set aside. However, the issue of jurisdiction was addressed and the judge's pronouncement in this regard illuminates judicial interpretation of marriage certificates and how it affects in practice, the nature of statutory marriages.

As regards the appellant's claim that the lower court had no jurisdiction since the marriage was a monogamous one, Monono J, made the following pronouncement:

> "... In the first place beside stating that the matrimonial regime was monogamous the marriage certificate also states that the marriage was according to the Bafawchu people native laws and customs. This at once makes the marriage potentially polygamous. A marriage cannot be potentially polygamous and monogamous at the same time. The word monogamy in the marriage certificate therefore, is at least superfluous and at worst contradictory and meaningless... in such a case the word

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(8). Alice Siri Morfor v. Martin Morfor, Suit No. CASWP/CC/49/88. Unreported.

monogamy can safely be disregarded and the marriage treated for all purposes as a polygamous marriage."[9]

Accordingly, as regards the jurisdictional question, the Court of Appeal found that the lower court had jurisdiction having interpreted the marriage in question as a customary one. A similar pronouncement was made by the Court of Appeal in Bamenda in the case of Motanga v. Motanga[10] which was mentioned by Monono J., in his judgement in the Morfor case.

On deciding on the jurisdictional point, Monono J., had based his decision on the evidence in the marriage certificate that the parties had performed the customary marriage formalities of the Bafawchu tribe, while ignoring at the same time two important facts regarding the marriage. First, the fact that the parties had legally celebrated their marriage in the civil status registry and did not merely register an already celebrated customary marriage as the courts held. If the customary formalities they had undergone were intended to bring into existence a legally binding marriage, which in that case, could have been a customary one, the spouses would have gone to the registry merely to have it registered but not to be married by the registrar. Second, their option for monogamy as the type of statutory marriage stated in the certificate was totally overlooked. Assuming for a moment that what the parties did in the registry was mere registration, it would be ridiculous to imagine that spouses who knowingly contract a valid customary marriage, would at the same time expect that marriage to be monogamous. It is common knowledge, amongst adult men in Cameroon that there is no limit to the number of wives a man can marry by custom, although he may choose to marry not more than one.

This decision was in line with two decided a year earlier in the High Court of Kumba. In Obiamanka v. Obiamanka,[11] the petitioner alleged that they had contracted a statutory monogamous marriage in the civil status registry in Kumba in 1975. In the petition for divorce filed to the High Court in Kumba under S. 1(2)b,c of the Matrimonial Causes Act 1973, she claimed custody of the four children of the marriage. The respondent contended that the High Court had no jurisdiction over the case claiming that the marriage in question was a customary marriage. He denied that a statutory marriage existed between them. Counsel for the respondent contended that it was two years after the customary marriage had been celebrated, that the ceremony at the registry in respect of which they opted for monogamy

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(9). At page 3 of judgement.
(10). CANWP/CC/37/86. Unreported, at p. 6 of judgement.
(11). Obiamanka Bridget v. Obiamanka Richard, Suit No. HCK/48^{mc}/88. Unreported.

as the type of marriage, took place. The court found for the respondent, hence, the petition failed. On ruling that the High Court had no jurisdiction over the case, Takam J., pronounced thus:

> "... the petitioner and the respondent had contracted a customary marriage in accordance with the native law and customs of the Bali people two years before the ceremony at the registry. ... A marriage celebrated under native laws and customs is potentially polygamous. A potentially polygamous marriage cannot be monogamous simultaneously as claimed by the petitioner."[12]

The operative word in this judgement and as shown in the facts is, ceremony. By repeating the word "ceremony" used by the respondent in his contention, the judge, as the respondent, acknowledged the fact that a ceremony took place between the spouses in the civil status registry in Kumba. Mere registration of a customary marriage as the respondent contended, would not be ceremonial, in other words, celebration. Celebration involves having to go through the preliminaries laid down in the 1981 Ordinance, which of course, are not done if parties are merely having a customary marriage registered. What took place in the registry was celebration of the marriage, nevertheless, interpreted as a customary one. Similarly, in Akweshi Dorothy v. Christopher Teghen,[13] the petitioner claimed that they had undergone the three-tier marriage celebration: the parties had gone through a ceremony of marriage at the civil status registry in Kumba; followed by the "knock-door" which is the first stage in the celebration of a customary marriage; and lastly, a church wedding was made. The marriage certificate which they were issued had contained the space for indicating the customary law according to which the marriage had been celebrated. Despite the fact that the formalities were not complete, the customary law in question was indicated in the certificate. The wife petitioned for divorce in the Kumba High Court under S. 1(2) a, b, c of the Matrimonial Causes Act 1973. The respondent's counsel challenged the jurisdiction of the court contending that no marriage existed between them. The contention was based on two facts. First, the fact that customary marriage formalities had not been completed meant no customary marriage was celebrated. Second, counsel contended that the ceremony at the registry was mere registration of the purported customary marriage which did not actually exist. The court found for the respondent. Like the cases discussed above, the judge disregarded the fact that a ceremony had actually taken place in the registry which could not

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(12). At p. 5 of judgement.
(13). Suit No. HCK/27^{mc}/88. Unreported.

have been mere registration.

The decisions show a judicial practice whereby courts turn a blind eye to the social reality in the society in which they live and work. There was no indication in any of the cases that what took place in the registry was registration of a customary marriage. On the contrary, it is evident from the facts of each of the cases that a ceremony took place in the civil status registries. The gap that may exist between the time of the customary law formalities and the eventual celebration of the statutory marriage in the registry, as it was in Obiamanka v. Obiamanka[14] does not make the customary law formalities, in the circumstances, celebration of a marriage. Therefore, the eventual solemnization of the statutory marriage by the registrar when the parties are ready, even five years after the customary formalities were met, should not be reduced to mere registration of a customary marriage.

Undoubtedly, the customary law formalities performed by those intending to celebrate a statutory marriage, are the same as those performed when one is actually contracting a customary marriage to be regulated by customary law. However, the legal effect of performing the customary law formalities in the two situations is different. Spouses intending to contract a valid customary marriage perform the relevant formalities to bring their marriage into existence and, to be bound by the customary law under which it was celebrated. If such parties go to the registry after that, it is merely to declare that a customary marriage has been celebrated between them. By contrast, parties intending to contract a statutory marriage, as discussed earlier, go through customary law formalities purely, for cultural reasons. Although they perform the formalities, they have no intention of celebrating a customary marriage, hence, they are not subjecting themselves to customary law jurisdiction. In legal terms, no marriage exists between them even after performing the customary law formalities. They become married only after going through the marriage ceremony in the civil status registry as they intended. The customary law ceremony, in this regard, is a component of the statutory marriage. Although of no legal significance, it has become part of the process of celebrating a statutory marriage in Cameroon, as in other common law African countries.[15] An analysis of this practice will be made later in the Chapter. The same is true of parties who opt for polygamy in celebrating a statutory marriage.

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(14). Supra, p. 98, note 8.
(15). See KASUNMU and SALACUSE, op. cit., p. 54, note 1: p. 55.

A Statutory Polygamous Marriage:-

A statutory polygamous marriage arises if parties contract a statutory marriage at the registry and choose polygamy as the type of marriage contracted in accordance with S. 49, clause 8 of the 1981 Ordinance. For this type of marriage to exist, the parties go through the same formalities of marriage as parties contracting a statutory monogamous marriage. The same goes for the capacity requirements which are to be met. The only difference between a statutory polygamous marriage and a statutory monogamous one is in the number of wives a husband in the former is permitted to marry under the Ordinance. Unlike in a statutory monogamous marriage, a husband in a statutory polygamous marriage is free to marry as many wives as he pleases (polygyny is the form of polygamy practised in Africa). By the same token he may stay without even a second wife as many do.

The legal validity of polygamous statutory marriage in statutory law, notwithstanding, the courts do not in general, recognise polygamous marriages as valid statutory marriages. We have seen in the cases discussed above that the courts concluded that the said marriages were customary marriages immediately they decided, from their interpretations of the marriage certificates, that the marriages were potentially polygamous. Similarly, in Efamba v. Efamba,[16] the marriage certificate showed that the parties had gone through a ceremony of marriage in the civil status registry in Kumba, (which had been preceded by customary law formalities) in 1980 and opted for polygamy as the type of marriage. The wife petitioned for divorce under S. 1(2)a,b,c of the matrimonial Causes Act 1973 to the High Court in Buea where the parties were then resident. Counsel for the respondent challenged the jurisdiction of the High Court. He argued that no statutory marriage existed between the parties basing his argument on the option for polygamy. His contention was upheld and the marriage was held a customary one, hence, out of the jurisdiction of the High Court. The following excerpt from the judgement is illustrative:

> "... a statutory marriage can never be polygamous. ... polygamy is an institution of marriage known in customary law. ...it is a well known fact that all customary marriages are potentially polygamous."[17]

The perspective adopted by the court in this case and those discussed earlier under statutory

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(16). Efamba Esther v. Efamba Enock, Suit No. HCK/25^{mc}/89. Unreported.
(17). At p. 2 of judgement.

monogamous marriages, are in line with the responses got from judicial interviews.[18] Judicial practice recognises only one type of statutory marriage - statutory monogamous marriage. Judicial attitude towards interpretation of statutory marriages is acknowledged by Ngwafor, who in his "examination guide for family law students," states that there are two types of marriages recognised in the North West and South West Provinces (anglophone Cameroon): statutory marriage otherwise known as monogamous marriage and customary law marriage otherwise known as polygamous marriage.[19]

In a society where polygamy is widely practised as in other African countries,[20]judicial use of the English law definition of marriage as the test for determining a statutory marriage under the 1981 Ordinance, explains courts' refusal to recognise statutory polygamous marriages. Writers have advanced[21] in this regard that the legal basis of judicial attitude is the Legitimacy Ordinance (Cap 103 of the Revised Laws of the Federation of Nigeria) 1958 which incorporates Lord Penzance's definition in Hyde v. Hyde,[22] in defining a marriage celebrated under the Marriage Ordinance (Cap. 115 of the Revised Laws of the Federation of Nigeria) 1958.

This purported legal basis is objectionable. The Nigerian Marriage Ordinance mentioned above is applicable in anglophone Cameroon today subject to the provisions of the 1981 Ordinance. The introduction of polygamy as a valid type of statutory marriage in S. 49 of the 1981 Ordinance, takes the definition of a statutory marriage celebrated under it out of the framework of the Nigerian Marriage Ordinance. It implies that the definition of a statutory marriage in Cameroon is no longer restricted to a monogamous marriage. It is as a matter of law and practice, to include statutorily celebrated marriages with an option for polygamy as the type of statutory marriage. Polygamous marriages as a social reality which does not only have to be reflected in statutory law but in statutory judicial practice as well,

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(18). This was the interpretation of the following judges: Mr. Fombe (judge and president of the High Court in Kumba in 1990); Mr. Bawak, B.B.(Judge in the Court of Appeal in Buea in 1990); Mr. Asuh (judge in the High Court in Buea in 1989); Mrs. Wacka (judge in the High Court of Buea in 1990); Mr. Justice Endeley S.M. and Mr. Justice Ekema (retired Chief Justice and Justice respectively of the Supreme Court in Yaounde). Interviews done between August-October 1990.

(19). See, NGWAFOR, E. N., Family Law, 2nd ed., Institute of Third World Art and Literature, London, 1987, p. 10.

(20). See, BURNHAM, op. cit., p. 58, note 10: p. 46; WAMBUI WA KARANJA, op. cit., note 24: p. 258. Cf. NUKUNYA, op. cit., note 40: p. 165. Cf. PARKIN and NYAMWAYA, op. cit., note 51: p. 11.

(21). See, NGWAFOR, op. cit, note 19.

(22). Supra, note 99.

had been perceived by Chief Justice Gordon as far back as 1962. He had the occasion in the case of Christopher Egbutu and others v. William Fosimodi[23] to interpret the meaning of "wife" in the Cameroonian society for the purpose of recovery under S. 5 of the English Fatal Accident Act 1846. He pronounced thus:

> "... in a polygamous society recognising the possibility of more than one person having the status of "wife", it would be open to more than one wife to claim in the circumstances."

This means in effect that in the Cameroonian context, "wife" in S. 5 of the 1846 Fatal Accident Act includes the wife in a statutory polygamous marriage. This Act is applicable in anglophone Cameroon solely as part of statutory law which binds only spouses in statutory marriages. It would be inapt to suggest that in dealing with polygamy for the purpose of deciding which wife can recover under statutory law, the Honourable Chief Justice could have been referring to polygamy in a customary marriage. It is, therefore, the legal right of co-wives in statutory polygamous marriages to have the benefit of statutory law in matrimonial cases, for example, divorce and custody of children and division of matrimonial property. Wives have no property or custody rights in customary law. It is plausible to say that the 1981 Ordinance intended to water-down the rigour of customary law in these matters by introducing polygamy as a form of statutory marriage. Thus, balancing husbands' inclination towards marrying more than one wife, with wives' need to have the benefits of statutory law in settling their matrimonial issues. Unfortunately, they are yet to see this benefits, for the noble intention in the law has not been made a reality by those who apply it.

Judicial Interpretation of Statutory Marriage vis-a-vis the law:-

As has been discussed, statutory polygamous marriages and statutory monogamous marriages in respect of which there is evidence that customary law formalities were performed as well, are in judicial practice not statutory marriages. The question that the following discourse intends to focus on is: what happens in case of divorce or any matrimonial issue arising from such a marriage?

The High Court declines jurisdiction over such marriages on the ground that they are customary marriages, as we have seen. However, the nature of a marriage does not change merely at the instance of a judge's pronouncement to that effect on the basis of his interpretation of a marriage certificate. The only legal means by which the nature of a

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(23). (1962) W.C.L.R 1962-1964, 42.

marriage changes is by conversion.

Conversion in this discussion will be given a wider connotation than has been used by some writers. Kasunmu and Salacuse, for example, use conversion with reference solely to the process and result of changing a customary marriage, which is essentially polygamous, to a statutory or christian marriage, which is monogamous.(24)

The term conversion is employed in this discussion to refer to the process of change from a statutory monogamous marriage to a statutory polygamous marriage. Alternatively, conversion from a statutory polygamous marriage to a statutory monogamous one. In general, conversion of a statutory polygamous marriage can be effected by a number of factors. The parties' intention alone to effect such a change does not convert a marriage. To use the words of Bromley and Lowe, "there must be some other act or event which brings this about by operation of law... ."(25)

Examples of such acts are; a change of religious faith affecting the parties' status as was in the Sinha Peerage claim(26)in which a change of hindu sect from one practising polygamy to one practising monogamy effected a change to the hitherto polygamous marriage; a change of domicile from one practising polygamy to one which forbids polygamy can change a polygamous marriage into a monogamous one as was held in the in Ali v. Ali.(27) Alternatively, conversion of a marriage from polygamy to monogamy may be caused by local legislation which effects a change in the character of the marriage: the English case of Parkasho v. Singh(28); finally, conversion of a polygamous marriage into a monogamous one can be effected by the performance of a second ceremony of marriage designed to create a monogamous marriage. This form of conversion was recognised in the English case of Ohochuku v. Ohochuku(29)Talking of the legality of a marriage by a Nigerian couple in England who had been married polygamously in Nigeria, Wrangham J, held that the second marriage celebrated by the Nigerian couple in England could dissolve the polygamous marriage they celebrated in Nigeria. The decision has attracted criticism in view of the fact that the first polygamous marriage was recognised under English law as valid since it was so

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(24). See, KASUNMU and SALACUSE, op. cit., p. 54, note 1: p. 90.
(25). See, BROMLEY and LOWE, op. cit., note 31: p. 62.
(26). (1946)1 All ER 348, H L.
(27). (1966)1 All ER 664. Cf. R. v. Sagoo (1975) Q B 885; (1975) 2 All ER 926, CA.
(28). (1967) 1 All ER 737, where an Indian statute converting polygamous Sikh marriages into monogamous ones.
(29). (1960) 1 All ER 253; (1960) 1 W.L.R 183.

valid under the law of the country of celebration.[30]These cases can be contrasted with the situation in Cameroon.

Although conversion from polygamy to monogamy is legally possible, as stated at the beginning of this discussion, in practice, conversion in Cameroon mainly involves changing a statutory monogamous marriage to a statutory polygamous one. A husband who opts for monogamy during solemnization of a statutory marriage is confined solely to one wife and vice versa. In a society where polygamy is widely admired and practised,[31]a husband who contracted a monogamous marriage may in the future desire to marry another woman or even more. Polygamy as an African institution of marriage has been associated with a variety of benefits, such as, economic advantages in the traditional family economic structure; it has been seen as a measure of financial capability as only those who are financially secure can afford to be polygamists, (an issue which will be returned to in Chapter Six) hence, a symbol of social status. In addition, polygamy has been seen to facilitate domestic work by division of labour between the wives.[32]Besides these wider economic and social factors put forward by anthropologists as attributes which are likely to motivate polygamy, changed circumstances may also generate the desire for another wife or more wives. These are, for example, cases where a husband who had polygamous inclinations celebrated a monogamous marriage because the marriage ceremony took place in a country which does not allow polygamy. On their return home, such a husband may want the marriage to be converted. Similarly, the desire for children may lead a husband in a monogamous marriage to change the character of the marriage if his wife is not able to have children, or if a particular sex is needed and it seems unlikely that his current wife would give birth to the desired sex.[33]

Regardless of the motives for change, in order for a marriage to be converted, a second statutory marriage ceremony with an option for the new type of marriage must be made. For this to take place, the first marriage - the statutory monogamous marriage or statutory polygamous marriage must be dissolved and the new one must be celebrated for conversion to occur. A wife's consent to the dissolution of the first marriage, either verbally or in writing is a pre-requisite to the celebration of the second. In practice, even conversion

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(30). See, Cairns J, in Parkasho v. Singh, supra at p. 741; See generally, BROMLEY and LOWE, op. cit., note 31: pp. 62-64.

(31). Supra, p. 101, note 20.

(32). See, STEADY, F. C., "Polygamy and the Household Economy in a Fishing Village in Sierra Leone," in PARKIN and NYAMWAYA, op. cit., p. 58, note 10: p. 211 at pp. 219-226; BURNHAM, op. cit., p. 59, note 10: pp. 46-47.

(33). Information obtained from interviews cited on p. 66, note 33.

from statutory monogamous to statutory polygamous marriages is a rare occurrence. Generally, wives in statutory marriages (who are those in the elite or educated class of women in the country) dislike polygamy as it involves sharing their husband's love, affection and attention.[34]Contrary to what might be expected, therefore, the consent required from wives is not readily given. To circumvent the consent handicap, husbands-to-be avoid the necessity of having to undergo a conversion procedure in the future by convincing their brides to agree with them and opt for a statutory polygamous marriage during the marriage celebration. The brides' wariness to accept the option for a statutory polygamous marriage is dematerialised by bridegrooms' promises that all they need is a potentially polygamous marriage, which may never be actually polygamous unless it is necessary. If the bride refuses an option for a statutory polygamous marriage even under these circumstances and they contract a statutory monogamous marriage, the process of conversion discussed above has to take place for the character of the marriage to change. The same procedure is required to convert a statutory polygamous marriage to a statutory monogamous one.

Judicial attitude, therefore, of interpreting valid statutory polygamous marriages as customary marriages on the grounds that they are polygamous is unconstitutional. The same criticism is made against courts' interpretation of statutory monogamous marriages in respect of which there is evidence that customary marriage formalities were performed as customary marriages. The double and sometimes, three-tier celebration of marriages by parties intending to celebrate a statutory marriage is a socio-cultural reality in statutory marriage in most African jurisdictions, as discussed earlier. The unconventional manner in which the judiciary changes the character of marriages attracts even greater criticism.

The consequence is that spouses, especially wives, realise when it is too late that the marriages they are in are not what they intended at the time of celebration. This is the

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(34). See, PARKIN and NYAMWAYA, op. cit., note 51. For a discussion on romance or love as the basis of marriage among African elites and even in the traditional marriage concept, see, OKPEWHO, I., "Understanding African Marriage: Towards a Convergence of Literature and Sociology," in PARKIN and NYAMWAYA, op. cit., p. 58, note 10: p. 331 at 335 and 337-341.

The response of younger women in the interviews cited on p. 66, note 33 was disapproval of polygamy. Although the older generations of wives spoken to were a bit tolerant towards polygamy, some were bold to express their feelings if polygamy was eradicated. Indeed one elderly woman who was asked to say why she would like to see a democratic government in Cameroon, in the Channel 4 television programme cited earlier (in Ch. 1, p. 7 at note 24) said she likes democracy because it will stop polygamy.

situation for a spouse who contracted a valid statutory polygamous marriage or the double celebration of a statutory monogamous marriage and customary law formalities, which turns out to be a customary one in practice. The main protagonists are wives and children who become subjected to harsh customary law rules in deciding issues of matrimonial property and the future upbringing of children on divorce. It is time the reality is recognised by decision-makers that in Cameroon, as in other common law African countries, socio-cultural factors necessitate the co-existence of the three types of marriages - statutory monogamous, statutory polygamous marriages(both with or without traditional marriage formalities) under the jurisdiction of statutory law and courts; and customary marriages brought into existence by customary law and regulated by customary law. This reality has been acknowledged by law-makers in S. 49 of the 1981 Ordinance. It is left to the decision-makers to execute the law.

A Comparative Analysis of Capacity to Marry and Formalities of Marriage Under Cameroonian Statutory Law and English Law:

It has emerged from the discussion of Cameroonian statutory marriage law so far that the 1981 Ordinance is a procedural legal framework. It simply provides preliminaries of marriage with no provisions to deal with substantive matrimonial matters. For example, the rights and obligations which ensue between parties on marriage; divorce and custody; adoption; custodianship; matrimonial property; relationship between parent and child are all areas over which there is no Cameroonian law. English law is applicable in anglophone Cameroon when dealing with such matters, as seen in a previous discussion. Resorting to English law to fill the gap in matters not covered by Cameroonian law is not a satisfactory solution. Law does not operate in a social vacuum. A legal system functions within its social, cultural, economic and even political needs and ideologies. The history of English family law indicates that matrimonial laws and judicial decisions have for the greater part been informed by socio-cultural ideologies based on the values of the people at any given time.[35]Applying in toto English family law to matters arising from Cameroonian statutory marriages, adapted to the African social and cultural scene and brought into existence by Cameroonian law, is an absurdity. Especially, as no regard seems to be given to the differences that exist in the

(35). See, MAIDMENT, S., Child Custody and Divorce, Croom Helm, London. Sydney. Dover, New Hampshire, 1984, Chs. 4 and 5. Cf. BROMLEY and LOWE, op. cit., p. 65, note 31: pp. 38-42.

law and concept of marriage under Cameroonian and English law. A comparative study, of certain features in the marriage celebration process under the two legal systems in the discussion that follows, is intended to illustrate this basis of our reservation.

Although there are certain requirements for celebration of marriage which are similar in both legal systems, the legal implications of failure to comply with them are in some cases different. Furthermore, statutory marriage law in Cameroon provides some formalities and features which are incompatible with English marriage law. Our discussion will be in two parts. First, we shall examine provisions relating to capacity to marry, analysing the similarities in the provisions and the differences in interpretation of their effect on the marriage. They include, the provisions relating to age, sex and consent[36] of the parties. Basically, the differences in the marriage laws of the two systems are manifest in the formalities for celebration. We shall treat this issue as the last discussion in this Chapter.

Capacity to marry:-

Compliance with the provisions stating the age, sex and consent of the parties[37]and publication of banns, gives the parties capacity to marry under Cameroonian law[38] and, with the exception of consent,[39] under English law. We shall treat age and consent, first and sex second. In the third part, other capacity provisions, such as those dealing with previous marriage, and prohibited degrees of marriage shall be treated. The law in both legal systems is divergent on these two requirements.

Age and consent:-

As in English law, a minor[40] lacks capacity to celebrate a valid statutory marriage under Cameroonian law.[41] Similarly, consent of the spouses is a pre-requisite to the

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(36). Infra.

(37). We are treating consent under capacity requirements because under Cameroonian law, lack of consent renders a marriage void. As we shall see, this is the effect of non compliance with capacity provisions under both systems of law. Cf. S.12(c) of Matrimonial Causes Act 1973.

(38). S. 52 of the 1981 Ordinance contains formal and Capacity requirements.

(39). Consent is one of the formalities of marriage under English law, as we shall see later.

(40). Capacity to marry under S. 52(1) of the 1981 Ordinance is attained at the ages of 15 years and 18 years for females and males respectively. Cf. S. 2 , of the 1949 English Marriage Act.

(41). Supra., note 40. Cf. BROMLEY and LOWE, op.cit, p. 65, note 31: p. 35. Cf. CRETNEY and MASSON, op.cit., note 92: p. 32.

celebration of a valid marriage under English law and Cameroonian statutory law regulating celebration of statutory marriage.[42] The interpretation of these general requirements under the two legal systems limits this apparent similarity. This is with regard to the flexibility inherent in the age provision under Cameroonian law; the significance of parental consent on that of the spouses; and the different effects that absence of parental consent or those with parental responsibility under current English law, has under the laws of the two countries. We shall discuss these points seriatim.

Age as capacity requirement under Cameroonian law is not absolute:-

Under English law, the requirement that the parties must have attained majority to acquire capacity to celebrate a valid marriage cannot be bargained with.[43] By contrast, the provision against marriages by minors under Cameroonian law is not absolute. A minor can celebrate a valid statutory marriage if, for serious reasons, a waiver of the general rule is granted by the President of the Republic as per S. 52(1) of the 1981 Ordinance. Furthermore, the age at which capacity to marry is attained under English law is the same regardless of sex.[44] This is not the case in Cameroon. The Civil Status Registration Ordinance, states different ages for the two sexes. Whereas a girl has capacity to marry from the age of fifteen, subject to the exception stated above, a boy below the age of eighteen lacks capacity to marry.[45]

Two inferences may be made from this legal state. First, the law-makers may have been influenced by the traditional test for age of marriage which as discussed earlier, is puberty. Earlier maturity by females as opposed to males is the premise on which the puberty test rests. If puberty was the consideration made by the framers of the differential age provision, this in effect would be a reconstruction of traditional values in statutory law.

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(42). S. 52(4) of the 1981 Ordinance. Cf. CRETNEY and MASSON, ibid., p. 11. Cf. SS. 24 and 48, 1949 Marriage Act.

(43). See, S. 2 of the Marriage Act 1949. See the case of Pugh v. Pugh (1951) P. 482, (1951) 2 All ER 680, in which a marriage celebrated in Austria by an English boy over 16 and an Austrian girl aged 15 was held void in English law. Although it was a valid marriage under Hungarian law where the girl was domiciled, it was held that the English boy who was domiciled in England had no capacity to marry a girl of 15.

(44). S. 2(1) of the Family Law Reform Act 1969 reduced the age of majority to 18. Hence, any one over that age has capacity to marry without parental consent. Capacity to marry with parental consent is reached at the age of 16. See, S. 2 of the 1949 English Marriage Act.

(45). S. 52(1) of the 1981 Ordinance.

Another inference could be that the difference in statutory age is simply sexual division in law, which is rooted in customary law,[46]the values of which inform to a large extent, the making of decisions in family matters, and administrative policy-making.[47]Such division of sexes in stating age of majority raises the question as to the criteria to be used in classifying the sexes. The use of the words, "girl" and "boy" in S.52(1) of the 1981 Ordinance raises the same arguments generated by the terms "man" and "woman" which was used in S. 1 of the English Nullity of Marriage Act 1971.[48]We do not intend to open a discussion on this argument which has been made elsewhere.[49]The argument advances difficulties that ascribing sex to humans at birth on biological criteria may give rise to.

The requirement of the consent of those with parental responsibility under English and parental consent under Cameroonian law are informed by different considerations:-

Under English law, the consent of parents, or now under the 1989 Children Act, any one with whom the child is living or is to live if a residence order has been made or is to be made,[50] is required only if either party to the marriage is over the age of sixteen but under the age of eighteen. This provision is an additional safeguard to ensure the guidance of anyone with parental responsibility over the bride or bridegroom as far as the parties' ages do not permit sufficient understanding of the nature and effect of marriage. The motive is to reduce the number of unstable marriages.[51]This objective underlying the consent of those with parental responsibility in current English law reflects social changes that have occurred in the area of marriage. In 1753, Parliament was primarily concerned to see that property did

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(46). Sexual division is characteristic of customary law, intended to subordinate women. We shall discuss this issue later, post, Ch. 6. See ANYEBE, op.cit., p. 54, note 1: p. 33.

(47). We shall return to the discussion on sexual divisions later, post, Ch. 6.

(48). The section is now S.11 of the Matrimonial Causes Act 1973.

(49). For an account of the complication, see,BROMLEY and LOWE, op. cit., p. 65, note 31: pp. 34-35. Cf. O'DONOVAN, op.cit., note 92: p. 60-69; KENNEDY, M.I., "Transsexualism and Single Sex Marriage," (1973) 2 Anglo-American Law Review 112.

(50). For a discussion on parental consent in this case, see, BROMLEY and LOWE, ibid., p. 43.

(51). See, Report of the Latey Committee, Cmnd. 3342, paras. 135- 177; EEKELAAR, J., Family Security and Family Breakdown, Penguin, Harmondsworth, 1971, pp.17-19. Cf. PRIEST, J., "Buttressing Marriage," (1983) 13 Family Law 40, at 43-45.

not fall into the hands of undesirable suitors[52] who were motivated solely by the pre-1882 law on matrimonial property[53] to get married to rich brides.

By contrast, parental consent in the 1981 Ordinance is motivated by traditional social and cultural values. Under S. 64(2), the consent of parents is a condition precedent to the validity of the spouses' consent to their marriage. It reads thus:

> The consent of a spouse-to-be shall be valid only when supported by that of his father and mother."

This requirement is informed by the traditional concept of social security in the Cameroonian society which has been treated under the significance of kinship lineage. Socio-cultural values inform policy-making and they may explain why unlike in English law, absence of parental consent in Cameroonian law is a defect which renders a marriage void.

Difference in legal effect of absence of the consent of those with parental responsibility and parental consent:-

Under English law, absence of the consent of those with parental responsibility where it is required renders a marriage voidable not void. For if no objection is made on publication of banns, the marriage is celebrated and the damage would have been done.[54] Hence, the marriage would remain valid as long as it is not annulled by a decree. Even then, a decree of nullity would be accompanied where necessary by custody and financial provision orders in respect of the children. The court in making such custody orders are guided by the welfare principle[55] as in divorce custody cases.

By contrast, lack of parental consent in a marriage celebrated under the Ordinance renders the marriage invalid. This inference is made from a joint reading of sections 52(4) and 64(2) of the 1981 Ordinance. Both sections read thus:

> S. 52(4) - "No marriage shall be celebrated if the spouses to-be do not consent."
>
> S. 64(2) - "The consent of the spouse-to-be shall be valid only when supported by that

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(52). Lord Hardwicke's Act which for the first time introduced formalities in solemnization of marriages was enacted in 1753. See, BROMLEY and LOWE, op.cit., p. 65, note 31: pp. 40 and 43. Cf. O'DONOVAN, op.cit., note 92: pp. 42-50.

(53). At common law married women had no right to own property. Until the Married Women Property Act was passed in 1882, which gave women property right on marriage, a woman's property became her husband's. See BROMLEY and LOWE, ibid., pp. 566-569.

(54). See, BROMLEY and LOWE, ibid., p. 43.

(55). We shall treat the application of the welfare principle in Cameroonian custody courts later in Chapter Four.

of his father and mother."

Although S. 49 stating the content of a marriage certificate only mentions the consent of the spouses-to-be in clause 3, such consent has to be accompanied by parental consent to qualify as consent of the spouses-to-be regardless of their ages. It is also the same even if it is a second marriage. Hence, the parties consent alone unaccompanied by parental consent is not sufficient to satisfy the requirement of consent regardless of the parties' ages. However, there is a difference between parental consent in case of minors and parental consent where the parties have attained majority. Where consent is to a marriage between minors, such parental consent has to be indicated in the marriage certificate in compliance with S. 49, clause 4. Although S. 64(2) talks of the consent of the father and mother, where the parents cannot agree, the consent of one parent satisfies the provision.[56] The power to consent in this case is given to the person exercising parental power or one who has custody over the child under S. 64(3)c.[57]Similarly, the consent of one parent suffices in case of death or absence legally established of one of the parents or if one is unable to express the required consent as per S. 64(2). This leads to the question of whose consent is required where both parents are legally absent or dead. S. 64(4) provides in this regard thus:

> "The consent of the guardian or customary authority shall validly replace: (a) that of the father and mother of a child whose parents are still unknown; (b) that of the father and mother of an orphan; (c) that of the father and mother of the child whose parents are unable to give their consent."

It is not certain what a customary authority in the section implies but a guardian could mean next of kin.

Whereas, therefore, the requirement of the consent of those with parental responsibility under English law is a procedural safeguard, absence of which merely renders the marriage voidable, it is fundamental to the existence of a valid statutory marriage in Cameroonian law. A marriage without parental consent is void ab initio. Hence, children of the marriage are considered in law illegitimate, as children born out of wedlock.[58]However, under the provision of S. 41(1)a and b of the 1981 Ordinance, children of a void marriage may legally

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(56). S. 64(3) of the 1981 Ordinance.

(57). This discourse shall be returned to later in Ch. 6.

(58). Cf. English common law. See, CRETNEY and MASSON, op.cit., note 92: p. 67. The law, however, does not clarify the effect of some procedural defects. See, ibid, pp. 25; HALL, C. J., "Common Law Marriage,"(1987) Cambridge Law Journal 106 at pp. 108-109. BARTON, J. L., "Irregular Marriages,"(1973) 89 Law Quarterly Review 181.

be ascribed legitimate status if a court order is issued to that effect or if the parents subsequently contract a valid marriage with the requisite consent. In order to protect the children who are innocent victims of the law on void marriages, English law[59]makes provision for custody orders and financial provisions to be made in respect of the children. In this regard, the 1981 Ordinance guides the courts on how to make a custody ruling in such cases. S. 47 provides as follows:

> "Parental power over children born out of wedlock shall be jointly exercised by the mother and the father with whom affiliation was legally established."
>
> "In case of disagreement, it shall be exercised by the parent who has effective custody of the child except the judge decides otherwise."

Apart from this general ruling on the custody of illegitimate children, there are no financial provisions in the 1981 Ordinance, hence, a judge who makes such orders accompanying the custody ruling under S. 47 does so in accordance with English law.

Sex of the parties:-

As in English law,[60] compliance with the provision stating the sex of parties is a condition precedent to the existence of a valid statutory marriage. Section 52(3) of the 1981 Ordinance states as follows:

> "No marriage may be celebrated if the spouses-to-be are of the same sex."

The effect of non-compliance under both legal systems is the same. It renders the marriage void ab initio.[61]Hence, a purported marriage between transsexuals shall be void for lack of capacity to marry as was held in Corbett v. Corbett[62]However, no such case has come before a Cameroonian court for consideration of the issue.[63]

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(59). The knowledge of the parents at the time of conception is a vital factor. S. 1 of the Legitimacy Act 1976 as amended by the Family Law Reform Act 1987, S. 28. See, BROMLEY and LOWE, op. cit., p. 65, note 31: pp. 280-282. Cf. CRETNEY and MASSON, op. cit., note 92: pp. 68-69. Current English law on nullity has been criticised and reforms proposed. See, ibid., pp. 70-73.

(60). S. 11(c) of the Matrimonial Causes Act 1973 (former S.1 of the Nullity of Marriage Act 1971) requires the parties to be male and female respectively. See, CRETNEY and MASSON, ibid., pp. 46-48; Cf. BROMLEY and LOWE, ibid., p. 34.

(61). See, S. 52(3), the 1981 Ordinance. See also S. 347 Order No. 72-16 of 28th September 1972 amendments to 1965 Penal code. Cf. Ormrod J, in Corbett v. Corbett(1971) P 83; (1970) 2 All ER 33.

(62). Supra.

(63). Information obtained from interviews with judges cited on p. 100, note 18.

Other capacity requirements:-

The other two capacity requirements that we have not discussed are, prohibited degrees of consanguinity and affinity and the prohibition of bigamous marriages. (Although publication of banns which had been treated under preliminaries of marriage, appears to be a formal requirement, it is treated in the 1981 Ordinance as a capacity requirement. Under S. 52(2) failure to comply with that requirement, no marriage comes into existence.)

Prohibited degrees of consanguinity and affinity:-

English law[64] prohibits marriage between persons related in certain degrees, either by blood or marriage. Morality underlies disapproval of incestuous relationships on grounds of public policy.[65] By contrast, there is no provision in the 1981 Ordinance restricting marriage between certain classes of blood relatives or affines.[66] This difference may be explained within an historical and a cultural context.

The different origins of marriage law in English law and statutory marriage and marriage law in Cameroon partly account for this. English law on prohibited degrees of consanguinity and affinity was developed from canon law, which had exclusive jurisdiction over marriages till 1836 as treated in a previous discussion. Despite the split from the Roman Catholic Church, the modified table of prohibited degrees found in English statute law by mid nineteenth century, was levitical in origin.[67]

By contrast, the divine inspired disapproval of marriage between relations is not envisaged in Cameroonian statutory law of marriage which is entirely secular. Similarly, the christian notion of husband and wife becoming one flesh on marriage[68]is not envisaged. Hence, there is no provision in the 1981 Ordinance that renders invalid marriages between affines.[69] It is not certain whether this is an over sight in policy-making or, it is in practice, intended to portray the purely civil nature of marriage law in Cameroon.[70] Besides moral

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(64). Marriage Act 1949, schedule one, as amended by the Marriage (Enabling) Act 1960, the Children Act 1975, schedule 3 and the Marriage (Prohibited Degrees of Relationship) Act 1986.

(65). For the current table of prohibited degrees, see, BROMLEY and LOWE, op. cit., p. 65, note 31: Appendix C. Cf. Ibid., pp. 36-38.

(66). This inference is made from the Ordinance.

(67). See, BROMLEY and LOWE, op. cit., p. 65, note 31: p. 36.

(68). Ibid., pp. 37-38. Cf. CRETNEY and MASSON, op.cit., note 92: pp. 36-41.

(69). Inference from the Ordinance.

(70). Conflicting opinions were intimated by the four parliamentarians interviewed on this point in the towns of Kumba and Buea in August 1990.

considerations, biological factors render necessary the prohibition of marriages between certain groups of relatives. The more closely parties are related, the greater would be the risk of their children inheriting undesirable genetic characteristics and even deseases.[71]Such an important aspect of marriage is unlikely to have been overlooked. This may explain the mandatory requirement of parental consent to a marriage and the effect of its absence, discussed earlier. As explained when treating consent of parents under customary law, parents generally make inquiries on the background of their prospective son or daughter-in-law before giving their consent. The same precautions are taken before parental consent to their children's marriages required by statutory law is given. This is the situation whether the marriage was arranged by parents or the parties fell in love. However, this traditional precautionary measure is in the present generation threatened by an upsurge of (English type) Gretna Green marriages in Cameroon.

There are civil status registries in some villages and even towns where there is readiness by the civil status registrars to dispense with the pre-requisites for the celebration of a statutory marriage laid down by the law. Marriages are celebrated in such registries, as in the villages of Soa and Mambanda, between parties who elope without compliance with the requirement of parental consent and publication of banns. Besides, there are in the town of Kumba, documentary services which sell already signed marriage certificate forms. All that needs be done is for parties intending to get around the law to buy the certificate and complete them, which they keep as proof of marriage.[72] Undoubtedly, such marriages are either void or voidable depending on which marriage preliminaries were evaded.

Having dispensed with parental consent, there is a likelihood of contracting such illegal marriages between spouses who are blood relatives. In the absence of any provision in the 1981 Ordinance prohibiting marriages between blood relatives, that fact in itself is no breach of a requirement. However, such parties would have failed to comply with the requirement of parental consent. They also fail to satisfy the capacity requirement of publication of banns. Although, therefore, such illegal marriages are brought into existence by a civil status registrar's pronouncement to that effect, they are void for lack of capacity.

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(71). BROMLEY and LOWE, op.cit., p. 65, note 31: p. 37.

(72). Information obtained from interviews with fifteen parent respondents in each of the towns of Kumba, Buea, Mutengene, Tombel and Muyuka between August-October 1990. Two female respondents in Kumba and one in Tombel intimated that they accidentally discovered their marriage certificates in their husbands' files although they never went to any registry for the ceremony.

In the event of nullity of a "Soa type marriage" the legal status of children from such marriages has been treated under effects of absence of parental consent. With an increased significance attached to love and personal consent of parties as the basis of marriage, "Soa Marriages" and the likes of them are a cause for concern. There is danger of an increase in the number of marriages celebrated between blood relatives with associated moral and biological consequences. In turn, this could increase the number of children whose legal status is illegitimate as they would be children of void marriage due to lack of capacity. Children of bigamous marriages are within the same category.

Bigamy:-

Under English law, a marriage is bigamous if one or both spouses are committed in a bond of a previous undissolved marriage. The second marriage is bigamous and illegal.[73] As in English law, the 1981 Ordinance makes provision against celebration of bigamous marriages. S. 63 provides as follows:

> "..., any marriage contracted by a woman who is legally married or by a man who is legally committed on the bonds of a previous undissolved monogamous marriage, shall be null and against public policy."

Bigamy is also an offence punishable under S. 359 of the Cameroonian Penal Code with fine and/or imprisonment. Although bigamy is illegal and the second marriage would be a void marriage under Cameroonian and English law, the circumstances under which it would arise are different. In other words, the definition of bigamy would not be the same in the two legal systems.

Under English law, any marriage purportedly celebrated by a spouse(woman or man) who had previously celebrated another marriage which is still in subsistence is bigamous. By contrast, a man in Cameroon can only commit bigamy if his previous marriage was a statutory monogamous marriage. Even then, the conversion of marriages by the judiciary discussed earlier, makes it less likely for a bigamous marriage to arise in practice. For example, if the first statutory marriage involved the double celebration of customary formalities and a civil status registry ceremony, it is held a customary marriage, as seen earlier. In consequence, any second marriage sought to be nullified on ground of bigamy would be a legally valid marriage. The first marriage which is held by the judiciary as a

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(73). See, BROMLEY and LOWE, op. cit., p. 65, note 31: pp. 65-66. Cf. CRETNEY and MASSON, op. cit., note 92: p. 46.

customary marriage is potentially polygamous. The existence of polygamy itself as a valid form of statutory marriage which has been discussed earlier, coupled with judicial interpretation of marriages makes the provision against bigamy of little practical effect. Bigamy under Cameroonian law can never be committed by a man if his previous subsisting marriage was potentially polygamous. As discussed earlier, opting for polygamy even if it is done only as a precautionary measure, is a common occurrence in the celebration of statutory marriages. By contrast, a marriage would be bigamous if celebrated by a woman who had contracted a previous undissolved marriage. This is because, in Cameroon as in the rest of Africa, polygyny as opposed to polyandry is the form of polygamy practised.(74) Parties qualify to the formalities of marriage if they have capacity to marry.

Formalities of Marriage:

Under both legal systems, capacity qualifies the parties to perform the formalities required by law to celebrate a valid marriage. Formalities of marriage have been discussed under preliminaries to marry. Attention was drawn to the fact that unlike in English law, a statutory marriage under the 1981 Ordinance cannot be celebrated in a place other than the civil status registry. Another dissimilarity in formalities is the possibility of contracting a polygamous statutory marriage under the 1981 Ordinance which has also been treated earlier. The purport of this part of the discussion is not to reproduce the formalities of marriage in the two legal systems.(75)Rather secularisation of statutory marriage under Cameroonian law is a significant dissimilarity to be examined in this last part of the Chapter.

The civil nature of statutory marriage under Cameroonian law:-

English law recognises civil marriages as well as marriages performed by religious rites. If it is intended to be a civil ceremony, the provisions of the Marriage Act 1949 as amended(76)relating to celebration of marriage by the superintendent registrar must be complied with. Where the ceremony takes place in a register office, the registry ceremony may be followed by a religious ceremony in a church. As far as the legal validity of such a

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(74). See, MAIR, op. cit., p. 54, note 8: p. 1.

(75). See, 1981 Ordinance, Part VI, chs. I, II and IV. Cf. CRETNEY and MASSON, op. cit., note 92: pp. 8-29; BROMLEY and LOWE, op. cit., p. 66, note 31: pp. 44-51. For criticisms of English law on formalities, see, CRETNEY and MASSON, ibid., pp. 24-28.

(76). See, HALL, op.cit, p. 111, note 58: p. 108 at note 16.

marriage is concerned, however, the marriage solemnized in the register office is that which is legally binding.[77]The church ceremony is in this case, purely of social significance. No church ceremony is required by the Marriage Act 1949 for the celebration of a marriage in the registry.[78]Similarly, with the exception of marriages celebrated in accordance with the rites of the church of England, celebration of marriage by any form of religious precepts has to comply with the requirements of secular law. All marriages other than those celebrated in accordance with rites of the Church of England may be solemnized only on the authority of a superintendent registrar's certificate. This may be done either without a licence, or by a licence or on the authority of the Registrar General's licence.

Where, however, a marriage is solemnized in accordance with the rites of the church of England, the church ceremony itself constitutes legal validity of such a marriage.[79] This is not the case in Cameroon.

By contrast with English law, parties intending to celebrate a statutory marriage under Cameroonian law, must comply with the requirements of the 1981 Ordinance. The Ordinance does not recognise solemnization of a statutory marriage other than by the formalities laid down in it as treated earlier. In this regard two main differences exist: First, marriage under the 1981 Ordinance, if celebrated in Cameroon,[80] can only be contracted in a civil status registry by a civil status registrar and second, the purely secular nature - its legality derives solely from the 1981 Ordinance. This issue has been addressed in a previous discussion.

In light of the differences in form and content between the two legal systems as regards provisions which regulate the manner in which marriages are celebrated, importation of English law of marriage is not, therefore, an appropriate answer to the lag in substantive family law in Cameroonian legal system. This will become more apparent in our discussion of the law and practice of child custody after divorce in the rest of the Chapters.

CONCLUSION:

We have in this Chapter analysed the differences that exist between celebration of

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(77). See, S. 44 of the Marriage Act 1949. For a discussion on the celebration of civil marriages, see, BROMLEY and LOWE, op. cit., p. 65, note 31: pp. 45-49. Cf. HALL, ibid., pp. 106-109.

(78). SS. 4, 22, 33, 44(2), 45(1), 45A(2)(3) and 75(1)a 1949 Act (as amended and added by the Marriage Act 1983, sch. I).

(79). See, BROMLEY and LOWE, op. cit., p. 65, note 31: pp. 44-45.

(80). For Cameroonians in foreign countries, Embassies are places of celebration. Part I, S.5 of the 1981 Ordinance.

marriage under Cameroonian law and English law. Marriage under Cameroonian law has a double concept - one indigenous in origin and the other, Western inspired but informed partly by cultural values. These are customary and statutory marriages respectively. As far as marriage laws regulating celebration of marriages in Cameroon are concerned, two issues are thorny: the practical effect of the registration of customary marriages and the fact that statutory marriages can only be celebrated in a register office.

Without prejudice to the noble idea of registering customary marriages for statistical and evidential purposes, the present means of realising the intention of the law makers lags behind. Civil status registries in which celebrated customary marriages are to be registered are not readily accessible to the population in villages who celebrate the majority of pure customary marriages.

The second point of concern is the fact that the law does not make it possible to celebrate a statutory marriage in Cameroon elsewhere, other than in a register office. The present state of the law overlooks cases of house-bound people due to ill-health, prisoners and other detained people who for reasons beyond their control may not be able to appear in the registry even if they intend to celebrate a statutory marriage. Should it be inferred that these groups of persons do not have the "capacity" to celebrate a valid statutory marriage? If so, it needs to be made explicit in the law. Otherwise, we can conclude that their interests are prejudiced because they are not able to comply with the formalities in the registry.

CHAPTER THREE

DIVORCE AND THE CONCEPT OF CUSTODY

As in other areas, divorce and custody in Cameroon are regulated by customary and statutory law. Customary marriage divorce falls under the jurisdiction of customary law. Divorce and custody matters arising from statutory marriages are governed by the respective foreign laws applicable in Cameroon. The purpose of this Chapter is to discuss the concept of custody in the Cameroonian divorce context. The intention is first, to examine whether the concept of custody exists in customary law. Second, the meaning of the concept in English law and the interpretation given to custody in Cameroonian statutory divorce courts will be looked at. Before that discussion, an historical excursus will be made into the concept of divorce.

A. DIVORCE, WOMEN AND THE LAW: PAST AND PRESENT:

The modern concept of divorce which has received social acceptance in the Cameroonian society is a colonial creation. A caveat must be entered against an extreme interpretation of this assertion. It does not suggest unqualified stability of marriages in pre-colonial Cameroon. As in other pre-colonial African communities, matrimonial outcries were experienced in pre-colonial Cameroonian communities.[1] Matrimonial disputes were settled in "family" [2] meetings, or by the quarter head or by the village chief in a village meeting. Reconciliation was the ultimate goal of matrimonial dispute settlements. For reasons which will be explained below, such disputes arising in pre-colonial customary marriages were in general, settled primarily through a "family" reconciliation process and rarely by the chief or quarter-head.[3] Divorce in the present day sense of termination of a marriage was not known.

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(1). See, ARDENER, E., Divorce and Fertility: An African Study, Oxford University Press, 1962, pp. 8, 10, 47, 73; RUBIN, N.N., "Matrimonial Laws Among the Bali of West Cameroon: A Restatement," (1970) 14 Journal of African Law 69 at pp. 88-89; BRAIN, R., Bangwa Kinship and Marriage, Cambridge University Press, 1972, p.162.

(2). Family is here used in the broader African context of a kin group or extended family as opposed to the Western context of nuclear family. See, BROMLEY, P. M., and LOWE, N. V., Bromley's Family Law, 8th ed., Butterworths, London, Dublin, Edinburgh, 1992, pp. 1-4.

(3). See, ANYANGWE, C., The Cameroonian Judicial System, Publishing and Production Centre for Teaching and Research (CEPER), Yaounde, 1987, p. 15.

not known.

Under indigenous customary law, a customary marriage may be terminated only by death of the wife. Death of a husband does not, generally, terminate a marriage in customary law due to the practice of widow-inheritance and the leviratic marriages, which have been discussed in Chapter Two. Even then, the continuity of the marriage in some of the tribes studied and elsewhere was preserved by substituting the deceased wife's sister. The absence of a term for divorce other than descriptive phrases in the various tribes until now is indicative of the non-existence of the concept of divorce in pre-colonial customary law. For example, divorce is referred to by phrases, such as: "di bolowa boluka" and "manok ok" meaning "to kill a marriage" in the Mbonge/Bakundu and Barombi tribes respectively, and "buwé bo mali", meaning the "marriage is finished" in the Bafaw tribe. Indissolubility of marriage was the ideology in pre-colonial African societies.(4) The negotiating process involved in the celebration of a customary marriage may have been the basis of this ideology.(5) The payment of bride price by the bridegroom and his kinsmen is significant in this regard. The idea of a marriage for life is based on the impracticality of returning something that one has already eaten. This refers to the bride price money together with other material things requested by the bride's family during marriage negotiations. A validly contracted marriage, therefore, meant transfer for life, of the bride from her family into her husband's family, as we have seen in Chapter Two. Husbands took permanent possession of their wives in the same way as a purchased commercial good. In other words, she became

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(4). My informants on this points were, Chief Elangwe Bokwe (then chief of Matoh Butu village), chief Mukambe Adolf of Mbonge village; Nfon Eseme, E.M.E of kokobuma; chief Akama of Barombi Kang village, and Chief Mukete Mabia of Kombone village. In all the villages they sat with four council members and three or four village elders, between June-August 1990.

(5). This ideology of indissolubility of marriages is analogous to the history of English marriages. See, ANDERSON S, "Legislative Divorce: Law for the Aristocracy?" in RUBIN, G. R., and SUGARMAN, D.,(eds) Law, Economy and Society: Essays in the History of English Law 1750-1914, Professional Books Ltd., Abingdon, Great Britain, p. 412 at 412-419. See, also BROMLEY, and LOWE, op. cit., note 2: pp. 181-182. Cf. O'DONOVAN, K., Sexual Divisions in Law, Weidenfeld & Nicolson, London, 1985, pp.50-52. See also, AMBROSE, P., HARPER, J., and PEMBERTON, R., Surviving Divorce: Men Beyond Marriage, Wheatsheaf Books Ltd., Sussex, 1983, pp. 2-5.

the husband's property[6] for life.[7] This indigenous ideology of marriage changed with colonialism. Socio-political and economic changes brought about by colonialism, as we shall see later, influenced cultural values. The introduction of statutory marriage also interpolated the notion of divorce, first, among indigens who contracted christian marriages. Furthermore, the development of Customary Courts which had been discussed earlier, introduced a formal institution for settling matrimonial disputes arising from customary marriages. Divorce became open in Customary Courts to parties who could not be reconciled. The impact of colonialism was equally felt in extra-judicial matrimonial disputes, as termination of marriage became recognised.[8]

Although divorce became socially acceptable, termination of marriage remained impracticable. Husbands were wary of initiating actions for termination. In most tribes, their unqualified right to return of bride price depended and still depends, on who initiates the action for termination. This issue will be returned to later in the Chapter. Besides, husbands who were, and still are the beneficiaries of customary matrimonial law[9] were relatively not the disadvantaged in the marriage. Therefore, women were much more likely to be in need of a divorce than the husbands. Women were thus, the initiators of termination in the rare cases that it arose.[10]

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(6). The issue of whether a customary marriage wife becomes her husband's property on marriage shall be pursued later in Chapter Six.

(7). Information on indissolubility was obtained from the interviews cited earlier at note 4.

(8). See, BURNHAM, P. "Changing Themes in the Analysis of African Marriage," in PARKIN, D., and NYAMWAYA, D., (eds) Transformations of African Marriage, Manchester University Press, Manchester, 1987, p. 37 at 47.

(9). Writing about family law obtaining in the former French part of Cameroon, Nkouendjin acknowledges the privileged position of men in customary law and its subordination of women. See, NKOUENDJIN, Y.M., Le Cameroun à la Recherche de son Droit de la Famille, Tome xxv, Paris, 1975, pp. 32 and 41. Cf. WANITZEK, U., "Integration of Personal Laws and the Situation of Women in Ghana: The Matrimonial Causes Act of 1971 and its Application by the Courts," in FINKLER, HARALD, W., (Compiler, 1991). Paper of the Commission on Folk Law and Legal Pluralism, Proceedings of the Vith International Symposium, Ottawa, Canada, August 14-18 1990, vol. II, Themes II and III, p. 716 at pp. 717-718.

(10). My informants on this point for extra-judicial divorce were the respondents in the interviews cited earlier at note 4. As regards the position in courts, this was evident from the Civil Record Books (case books) inspected in the Customary Courts of Kumba, Kombone, Mbonge and Tombel which confirmed the information given to me by Pa Dibo Ngoh, Mr. Dituke, and Mr. Panjumba, registrars and court members in the respective courts and Mr. Stanislaus, judge in the Customary Court in Tombel, during field work in June-August 1990.

Similar findings were made by Ardener in his study of the Bakweri tribe. Only

Impracticality of divorce was dictated by the conditions of women. Married women in customary law have always been in a state of subordination. For example, they have no "right" as a parent over their children and no property rights on divorce.[11] Similarly, women's role as the economic mainstay[12]in their families and potential contribution to national economic development had until recently, [13]been ignored. This may be explained within the context of new economic values [14] against which the non-pecuniary domestic labour of women and their contribution in development of their husbands' farms was measured. Women labour was not equated to cash crop production of the men as it was of no commercial value. Their subsistence crops for household consumption were not for the market.[15] Hence, women and children were stigmatised as the non- productive economic sector. This placed Cameroonian wives in a situation analogous to the situation of women in Victorian England.[16]

2.3% out of 40% of divorces in the sample of 1,063 village women was initiated by their husbands. See, ARDENER, E., "Social and Demographic Problems of the Southern Cameroons Plantation Area," in SOUTHALL, A., (ed.) Social Change in Modern Africa, Studies Presented and Discussed at the First International African Seminar, Makerere College, Kampala, January 1959,, Oxford University Press, London New York Toronto, 1961, p. 83 at 94.

(11). The general position in African customary law on matrimonial property has recently been discussed in a paper by WANITZEK, op.cit,., note 9. Whether or not a wife takes away even her personal belongings, for example, kitchen wear, other households and even in some cases her bodily wears depends on the discretion of her husband. Some would not even allow her to harvest her crops planted during that season. Information obtained during my interviews cited earlier, see note 4. We shall make an analogy with English common law later in the Chapter.

(12). See, GEARY, C., On Legal Change in Cameroon: Women, Marriage and Bridewealth, Boston, 1987, pp. 9-10; NKWI, P., "The Changing Role of Women and their Contribution to the Domestic Economy in Cameroon," in PARKIN and NYAMWAYA, op.cit., note 8: p. 307 at pp. 310-318. Cf. BOSERUP, E., Women's Role in Economic Development, George Allen & Unwin Ltd., London, 1970, pp. 16-17 and Ch. 5.

(13). The public sector in Cameroon was opened to women only in the early 60s. See, DWIGHT, M.L.,"Cameroonian Women at the Crossroads: Their Changing Role and Status,"(1986-87) Journal of African Studies 126 at p.129; The Ministry of Women Affairs Two Years After its Creation, SOPECAM, Yaounde, 1986, p. 14.

(14). This refers to the introduction of cash crop economy aimed primarily at the financial market as opposed to the hitherto wholly subsistence economy. DWIGHT, ibid., p. 127.

(15). Ibid., pp. 127, 128. Cf. BLEDSOE, C., Women and Marriage in the Kpelle Society, Stanford University Press, California, 1980, p. 81. Cf. SMART, C., The Ties that Bind: Law, Marriage and the Reproduction of Patriarchal Relations, Routledge & Kegan Paul, London, Boston, Melbourne and Henley, 1984, pp. 9-11.

(16). Cf. O'DONOVAN, op.cit., note 5: p. 36.

Relevance of the historical exercise:-

This historical account is significant in our analysis of divorce, to illustrate the liaison between the status of women discussed above, bride price and the social trend in divorce. It explains rarity of divorce in early times. Having been kept out of the public labour market, wives could not afford to refund the bride price paid to them and their "family" on marriage. Refund of bride price to the husband and his "family" was and is still a condition precedent to termination of a customary marriage. It is returned either by the "divorcing" wife alone, or with contribution from her "family", or entirely by her kin-group.

Without means of their own, kinship assistance was relevant if a marriage was to be terminated, the availability of which was dictated by socio-cultural ideology on marriage. Guided by the traditional ideology of indissolubility of marriage, kinship assistance in the refund of bride price to terminate a marriage was not readily available.(17) Some writers have put forward in this regard that one of the reasons women were excluded from the public sector which provided wage labour was to stabilise marriages.(18) This view is plausible as the requirement to return bride price inhibited extra-judicial divorce, the limitation of which was greater in Customary Court divorce. Besides bride price, the divorce process itself in Customary Courts was and is still costly.(19)It was, therefore, a further deterrent to divorce.

Furthermore, dominant cultural values also partly made divorce impracticable. As children were, and are still regarded as their father's possession as we shall see later,(20)his almost sacred right over them against their mother remained, and still remains on "divorce". The cost of terminating a marriage to a mother was not only pecuniary but she also stood

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(17). Information given to me by the respondents in the interviews cited earlier at note 4. It was confirmed by the responses of the elderly informants in the interviews conducted with fifteen parents in each of the villages of Butu, Matoh Butu, Mbonge, Kombone and Barombi Kang, between June-August 1990. Cf. ANYEBE, A. P., Customary Law: The War Without Arms, 4th Dimension Publishers, Enugu, 1985, p. 93. Ardener made similar findings amongst the Bakweri. See, ARDENER, op. cit., note 10: p. 94.

(18). See, WEEKES-VAGLIANI, W., Family Life and Structure in Southern Cameroon, Development Centre for the Organisation for Economic Co-operation and Development, Paris, 1976, p. 48.

(19). A petition filed in the Customary Courts of Kumba, Kombone, Tombel and Mbonge respectively has to be accompanied by a deposit of between 50.000-60.000frs. CFA (until the recenty, it was about £100 to £120). This is required as a deposit for the bride price to be refunded. Information obtained from the interviews with Customary Court personnel cited earlier at note 10.

(20). A father's almost sacred rights over his legitimate children shall be treated later in Chapter 5. BRAIN, op.cit., note 1: pp. 160-162. Cf. ANYEBE, op.cit., note 17.

to lose her children.[21] This placed Cameroonian women in a situation analogous to that of English Victorian women until late nineteenth century.[22] Besides, customary law rules on matrimonial property, discussed earlier, were harsh on wives. Their position in this regard remains the same. On "divorce", the wife is not entitled to any share in the property acquired during marriage. These include, personal acquisitions made with supplies from the husband,[23] property bought for her by her husband, or property acquired jointly. Even statutory wives were not wholly protected by English statute law on matrimonial property till 1964.[24] On termination of marriage, therefore, a wife stood to lose not just her children but in addition, any real property she may have had during marriage. This is still true today in customary divorce.[25]

Customary law on matrimonial property, law relating to rights over children and the bride price may have inhibited divorce in customary marriages. It may be thought that the rights of mothers in statutory divorce were protected by statutory law. This was and is still not the case generally, for, custody adjudication in statutory courts, as will be examined later, is informed by dominant cultural values and social beliefs. Therefore, as with customary law divorce, loss of children, monetary cost of proceedings, and loss of property may have kept

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(21). The fact that more women in customary marriage divorce their husbands today despite their non custodial status indicates that inability to refund bride price was the main hinderance to divorce in the old days. Cf. ANYEBE, ibid., p. 94.

(22). See, generally, HOLLIS, P., Women in Public: The Women's Movement 1850-1900, George Allen & Unwin, London, Boston, Sydney, 1979, pp. 179-183. For a summary of the common law position of Victorian women, custody and fathers' right, see, the extract of Mr. Leader's speech in the House of Commons' debate on Serjeant Talfourd's Bill quoted in ibid., p. 185.

(23). These include, for example, property bought by the wife out of her trading money, the initial capital of which was given by her husband. See, BLEDSOE., op.cit., note 15: pp. 89 at para. 1 and 90. Cf. RUBIN, op.cit., note 1: p. 90.

(24). There was no property right for married women in English law until the Married Women's Property Act of 1882. Even then, it was held in Blackwell v. Blackwell(1943)2 All ER 579, that any property bought by a housewife from housekeeping money supplied by her husband remained his property. The injustice inherent in this rule (see, BROMLEY and LOWE, op.cit., note 2: pp. 567-569 and 572-573.) was only remedied in 1964 by the passing of the Married Women's Property Act 1964. See S. 1 of that Act. Cameroonian statutory marriage wives would benefit from this section as the 1964 Married Women's Property Act, being a law on matrimonial causes, is within the exception to the 1900 limitation in the clause that enabled reception of English law.

(25). See earlier citation on this point at notes 4 and 17.

statutory marriage divorce levels to a minimum.[26]

The second half of the twentieth century witnessed a gradual transformation of women's economic, political and social status. Policy-making in national development recognised in part, the image of the emancipated Cameroonian woman. Female labour was interpolated into the national economic and political system, thus appreciating the contribution of women to the task of nation building.[27]The possibility of a married woman to live as a femme sole, coupled with relaxation of divorce law in 1969[28] made divorce a reality for women in both types of marriages.

Changing economic factors occasioned social and cultural changes. An example of great significance was the gradual transformation of the nature of bride price into a commercial transaction and the effects of that change on marriage, and the ability of wives to personally afford the money for return of bride price. This change in the nature of bride price and the effect of that change treated in the previous Chapter, account for the relative increase and frequency of divorce.[29]

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(26). No divorce cases before 1961 were found either in statutory courts or Customary Courts. This fact may be indicative of relatively low rate of divorce, although the possibility that they were extra-judicially terminated is not to be ruled out. However, information from my respondents in the interviews cited earlier at note 4 confirm that divorce was rare in the old days.

(27). See earlier citations at notes 12 and 13. Cf. NDAME ESSO, Problèmes Posés Par le Système Educatif Camerounais, Yaounde, 1978, p. 74; NAMTANG, J., Technological Development and the Cameroonian Woman, Yaounde, 1985, p. 8.

(28). For an historical account of English law of divorce, see, our earlier citations at note 5. The discussion on divorce will be returned to later in the Chapter.

(29). Ardener's study among the Bakweri provides a vital statistics on the upsurge of divorces during the period in question: 40% out of 63%, the percentage of legitimate marriages found in a sample study of 1,062 village women, ended in divorce. He concludes this as a total of 683 divorces per 1000 marriages. See ARDENER, op. cit., note 10: pp. 93-94.

Although no other statistics have been made on this issue apart from Ardener's, the Civil Record Books in the Customary Courts of Tombel, Kumba towns and Kombone and Mbonge villages indicated a general increase in petitions filed. Similarly, statutory court judges intimated the same during my interviews conducted between August-October 1990. (Justice Endeley and Ekema, both retired Supreme Court Judges), Mr. Fombe (President of the High Court in Kumba in 1990), Mr. Bawak (Judge in the Court of Appeal in Buea); Mrs. Wacka, and Mr. Asuh (both judges in the High Court in Buea in 1990. Cf. It is analogous to the social trend in Britain where divorce is indicated to have been doubled within a decade from 1971 when the Divorce Reform Act 1969 came into force. Citations for this statistics are many. We will mention just two in view of limited space. See, CLULOW, C., and VINCENT, C., In the Child's Best Interests: Divorce Court Welfare and the Search for a Settlement, Tavistock Publications, Sweet & Maxwell, London, New York, 1987,

Under customary law as in statutory law, either party can petition for divorce. The general trend, however, has been for petitions to be filed by wives than their husbands. Despite the divorce reality, decisions about post-divorce upbringing of children are not informed by a determination to enable the children adjust to the new social change. The concept of custody through which the upbringing of children in statutory divorce is made, as will be seen later in the Chapter, has a cultural presence hence, it is defined to fit in with the customary law rule that a father "owns" his legitimate children. As regards children in indigenous customary marriage divorce, no such concept exists at all. The concept of custody is our topic for discussion next.

B. THE CONCEPT OF CUSTODY UNDER CAMEROONIAN DIVORCE LAW:

We should start this discussion by explaining why the thesis is based on the concept of custody despite its disappearance in English law (with the passing of the children Act 1989) through which that concept was introduced in the Cameroonian legal system. In sum, the socio-political circumstances under which English law is applicable in Cameroon render unlikely a spontaneous change from the concept of custody to parental responsibility introduced in the Children Act 1989. Decisions about post-divorce upbringing of children under statutory law and the Customary Court Rules 1965, are still made within the framework of the concept of custody, as a recent case to be discussed in Chapter Four will indicate. The discussion on the applicability of the Children Act 1989 in Cameroon shall be pursued further in the next Chapter.

We shall in the next two parts of the Chapter discuss post-divorce parenthood in customary law and statutory law. The discourse relating to statutory law will be based on the concept of custody. Post-divorce upbringing of children in customary marriages will be examined in the context of customary law fathers' rights. There is no concept of custody in indigenous customary law, which Woodman refers to as "Sociologists' customary law".[30] By this is meant customary law as it exists in the villages.

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p. 16. Cf. RICHARDS, M., "Divorce Research Today," (1991) Family Law 70 at pp. 70-71.

(30). See, WOODMAN G. R., "How State Courts Create Customary Law in Ghana and Nigeria," in FINKLER, HARALD, W., (Compiler, 1983). Paper of the Symposia on Folk Law and Legal Pluralism, Xith International Congress of Anthropological and Ethnological Sciences, Vancouver, Canada, August 19-23, 1983. Ottawa: Commission on Folk Law and Legal Pluralism, 297 at pp. 298-315.

Custody in Indigenous Customary Law: A Question of Rights:

In discussing post-divorce parenthood of children in customary marriages, a distinction has to be made between Customary Court divorce and extra-judicial termination of marriage. This distinction is essential as the concept of custody has been introduced in Customary Court divorce law. Before this analysis, something should be said about the causes of divorce in customary law.

Unlike in statutory law which will be examined later in the Chapter, the list of grounds on which divorce may be obtained in customary law is not closed. Furthermore, although most of the causes are the same regardless of who is initiating divorce, there are some which exist as grounds only when the wife is divorcing or when proceedings are initiated by the husband. In view of the indefinite list of factors that may be adduced as ground for divorce,[31] the common causes will be mentioned.

It is common for the following to be causes where action for termination is taken by the husband: extra-marital pregnancy; refusal of sexual intercourse;[32] infertility; disobedience to husband; threats to kill husband; disrespect of his relatives. Although adultery by the wife is an actionable wrong, which can lead to divorce, it is not customary for the action to be one to terminate the marriage. Sleeping with a married woman in indigenous customary law is tantamount to theft of one's property. Thus, the action by the husband is one for damages against the man who committed adultery with the claimant's wife. The erring wife is thereafter, dealt with domestically. She receives any punishment thought suitable by her husband, usually, beating.[33] Where divorce is initiated by the wife, the causes are relatively restricted. The common grounds are: cruelty; neglect[34] and refusal to maintain the children and wife could be a cause if the wife chooses. Unless there are other reasons for divorce, most women usually put up with it and become breadwinners.[35] Adultery may only be a

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(31). This information was obtained from my interviews cited at notes 4 and 10. Cf. ALLOTT, A. N., Essays in African Law, Butterworths & Co. Ltd., London, 1960, p. 221.

(32). The case of Martin Lobe v. Agnes Ule Nofondo, case No. 17/87-88, Civil Record Book 3/87-88, (Unreported) decided in the Customary Court of Mbonge is in point here.

(33). Information obtained from interviews cited at note 4. Cf. ALLOTT, op. cit., note 31: p. 220.

(34). Divorce was granted in the Customary Court of Kumba in the case of John Epie v. Thomysco Mboe Mukete, case No. 83/82-83 Civil Record Book 1/83-84 (suit by wife's brother on her behalf) on grounds of neglect. (Unreported).

(35). Information obtained from mothers in the interviews referred to at note 17. This discourse will be returned to in Ch. 6.

cause if it is accompanied by another factor, such as cruelty. A wife does not have the same right of action as her husband if he commits adultery.[36] The condition precedent to termination on proof of at least one of these causes and the rules relating to post-"divorce" upbringing of children of the marriage is what we are about to discuss. First, we shall treat extra-judicial divorce and second, Customary Court divorce.

Extra-judicial "divorce" and "custody":-

The use of the term "custody" in the sub-title is for convenience. Indigenous customary law as opposed to customary law applicable in courts has no concept of custody. In examining post-divorce parenthood of children in indigenous customary law, it is appropriate, therefore, to talk of "ownership" rather than custody.[37]

Customary marriages are, as a general rule, terminated extra-judicially in villages, in the same informal manner as they are celebrated. The traditional way of terminating an African customary marriage is by unilateral action of one of the spouses. In the tribes under consideration, as in most African tribes,[38] it is usual for the wife to desert the matrimonial home, after previous attempts to settle the matrimonial crisis in "family" meetings fail. Desertion indicates her intention to terminate the marriage if further reconciliation fails. However, it is so regarded only if she takes up residence with her parents or relatives other than her husband's. Unilateral action of leaving the matrimonial home is declaratory of intention to terminate, it is not by itself termination. The same is the effect where the husband orders her out of the matrimonial home and throws out her belongings. The marriage only comes to an end on agreement by the kin-groups of both spouses to that effect. This takes the form of a meeting in which the bride price to be returned is assessed by the husband and its payment is demanded from the wife. The rules relating to the refund of bride price are the same in extra-judicial divorce as well as in Customary Court divorce.[39]

Whether the marriage is terminated by a declaration made by the wife's or husband's family head, or by the chief of the village, or as will be discussed later, in a Customary

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(36). Information obtained from interviews cited earlier at notes 4 and 17. Cf. ALLOTT, op. cit. note 32. A similar double standard existed in English law. See, BROMLEY and LOWE, op. cit., note 2: pp. 181-182.

(37). This information generally obtained from interviews cited earlier at notes 4, 10 and 17.

(38). See, ALLOTT, op. cit., note 31: p. 221.

(39). Information obtained from interviews cited at notes 4 and 10. Cf. ANYEBE, op. cit., note 17: pp. 91-93. Cf. BRAIN, op. cit., note 1: p.160.

Court, refund of the bride price is a condition precedent to an effective divorce. This is the general rule in the tribes under consideration, as in most other African tribes. There are, however, slight variations as regards the conditions under which it is demanded.

In the Bafaw tribe, refund of the bride price is demanded in every divorce regardless of who initiates divorce. Divorce is not valid until bride price has been returned in part or in full. There is slight divergence in the Mbonge and Bakundu customs for, they stipulate conditions under which the husband loses his entitlement to a return. In the Mbonge tribal law, the wife is automatically liable to repay the bride price as a condition precedent to recognition of a divorce if she unilaterally left the matrimonial home. In other words, she remains her husband's wife until she or her relatives have repaid the bride price at least in part. Where she was ordered out of the matrimonial home by her husband, bride price is refundable only if she is getting remarried. The second husband's bride price is used in repayment of the first husband's bride price. By contrast with the Mbonge and Bafaw tribes, the husband loses his right to refund of bride price entirely if he initiated divorce, under the indigenous customary laws of the Bakundu tribe. This explains why, it is women who institute actions for termination of customary marriage more, as mentioned earlier in this Chapter.(40)

The primary and only concern in the meeting in which a marriage is terminated is the assessment of bride price and its return. Nothing is said about the children, if any, of the marriage. This silence is not accidental. Indigenous customary rules of legitimate affiliation had since the pre-colonial period determined the kinship status of children. As discussed in the previous Chapter, marriage in customary law, does not reflect the notion of partnership inherent in the current Western concept of marriage.(41) Indigenous customary law on marriage incorporates a wife into the family of her husband on marriage. Integration in this case is not limited to the woman's person but includes the proceeds of her womb - children of the marriage.

Legitimate(42) children in patrilineal societies, which is the kinship system in the tribes under consideration, at all times "belong" to their father and his kin-group, as discussed

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(40). Information obtained from my interviews cited at notes 4 and 17.

(41). See, BRAIN, op.cit., note 1: p. 139. Cf. WEEKES-VAGLIANI, op.cit., note 18: p. 48. Cf. HAMILT, R., The Liberation of Women, George Allen & Unwin, London, 1978, p. 62. Cf. JULLAND, P., Women, Marriage and Politics 1860-1914, Clarendon Press, Oxford, 1986, pp. 71-78.

(42). The status of legitimate and illegitimate children had been discussed under customary marriage in Chapter Two.

in Chapter Two. This is a well established kinship rule and considered common knowledge in the tribes. The father's right of "ownership" over his legitimate children as against the mother during marriage remains the same after "divorce". Therefore, the question of parental upbringing of the children on "divorce" is common knowledge.(43) This explains why it is not an issue in extra-judicial customary "divorce", and as will be seen later in the Chapter, even in Customary Court practice.

It is important to ascribe filial status to children in customary law. For example, the rule that legitimate children at all times are affiliated to the lineage of their father or mother depending on whether it is a patrilineal or matrilineal society. While children born out of wedlock belong to the kin-group of their mother's father. The advantages of this have been treated in Chapter Two. Broadly speaking, inheritance rights, succession to titles and ranks, and membership into various sacred societies are the advantages of having filial status. Succession rights, inheritance rights and one's eligibility to become a member of a particular secret society, as seen earlier, all depend on establishing one's allegiance to a particular lineage. Despite the apparent positive effects of such status rules, the morality of such inflexible rules of thumb is questioned, especially as future upbringing of children of divorce is determined by status informed by kinship rules. In particular, if one considers social and economic changes which have taken place over the years and the effect of these changes on the traditional socio-economic structure founded on lineage.

Socio-economic Changes and its effect on Kinship:-

Economic, political and administrative changes introduced by colonialism engendered corresponding social changes which had a bearing on the traditional structure. Land which traditionally held lineages together no longer has that power. Although it remains a fundamental economic asset, its significance in holding the kin-group together is dwindling as increasing number of the younger generation of kin do not depend on lineage land for their livelihood. Alien political, economic and cultural factors have introduced new organising principles which tried first to complement and finally, to replace that of kinship. Although kinship continues to provide the basis for claims to property, it is now possible to turn to an authority outside the kin-group or village or clan, such as the police or national administration, to defend this claims. African societies have since colonial times been experiencing an increase in rural-urban migration in search of better education; job

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(43). Information obtained from interviews cited at notes 4, 10 and 17.

opportunities and better business prospects which are mainly found in the urban areas. Even those without educational or professional qualifications migrate to the urban areas in search of unskilled work in plantations and factories.[44] Modern opportunities make available political and economic roles which on their own, with or without the help of relatives can assist an ambitious African to build up his fortunes. Members of kin-groups are now able to rely on economic resources outside the lineage for their well-being. Furthermore, the traditional reliance on kins for services, such as, household chores and baby-sitting has for most in the urban areas been replaced by paid "house-boys" and "house-girls". This is not to say, however, that reliance on one's relatives for domestic assistance is totally a thing of the past. This is not the case, as we shall see later. Nevertheless, even in the villages, dependence on kinsmen for assistance in farm work is being replaced by paid workers. Production is directed towards the market, hence, cash crops are cultivated on a large scale. Therefore, farmers hire paid labour to reduce the work-load. It is not uncommon for members of the kin-group to be part of the hired labour to be paid. Generally, housewives are no longer available to give a helping hand in the farms as it has been traditionally. Wives grow subsistence crops, some of which is sold in village markets. In urban areas some wives trade in foodstuffs and farm produce. These economic changes have their incidence on the social organisation of the people.

With increased migration into the cites and towns, new institutions develop in the urban areas to take over the functions and activities which in the village are performed by the lineage: There are schools to undertake the teaching of new technical skills indispensable in today's world; hospitals to take care of the sick, a role which traditionally is done by lineage heads consulting with diviners; day nurseries to look after children not yet reached school age and baby-sitters for those who can afford to pay them. Furthermore, new social groups and associations develop in these cities which perform traditional kinship roles. For example, cinemas, night clubs and beer-parlours are the places for re-creation. The presence of televisions in homes and other Western introduced indoor games, such as scrabble, ludo,

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(44). Increases in growth of urban areas over the years and corresponding decline in rural population over the years have been documented. One study reveals that in 1975, urban population constituted 32% while rural population formed 68% of the total population. By 1980, urban population had increased to 40% with a corresponding decline in rural population to 60%. See, NDONGKO, W. A., and VIVEKANADA, F., The Economic Development of Cameroon, Bethany Books, Stockholm, Sweden, 1989, p. 28. Cf. GWANFOGBE, M., and MELIUGUI, A., Geography of Cameroon, 4th ed., MacMillan, London, 1990, p. 37. Cf. ARDENER, E., op. cit., note 10: pp. 84-90.

snakes and ladders and cards which two people can play have replaced the need for a large kin-group to sit down and tell folk tales as they traditionally did in the evenings. Especially, as some of these facilities have been made available to people in the villages by members of their lineages who maintain contact while they are away in towns and cities.[45] Changed social and economic factors have brought about less dependence on the kin-group and increased individual livelihood. Hence, individuals are increasingly willing to disregard kinship ties if they become irksome.

Therefore, it is apt to say that there is no justification today, for absence in customary law of a framework, independent of parental rights through which post-divorce upbringing of children is determined. It may have been justified to make upbringing of children of divorce a status-dictated issue when individual livelihood and subsistence was entirely dependent on the survival of one's lineage. On the contrary, there is increased independence from the lineage today. These new circumstances appear not to be appreciated considering the continuous significance of kinship rules in determining post-divorce upbringing of children in customary marriage divorces. The fact still lacks appreciation that there are other interests of children of divorce[46]than their rights to inheritance and succession which need protection on divorce. Statutorily created customary law under which jurisdiction divorce in Customary Courts fall, makes this attempt.

The concept of custody in Customary Court divorce:-

Customary Courts are operating within the legal framework of statutorily laid down rules referred to as the Customary Court Rules 1965, found in the Customary Court Manual. The Customary Court Rules incorporate the concept of child custody in Customary Court divorce. This in principle, is indicative of created customary law in the courts. This is one of the effects of reception of Western law on indigenous customary law, discussed in Chapter One. The change makes necessary the distinction between customary law as it exists in the villages today and as it is applied in the courts respectively. The Customary Court Rules direct Customary Court judges to adjudicate on the custody of children of the marriage on

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(45). LLOYD, P. C., Africa in Social Change, 5th ed., Penguin Books Ltd., Harmondsworth Middlesex, England, 1972, p. 108 and ch. 4; NUKUNYA, G. K., "The Family and Social Change," in OWUSU, M., (ed.) Colonialism and Change: Essays Presented to Lucy Mair, Mouton Publisher, The Hague. Paris. New York, 1975, p. 163 at 165-168. Cf. WOODMAN, op. cit., note 30: 298-319; ARDENER, op. cit., note 10: pp. 84-91.

(46). We shall discuss children's interests which need protection on divorce later, post, Ch. 6.

divorce where necessary.[47] These Rules will be examined later in Chapter Five.

The Customary Court Rules regulating custody were introduced to water down the rigour of indigenous customary law under which the post-divorce future of children is a matter of fathers' rights. However, this good intention is not realised in Customary Court practice, as we shall see in the next Chapter. The traditional manner of terminating marriages is applied in Customary Court divorces in Cameroon. A petition for divorce simply reads: "A petition for divorce and return of dowry".[48] This is indicative of the fact that, the petitioners, who are usually women, know that no ruling is made with regard to the future upbringing of the children. Therefore, petitioners deem it unnecessary to claim for custody in divorce petitions, although nothing prevents them from doing so and they sometimes do. Similar cultural influences inform judges' attitude in exercise of the discretion to make custody orders vested on them by the Customary Court Rules, but for a few exceptions, as it will become evident in Chapter Five.

Like in cases of extra-judicial divorce, therefore, custody is rarely adjudicated upon unless it is specifically pleaded by the mother.[49] One may conclude that there is no concept of custody in customary law. We shall advocate for the development of this concept in indigenous customary law of divorce in Chapter Seven. By contrast, decisions about post-divorce upbringing of children under statutory law are made within the legal framework of the concept of custody.

Divorce and Custody Under Statutory Law:

Divorce and custody of a marriage contracted under the 1981 Ordinance is governed by English law. The Matrimonial Causes Act 1973 as amended by the Matrimonial and Family Proceedings Act 1984, is one of the exceptions made to the limitation clause that was inserted in the provisions which enabled application of English law in Cameroon. A divorce decree is granted under statutory law, on proof of at least one of the five facts listed in S. 1(2)a-e of the Matrimonial Causes Act 1973, to establish irretrievable breakdown of marriage.[50] In practice, however, petitions for divorce are rarely based simply on one of the

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(47). See, General Section of chapter 10 of the Customary Court Rules 1965 in the Customary Court Manual.

(48). Inference made from personal observation of case files. Confirmed in my interviews cited earlier at note 10.

(49). Supra, note 48.

(50). For a discussion of current English law on divorce, see, BROMLEY and LOWE, op.cit., note 2: pp. 187-214. Cf. CRETNEY, S. M., and MASSON, J. N., Principles

five facts. It is usual for S. 1(2)(a),(b) and sometimes, (c) to be the combined facts in proof of irretrievable breakdown.[51] The facts of the following cases are illustrative. In Teh Ruth v. Teh Martin[52] the petition was based on adultery and cruelty (behaviour). In Njuaka v. Njuaka,[53]the petition was based on adultery, cruelty or behaviour and desertion. Similarly, divorce petitions in the following cases, decided in the High Court of Buea, (which will be discussed in Chapters Four and Five) were based on all three facts in the sub-section to establish irretrievable breakdown: Foma v. Foma,[54] Atem v. Atem,[55] Jesco Manga-Williams v. Anna Manga-Williams,[56] Agbortoko v. Agbortoko,[57] Kahwa v. Kahwa.[58] The same trend is indicated by the petitions filed in the High Court of Kumba as the following case show: Akweshi Dorothy v. Christopher Teghen,[59] Obiamanka Bridget v. Obiamanka Richard,[60] Anulege Josephine v. Asongakap Richard,[61] Tanah Andin v. Tanah Bambot Peter.[62] The petitions in all these cases, were based on the first three facts in the sub-section mentioned above. We shall be discussing some of the cases in another Chapter. A petition for divorce under the Matrimonial Causes Act as amended by S. 1 of the Matrimonial and Family Proceedings Act 1984 cannot be filed before the expiry of a period of one year from the date of the celebration of the marriage.

Although, therefore, there are up to five facts under S. 1(2) of the Matrimonial Causes Act 1973 as amended in proof of breakdown of marriage, in practice, facts (d) and (e) are rarely used. Of the cases consulted, in one case only was divorce consensual. In Yufanyi v. Yufanyi,[63]the parties had lived separately for a continuous period of over five years. The petition, based on S. 1(2)e of the Matrimonial Causes Act 1973 was merely intended to secure

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reform on the ground of divorce have been made. See, DELANY, L., "Facing the Future: Facing up to the Past," (1989) 19 Family Law 113 at 113-114.

(51). Personal observation of the cases. This is confirmed by Ngwafor in his Examination Guide for Law Students. See, NGWAFOR, E. N., Family Law, 2nd ed., Institute of Third World Art and Literature, London, 1987, p. 51.

(52). 1972 unreported case cited in ibid.

(53). 1982 case unreported cited in ibid.

(54). Foma Longchi Juventine v. Foma Yemetio Jean, suit No. HCSW/34mc/85. (Unreported).

(55). Suit No. HCSW/77mc/85. (Unreported).

(56). Suit No. HCSW/41mc/81. (Unreported).

(57). Suit No. HCSW/64mc/89. (Unreported).

(58). 1984, High Court, Buea.

(59). Suit No. HCK/27mc/88. (Unreported).

(60). Suit No. HCK/48mc/88. (Unreported).

(61). Suit No. HCK/29mc/89. (Unreported).

(62). Suit No. HCK/29mc/88. (Unreported).

(63). Suit No. HCSW/25mc/84. (Unreported)

a decree and the court's confirmation of arrangements which had been made for the children. The divorce was granted and arrangements which the parties had made for the future of their child were deemed by the court to be in the welfare of the child, hence, confirmed.

The implication of statutory divorce practice is that fault is still a fundamental aspect in proving irretrievable breakdown. This contrasts with the situation in English divorce practice in which divorce based on agreement between the spouses to separate is the general rule.[64] This discrepancy between black letter law and practice in divorce has two implications. First, the very foundation of the S. 1(2) of the Matrimonial Causes Act 1973 is destroyed. Amicable divorce in order to reduce hostility and increase post-divorce co-operation between parents underlies divorce reform introduced by the Divorce Law Reform Act 1969.[65] This is essential for the future upbringing of the children. By contrast, the practice in Cameroon still reflects hostility between divorcing parties which is inevitable as spouses strive to ascribe blame to each other for the divorce or defend themselves in rebuttal of the other's accusations.

It was not possible to ascertain for the purpose of this work what is the cause of this practice in statutory marriage divorce. The Judges and Barristers spoken to simply stated the practice as a fact. There are, however, three possible explanations for this practice. First, as decisions are based on petitions filed by legal practitioners on behalf of their clients, it may be that the courts simply make decisions one way or the other in accordance with the fault-based facts on which the petitions are based. Second, by basing the petitions solely on the fault-based facts, legal practitioners may be doing what is best for their clients. They may be founding petitions on facts which they are certain that the courts would accept as proof of irretrievable breakdown. However, this explanation is rebuttable since the Yufanyi case is indicative of judicial readiness to give recognition to consensual divorce agreements made between spouses. The third possible reason could be that spouses deem it necessary to petition for divorce only if adultery, and/or cruelty and/or desertion occurs, a state of affairs which may be the result of ignorance of the law. If this is the case, there needs to be greater awareness in the society of the legal possibility of breaking the empty shell of a marriage, which in several respects has broken-down, although there may not have been any signs of

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(64). Post, Ch. 5, note 16.

(65). It came into force in 1971, repealed and consolidated in the 1973 Matrimonial Causes Act, S. 1(2)a-e. For an account on the intention of the 1969 reform, see, Law Commission Paper entitled, "Facing the Future", Law Com. No. 170, para. 6.1. Cf. BROMLEY and LOWE, op.cit., note 2: pp. 183-186.

adultery, cruelty or desertion. As long as the society still operates within the framework of culpability in divorce, hostilities are bound to persist. The consequence of which will be examined in the next Chapter.

The second effect of Cameroonian statutory divorce practice, also with a bearing on the welfare of children of divorce, is the fact that proper arrangements for children are rarely a condition precedent to the granting of a divorce decree. S. 41 of the 1973 Matrimonial Causes Act,[66] the purport of which is to protect the interests of children of divorce[67] makes satisfactory arrangements for children a condition precedent to granting a divorce decree (the new S. 41 under the Children Act 1989 requires very minimal court intervention) only where divorce is by consent. Custody of children in Cameroonian divorce courts, therefore, is always a follow up on the divorce decree. This is in contrast with the situation in English courts where the prevalence of consensual divorce made section 41, at least in principle,[68] a child- saving provision.[69] This divergence in practice may be explained by situating the concept of custody within the Cameroonian context. Before that, we shall briefly look at the history of the concept of custody.

The concept of custody in an historical perspective:-

The absence of a custody concept in indigenous African customary law has already been discussed. By contrast, it exists in statutory law, historically founded on English law. Before limiting the discourse to custody in divorce, something should be said about the concept of custody generally.

Under English law, the concept of custody was until recently the general framework

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(66). For the full provision of the old S. 41, see, MAIDMENT, S., Child Custody and Divorce, Croom Helm, London. Sydney. Dover, New Hampshire, 1984, pp. 17-18. The section has been amended in the Children Act 1989. See, BROMLEY and LOWE, op. cit., note 2: pp. 367-369. See also, WELLS, T., "The Children Bill: The Implication for Divorce Court Welfare Officers,"(1989) Family Law 235 at 235.

(67). See, INGMAN, T., "Reform on the Ground for Divorce," (1989) Family Law 94 at 95-96. Cf. DAVIS, G., "Public Issues and Private Troubles: The Case of Divorce," (1987) Family Law 299 at 300. The practicability of S. 41 has been the object of criticisms which led to its amendment in the 1989 Children Act. See, MAIDMENT, ibid., pp. 19-21. Cf. DODDS, M., "Children and Divorce," (1983 Journal of Social Welfare Law 228 at 229-236; DAVIS, ibid., PP. 299-301.

(68). See, citation for criticisms of the purported child protection motive of the section, supra, note 67.

(69). The child-saving motive is evident from the content of a declaration of satisfaction as provided by the Matrimonial Causes Rules 1977, Rule 8(2). see, MAIDMENT, op.cit., note 66: pp. 18-19. Cf. DODDS, op. cit., note 67: p. 228.

within which the state through its laws has sought to resolve issues about the upbringing of children either following the divorce of their parents, judicial separation or nullity. The primary concern of the law is to determine with whom the child will live or who should look after the child. Such issues were until the coming into effect of the 1989 Children Act, referred to as "custody" matters. Consequential to this is the necessity of determining how much control the person looking after the child has. To be balanced against this is the issue of what rights other interested parties have to see the child. This is the right of "access". Such disputes over children could be between parents; or between parents and other family members, such as, grandparents; between parents and strangers, such as, foster parents. Where strangers are involved, the appropriate jurisdictions for such custody and access disputes before the Children Act 1989, were custodianship and guardianship.[70]

With regard to custody disputes between parents, there are three jurisdictions under English law in which custody decisions have over the years been made. First, whenever an application for financial relief is made by a parent during the subsistence of a marriage under S. 1 of the Domestic Proceedings and Magistrates' Court Act 1978, the court is empowered to deal with the custody of any "child of the family".[71]Second, parents, including unmarried parents could until recently, apply for custody and related orders under S. 1 of the Guardianship of Minors Act 1971 provided the applicant proves he or she is the biological parent of the child. Thirdly, there are two custody jurisdictions under the Matrimonial Causes Act 1973 as amended by the Domestic Proceedings and Magistrates' Courts Act 1978, S. 63 and S. 33(3) of the Matrimonial and Family Proceedings Act 1984. The court has powers to make custody orders under the 1973 Act in cases where it has made a maintenance order pursuant to an application made under S. 27 of the Matrimonial Causes Act 1973, for financial relief if the other party has failed to provide reasonable maintenance for the spouse or any child of the family, during the subsistence of the marriage. The other facet of custody jurisdiction under the Matrimonial Causes Act 1973 and the most widely used[72]is that in the context of divorce. Under S. 42, the divorce court has jurisdiction over custody and

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(70). Under the 1989 Act, disputes over children are not custody disputes but are claims for parental responsibility. Unlike under the old law, actions by interested parties, such as grandparents and unmarried fathers are made under section 8 of the 1989 Act. For a discussion on this see, BROMLEY and LOWE, op. cit., note 2: pp. 395-396.

(71). For a discussion on the phrase, "child of the family", see, BROMLEY and LOWE, op. cit., note 2: pp. 368-369.

(72). See, BROMLEY, P. M., and LOWE, N. V., Bromley's Family Law, 7th ed., Butterworths, London, 1987, p. 290, especially at note 9.

related issues arising in the context of divorce, nullity, or judicial separation proceedings. All these custody jurisdictions have been removed by Schedule 15 of the 1989 Children Act in place of what is under the new law called, the section 8 orders.[73] Our concern in this work is with the custody jurisdiction in the divorce context.

Lack of a structure for parenthood beyond divorce,[74] until recently,[75]engendered the development of the concept of custody. This is a legal construct which enabled the state to intervene in the re-organisation of post-divorce parent-child relationship. State intrusion into private family sphere was informed by the belief that parents are unable to protect their children[76] amidst what Murch has termed, the fundamental dilemma on divorce.[77] As parens patriae, the state sets standards of parental behaviour believed necessary to protect children of divorce and empowers the courts to enforce them.[78] This has been done over the years through the concept of custody.

The concept of custody has been in English law since the legal recognition of divorce which has been treated earlier. Nevertheless, for several decades that post-divorce parenthood in English law was based on the concept, it remained vague hence, its content was left to be

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(73). See BROMLEY and LOWE, op. cit., note 2: pp. 348-350. For a discussion of the section 8 orders, see, ibid., pp. 351-365.

(74). MAIDMENT, op.cit., note 66: p. 2.

(75). The Children Act 1989 has introduced the concept parental responsibility which means parenthood beyond for life. See also, BROMLEY and LOWE, op. cit, note 2: Ch. 9. This discussion will be returned to in Chapter Four.

(76). A large volume of empirical research in Britain indicates negative consequences of divorce for children in that society. We shall mention just a few. See, EEKELAAR, J., "Children in Divorce: Some Further Data,"(1982) 2 Oxford Journal of Legal Studies 63 at p. 74. Cf. WALLERSTEIN, J.,and KELLY, J., Surviving the Break-up: How Children and Parents Cope with Divorce, Grant McIntyre Ltd., London, 1980, ch. 4; EEKELAAR,J., and MACLEAD, M., Children and Divorce: Economic Factors, Centre for Socio-Legal Studies, Oxford, pp.2-5; RICHARDS, M.P.M., "Joint Custody Revisited," (1989) Family Law 83 at 83. Cf. KELLY, J.B., "Children's Post-Divorce Adjustment: Effects of Conflict, Parent Adjustment and Custody Arrangement,"(1991) Family Law 52 at 52-54.

No such written findings exist about the effect of divorce on Cameroonian children. However, the opinion of the social workers interviewed on this issue together with the responses of children interviewed will be returned to later, post, Ch. 4.

(77). This is the dilemma to disengage completely from the marriage (and pretend it never existed) and the need for being a parent with a part to play in the children's future. See, MURCH, M., Justice and Welfare in Divorce, Sweet & Maxwell, London, 1980, pp. 129-131, 160-162, 194.

(78). See, MNOOKIN, H.R., "Child Custody Adjudication: Judicial Function in the Face of Indeterminacy,"(1975) 39 Law and Contemporary Problems 226 at p. 229.

determined by the courts. The concept had over the years been applied as a legal formula to uphold common law family ideologies. It was until 1973[79] interpreted within the context of dominant socio-cultural values[80] - common law father's right over his children. Custody was thus, equated to the father's right of guardianship by dint of being the father. This was stated in judicial pronouncements as a natural right.[81] Against this was balanced the status of a mother who was accorded no parental right over her children from a marriage.[82] Custody at common law was equated to guardianship.[83] This explains why a father had near absolute right of custody as illustrated by cases such as, R. v. De Manneville;[84] R. v. Greenhill;[85] and Re Agar Ellis.[86] This broad meaning of custody was recently re-iterated by the Court of Appeal in the case of Hewer v. Bryant.[87] Sachs LJ, explained as follows:

> "In its wider meaning the word "custody" is used as if it were almost the equivalent of "guardianship" in the fullest sense - whether the guardianship is by nature, by nurture, by testamentary disposition or by order of court. ...These include ... both the personal power physically to control the infant until the years of discretion and the right to apply to the court to exercise power as parents patriae."[88]

However, the concept had been narrowly interpreted, especially, after the development of the

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(79). S. 1 of the 1973 Guardianship Act provides for equal parental rights for both parents. See, MAIDMENT, op.cit., note 66: p.107. Under the 1989 Children Act, it is parental responsibility rather than rights, even after divorce. We shall return to this discussion in Chapter Four.

(80). For an account of patriarchal values in pre-twentieth century English society, see, MAIDMENT, ibid., pp. 108-110. Cf. DUNBAR, J., Early Victorian Women, George G. Harrap & Co. Ltd., London, Toronto, Wellington, Sydney, 1953, pp. 17-31; JULLAND, op. cit., note 41: pp. 58-60.

(81). See this fathers common law right as stated by Lord Ellenborough in R v. De Manneville(1804) 5 East 221, cited in MNOOKIN, op.cit., note 78: p. 234. See also, Cotton LJ., in Re Agar Ellis(1883)24 Ch.D 317, CA at 334. Cf. Under the new law parents are no longer regarded as natural guardians. See, BROMLEY and LOWE, op. cit., note 2: p. 395.

(82). See earlier references on the Victorian society, supra, note 80.

(83). For a brief elucidation of the content of guardianship, see, BEVAN, H.K., Child Law, Butterworths, London, 1989, pp. 36-37. Cf. Condom v. Vollum(1887) 57 LT 154, in which it was said that custody implied giving all the rights which a father had over his child at common law, cited in MAIDMENT, op.cit., note 66: p. 125.

(84). (1804) 5 East 221, cited in MNOOKIN, op.cit., note 78: p. 234

(85). (1836) 4 A & E 624 cited in MAIDMENT, ibid., p. 113.

(86). (1883) 5 East 221.

(87). (1970) 1 Q B D 359; (1969) 3 All ER, 578.

(88). At 378 and 585-586 respectively quoted in BROMLEY and LOWE, op.cit., note 2: p. 300.

welfare of the child as the first and paramount consideration in making custody orders after divorce, as will be seen in Chapter Four. The welfare of the child which became balanced against fathers' custody right in certain cases, demanded that the child be left in the daily care of the mother in certain circumstances. This was, for example, where a very young child was involved, or where it was impracticable for the father to raise the child, as Lord Denning stated in Wakeham v. Wakeham.(89)

The dilemma of complying with the welfare of the child requirement and maintaining the common law father's right led to emergence of split orders. Such orders entailed granting of care and control to the mother where the welfare of the child so required, while the father retained custody. Split orders were seen to reconcile the need to protect the custody right of an unimpeachable father(90)with a mother's suitability for primary care of her children, even if guilty of matrimonial fault.(91) Custody orders to fathers were thus, accompanied by care and control orders to mothers.

The implication was that custody came to be understood as the right to make important decisions concerning the child which remained in the father. Similarly, it was thought care and control bestowed physical possession on the mother who was to provide daily care and her decision-making power limited to issues of daily care. This, indeed, was a narrow meaning of custody as opposed to the wider sense which equated custody to guardianship and all it entails.

The exact meaning of custody became further complicated when sole custody and joint custody orders became prevalent, on judicial disapproval and abandonment of split orders, in view of the practical difficulties inherent in them.(92) The reason being that sole and joint custody orders did not generally distinguish between custody, care and control. Such orders

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(89). (1954) 1 All ER 434.

(90). The meaning of this word is explained in BROMLEY and LOWE, op.cit., note 2: p. 341.

(91). See, HOGGETT, B., and PEARL, D., The Family Law and Society Cases and Materials, Butterworths, London, 1987, p. 498. The discussion on parental conduct in custody determination shall be returned to in Chapter Five.

(92). Split orders became undesirable because of the practical difficulties they involved. For example, in cases of emergency where consent to immediate medical treatment (involving either blood transfusion or an operation) was needed from the parent with custody but who could not be reached or who disagreed, a child's life could be in danger. This problem was addressed in Jane v. Jane(1983) 4 F.L.R. 712, CA. Although a split order was made in that case, it established in general, that, split orders were not to be made except in exceptional circumstances where it was in the child's interest to do so. See, BROMLEY and LOWE, op.cit., note 2: p. 352.

were simply accompanied by access orders.[93]This uncertainty was not clarified by the attempt made in the Children Act 1975[94]to distinguish between legal custody and physical possession, corresponding to custody, care and control. Rather, it has been criticised for further complicating the already ambiguous state of the concept of custody in the divorce context.[95] Against this background of uncertainty, it became almost conventional to interpret sole custody orders as vesting pre-emptive power of decision- making about the child's future as well as physical possession on the parent with sole custody.[96] The parent without custody on this interpretation, was relegated to the background. By contrast, both parents were thought to have the right of decision-making where a joint custody order was made. Until the Court of Appeal decision in Dipper v. Dipper,[97]sole and joint custody orders appeared to convey the meaning discussed above. This interpretation was stamped out by Cumming-Bruce LJ., in the case of Dipper v. Dipper, supra. Denouncing it as a fallacy, he stated:

> "...The parent is always entitled whatever his custodial position to know and be consulted about the future education of the children and any other major matters... ."[98]

Similarly, the dictum of Ormrod LJ., in the same case eschewed the almost certain effect that it was thought for a while that sole orders had in the following words:

> "...It used to be considered that the parent having custody had the right to control the children's education, and in the past their religion. This is a misunderstanding. Neither parent has any pre-emptive right over the other. If there is no agreement as to the education of the children or any other matter in their lives, that disagreement has to be decided by the court. In day-to-day matters the person with custody is naturally in control... ."[99]

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(93). See, BROPHY, J., "Custody Law, Child Care and Inequality in Britain," in SMART, C., and SEVENHUIJSEN, S., (eds) Child Custody and the Politics of Gender, Routledge, London and New York, 1989, p. 217 at 219.

(94). Sections 86 and 87 of the Children Act 1975 introduced the statutory distinction between legal and physical custody respectively. See, MAIDMENT, op.cit., note 66: p. 25.

(95). Ibid., pp. 25-26; BEVAN, op.cit., note 83: pp. 37-38. Cf. CRETNEY, S.M., Principles of Family Law, 4th ed., Sweet & Maxwell, London, 1984, pp. 310-312 and 313.

(96). See, BROPHY, op.cit., note 93: p. 219.

(97). (1981) Family Law 31; (1980) 2 All ER 722, CA; (1980) 3 W.L.R 626, 124 Sol Jo 755, CA.

(98). Quoted in HOGGETT and PEARL, op. cit., note 91: p. 501.

(99). Quoted in ibid.

It appears from their Lordships' statements that the independent powers of action of a parent with sole custody were limited to matters incidental to daily care. On this interpretation, sole custody restricts the custodian's independent rights to physical possession or care and control. Hence, the other parent has to be consulted in the decision- making process of important issues relating to the child's future, for example, education, religious instruction, medical operation. This is indeed tantamount to stating that there is no difference between a sole and a joint custody order, an interpretation which has been criticised.[100]

Without disregard to the criticism made to the interpretation implicit from their Lordships' pronouncements in the Dipper case, it is plausible to say that the law Lords were ahead of their time. Indeed, they were laying down the foundation of a concept which nine years later entered the statute book. This is the concept of parental responsibility now introduced in the Children Act 1989, which will be discussed in the next Chapter, in place of the concept of custody. The aim is to encourage parents to continue regarding themselves as parents of their children, divorce notwithstanding. This is what the law Lords in our opinion meant in the Dipper case by stating that joint or sole custody orders were not intended to affect parental status. However, this is not the connotation of custody labels to the man on the street.[1]

The uncertainties surrounding the concept of custody have in English law been avoided by the Children Act 1989 which has provided a legal framework for post-divorce parenthood, despite criticisms to the contrary, as seen earlier in the Chapter. By contrast, the concept of custody remains the legal structure through which decisions about post-divorce upbringing of children are made under Cameroonian statutory law.

The Concept of Custody in Cameroonian Statutory Divorce Courts:

The concept of custody in Cameroonian statutory divorce courts appears to have a two-tier application. Cameroonian statutory court judges intimated[2] that a custody order unaccompanied by a care and control order gives the person in whose favour the order is made, care and control and the right of decision-making. That right is subject only to the qualification that the custodian parent should consult the other on making important decisions. This in principle is the narrow meaning which signifies that a custody order only gives the

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(100). See, CRETNEY, op.cit., note 95: p. 315. Cf. MAIDMENT, op.cit., note 66: pp. 27-28.

(1). See, PARKINSON, L., "Custody Orders - A Legal Lottery?" (1988) Family Law 26 at 26. Cf. DAVIS, op. cit., note 67: p. 306.

(2). Interviews cited at note 29.

parent with custody physical possession. In practice, however, the meaning of an order depends on whether custody is with the father or mother.

Where custody is granted to the father and access to the mother, custody is equated to guardianship by dint of him being the natural father. Although there are no statutory law cases in which customary law fathers' custody right has expressly been stated, as we shall see in Chapter Five, judicial decisions are informed by this cultural ideology. An order awarding custody to the father and access to the mother is seen by fathers as the licence to a clean break. Despite the obligation to consult the mothers on important decisions, such an order has the effect of cutting the mother out of the children's lives. They are unlikely to be consulted on anything generally, and they may have difficulty in exercising access rights. A custody order in this case, is equated to guardianship which in customary law, is vested in the fathers, as discussed earlier. This cultural right is upheld by statutory court judges, as we shall see in Chapter Five. The concept of custody assumes the narrow meaning where custody is awarded to the mother and access to father.

Two types of split orders are under consideration here. First, orders are made awarding custody of all the children to one parent, usually the father, and care and control to the other, usually the mother. Such orders are made where young[3]children are involved. The order in this case is intended to maintain the father's customary law right exercised under these circumstances, only by decision-making. The custody order in this sense, is equivalent to the distinction between custody, care and control which was given rise to by the making of split orders in English courts. The mother with care and control is seen to have no more than the responsibility for daily care, an issue to be analysed later in Chapter Six. The difficulties that this kind of arrangement, of one person taking daily care of the children while the parent not in possession makes decisions have been the object of criticism.[4]

The second type of split orders which are commonly made in Cameroonian courts involve separation of siblings. For various reasons, the custody of children in a single divorce is split. For example, where only some of the children are young, custody of the older children is awarded to the father and the custody of the young ones to their mother, at least temporarily. Instead of leaving mere care and control of the young children to their mother, the order sometimes, grants the mother custody until they attain an age stated therein (the age at which they may conveniently live with their father). Custody then reverts to the father.[5] While in

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(3). This discussion will be pursued in Chapter Five.
(4). See our earlier discussion on this anomaly. supra, note 92.
(5). This discussion will be returned to later in Chapter Five.

the mother's custody, decision-makers[6] expect the mothers to consult the fathers before making important decisions. Indeed, the fathers even claim that they have the right to make the decisions in their capacity as fathers.[7] This claim disregards the fact that custody was awarded to the mother who for the time being has possession as well. The custody order in the hands of the mothers is thus, narrowed down to rights of physical possession and daily care.

It is plausible to say, that, in the absence of any authoritative judicial pronouncement as regards the precise effect of a custody order, it is not certain what the meaning is. Is it not time the Cameroonian legislator and decision-makers clear this uncertainty? In particular, as decisions about post-divorce upbringing of children are still made within the custody framework.

CONCLUSION:

The object of this Chapter has been to evaluate the concept of custody under Cameroonian law. What has emerged from the discussion is the absence of a framework for determining post-divorce upbringing of children independent of parental claims in customary divorce. A case for the development of such a concept will be made in Chapter Seven. The other observation which follows from the Chapter is the uncertain state of the content of the concept of custody. This could mean in practice, that it may be given what ever meaning a father in the possession of a custody order is inclined to give. Individual interpretation of the concept of custody could give rise to a situation in which the content is widened and narrowed depending on what customary law fathers' custody right demands, considering the influence of cultural values in statutory courts custody adjudication. This will become more evident in the succeeding Chapters. It could be concluded that the existence of this concept in Cameroonian statutory law is not primarily concerned with state protection of children of divorce. One may say that custody happens to be a concept in the legal system because it is part of English marriage law that was received. Many would disagree with this conclusion, due to a refusal to acknowledge the custody reality. This will be evident from our discussion of the law and practice of child custody after divorce in Cameroon in the next

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(6). Inference made from the interviews with judges cited at note 29.

(7). Interviews cited at note 29. A similar response was given by fathers involved in the interviews with fifteen statutory marriage parents(some divorced) spoken to in each of the towns of Buea, Kumba, Mutengene, Tombel and Muyuka between August-October 1990.

two Chapters.

CHAPTER FOUR

CUSTODY AFTER DIVORCE UNDER CAMEROONIAN LAW

English law governs custody matters arising from divorce in statutory marriages. The welfare principle is the legal standard for deciding the future upbringing of children of statutory marriage divorces. This principle has been incorporated into customary law now found in the Customary Court Manual for Practice and Procedure by Court Clerks and Registrars which contains the Customary Court Rules 1965. Where divorce of a customary marriage is obtained in a Customary Court, the Customary Court Rules make the welfare of the child the basis for deciding the future of any children of the marriage. The application of the welfare principle in Cameroon is a colonial heritage which had been examined in a previous discussion, reinforced by the absence of any provision in the 1981 Ordinance dealing with divorce and custody.

However, the legal basis on which the welfare principle is applicable in Cameroonian courts is not certain. This is partly due to the controversy inherent in the reception clause discussed in Chapter One, exacerbated by the absence in Cameroon of legislation stating English statutes which are applicable in Cameroon. This is why our discussion of the welfare principle under the first sub-heading of this Chapter will begin with establishing the legal basis for applying the welfare principle in Cameroon. The meaning given to the principle will also be discussed under the first sub-heading. The second sub-heading will be concerned with the welfare of the child under customary law.

A. THE WELFARE OF THE CHILD UNDER STATUTORY LAW.

In making orders for the future upbringing of children of divorcing parents, Cameroonian statutory courts apply the English law principle of welfare. In legal terms, therefore, the welfare of the child is the first and paramount consideration.[1] Two reasons make the following question pertinent: What is the legal basis for the application of the welfare principle? Firstly, the provision which enables the application of English law as discussed in Chapter One, had a limitation clause restricting the received law to statutes and common law in force before 1900 and cases based on them. Secondly, the welfare of the child

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(1). In practice the courts are simply paying lip-service to the welfare principle. We shall return to this discussion in the next Chapter.

in English law only became a statutory principle of law in 1925.[2] If therefore, English legislation which came into force after the limitation date is not law in Cameroon it could be said that the welfare principle has no legal basis in Cameroon. More so because decisions do not indicate references to pre-1900 English case law in which the welfare of the child had been considered, as the rationale for the principle in these courts. Even if any such references existed, pre-1900 case law would not be the basis for the application of the welfare principle in Cameroon statutory courts. For although the welfare of the child was a consideration from 1886, it was not first and paramount consideration.

Legal basis for the application of the welfare principle in Cameroonian courts:-

There are two grounds on which the welfare principle will be held legal in Cameroonian law. The first point to be discussed does not establish the legality of the paramountcy of a child's welfare as a legal principle in Cameroonian courts. Nevertheless, it provides the first legal basis for regarding the welfare of the child as a custody consideration - the fact that the welfare of the child had been made a consideration in determining custody in English law in 1886. S. 5 of the Guardianship of Infants Act 1886 stated thus:

> "the court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father."[3]

On this footing even if the 1900 limitation is adhered to strictly, the welfare of the child would still be a legal consideration in custody adjudication, pursuant to section 5 of the 1886 Guardianship of Infants Act. If consideration of the welfare of the child in Cameroonian courts is founded on the 1886 Guardianship of Infants Act, it means that the courts are not

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(2). S. 1 of the Guardianship of Infants Act of 1925 gave effect to the rule that in any dispute relating to a child, the court must regard its welfare as the first and paramount consideration. However, equity had intervened earlier to mitigate the father's absolute right to custody in the interest of the child's welfare: R. v. Gyngall (1893) 2 Q.B. 232.

(3). Before the 1886 Act, the Court of Equity had intervened with the father's common law custody right in the interests of the welfare of the child. See, MAIDMENT, S., Child Custody and Divorce, Croom Helm, London. Sydney. Dover, New Hampshire, 1985, pp.94 - 99.

only required to consider the interest of the children involved but also the wishes and conduct of parents. It is on this premise that the Cameroonian courts' practice of regarding factors which ought to guide their determination of welfare as other considerations,[4]may be legally explained.

However, if this was the case, the welfare of the child as a principle which emerged in 1925 would not be the law applicable. A child's welfare would not be seen as the first and paramount consideration in Cameroonian law ,as we shall see later in the Chapter. The paramountcy principle in Cameroonian courts, therefore, has a different legal basis in English law.

The second point and only possible ground for the existence of the welfare principle in Cameroonian custody law is by reading section 11 of the 1955 High Court Law which states the quantum of received English law, together with section 15 of the same Law, which provides as follows:

> S. 15 "The jurisdiction of the High Court in probate, divorce, and matrimonial causes and proceedings may, subject to the provisions of this law and in particular of section 27, and to the rules of court, be exercised by the court in conformity with the law and practice for the time being in force in England."

This provision, as discussed in Chapter One, enables the courts to exercise their jurisdiction in deciding on custody after divorce in conformity with the law and practice for the time being in force in England. The interpretation that has been widely placed on the phrase "for the time being in force," which had been discussed in Chapter One, is that it means applying English law as it changes over the years.[5]

On this interpretation, divorce and custody matters are governed by the English Matrimonial Causes Act of 1973 as amended by the Matrimonial and Family Proceedings Act 1984. Still, it is not clear whether application of the welfare principle is founded on the 1925 Guardianship of Infants Act or on the 1971 Guardianship of Minors Act. However, an inference can be made from the use of the 1973 Matrimonial Causes Act which embodies current English divorce law subject to the amendments made by the Act mentioned above. It may be implied from the courts' application of Matrimonial Causes Act 1973 in divorce as opposed to the Marriage Act 1949 that the Guardianship of Minors Act 1971, rather than

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(4). The point will be treated under the chapter dealing with the determination of child welfare in divorce courts, post, Ch.5.

(5). See Ch. 1 at pp. 35-37.

the Guardianship of Infants Act 1925, is the basis for the existence of the welfare principle in Cameroonian statutory law of custody. Until recently, the welfare principle was provided in section 1 of the Guardianship of Minors Act 1971 which has been re-stated in simpler language[6]in the 1989 Children Act. Current English law on the welfare of the child on divorce is section 1 of the Children Act 1989.

Is the Children Act 1989 applicable law in Cameroon?:

The 1989 Children Act which came into force in England in October 1991 has replaced the long-standing concept of custody as the framework within which decisions about future upbringing of children on their parents' divorce are to be made under English law. In its place, the concept of parental responsibility has been introduced by the Children Act 1989.[7]Hence, under S. 8 of the Act, the orders to be made by the court are not based on which parent should have custody. Instead, the duty of the court is to decide with whom the child should live (a resident order) and in respect of who a contact order should be made. The other two section 8 Orders are prohibited steps and specific issue orders. Unlike the concept of custody, the concept of parental responsibility is intended to secure the parenthood of both parents for life, regardless of divorce or any other form of separation. It is intended that the residence and contact orders merely indicate the parent with whom the child lives while the same visits the parent with contact order on holidays, week-ends and whenever possible. Decisions about the child's upbringing are still to be made by both parents.[8]This is the law and whether it works as intended or not is a different issue. In this respect, the Children Act had been the centre of criticism even before it came into force.[9]Nevertheless, the welfare of the child remains the paramount consideration as stated in S. 1(1) of the Children Act 1989.

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(6). STEVENS, R.,"The Children Bill : A Blue Print for Change," (1989) Family Law 341 at p. 341. See also, BROMLEY P. M., and LOWE, N. V., Bromley's Family Law, 8th ed., Butterworths, London, Dublin, Edinburgh, 1992, p.336.

(7). For a discussion on the concept, see, BROMLEY and LOWE ibid., Ch. 9.

(8). See, STEVENS, op. cit., note 6: pp. 341-342 and 343. Cf. ADCOCK, M., "The Children Bill: The Challenge to Local Authorities,"(1989) Family Law 237 at p. 237; FISHER, T., "The Children Bill: The Challenge to Out-of-Court Conciliation,"(1989) Family Law 222 at 222. Cf. BROMLEY and LOWE, op. cit., note 6: Ch. pp. 351-366.

(9). See, BAINHAM, A., "The Children Act 1989: Parenthood and Guardianship,"(1990) Family Law 192. Cf. BAINHAM, A., "The Children Act 1989: Adolescence and Children's Right,"(1990) Family Law 310; BAINHAM, A., "Children Act 1989: Welfare and Non-Interventionism,"(1990) Family Law 143. Cf. HALPERN, A., "Parental Responsibility: An Instrument of Social Policy,"(1992) Family Law 113 at pp. 115-116. Cf. BROMLEY and LOWE, ibid., p. 347.

As regards the application of the children Act 1989 in Cameroon, it can only be said in this work that it forms part of the Cameroonian legal system on the basis of the interpretation, which has been discussed earlier, of S. 15 of the 1955 High Court law. It has been examined that in probate, divorce and matrimonial causes, English law is applicable as it changes from time to time in England. Having made this general statement with regard to the Children Act being part of the Cameroonian legal system, it has to be taken in with caution.

Although the Children Act 1989 is now in force in England, the same cannot be said for Cameroon, despite the fact that the 1989 Act is the current English law on the issue under discussion in this work. This conclusion is supported by two points: first, preliminaries to the application of the new concept and second, the social framework within which the new concept is to operate.

First, the concept of parental responsibility introduced by the Act is a wholly new concept, implementation of which needed administrative adjustments and social re-restructuring of family lives both physically and psychologically. Maintaining parenthood after divorce entails tracing disappearing or absent parents, an exercise likely to involve a drain in the government's finances and emotional strains for parents who are better-off physically and psychologically, by trying to forget the existence of the other parent. In order to implement the new concept, therefore, another Act was necessary to make detailed financial provisions for maintenance of children under the sole care of parents with resident orders and provisions to trace disappearing parents, usually fathers who fail to pay maintenance.[10] This was done by the passing of the Child Support Act 1991 which came into force in April 1993. Child Support Agencies were set up under the Act which also started functioning in early 1993, though faced with wide criticisms shortly after. They are charged with the duty of assessing and making maintenance payments. This is done by making maintenance payments to single mothers (divorced or never married), which also depends on their willingness to co-operate by naming the absent father and if possible, provide a lead as to his whereabout. He is to be traced in order to recover maintenance paid

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(10). See, EEKELAAR, J., "Child Support Scheme for the United Kingdom - An Analysis of the White Paper,"(1991) Family Law 15 at p. 15. Cf. BROPHY, J., "Custody Law, Child Care and Inequality in Britain," in SMART, C., and SEVENHUIJSEN, S., (eds) Child Custody and the Politics of Gender, Routledge, London and New York, 1989, p. 217 at 223; PEARSON, J., and THEONNES, N., "Supporting Children After Divorce: The Influence of Custody on Support Levels and Payments,"(1988) Family Law Quarterly 319 at pp. 319-320.

out to his family and imprisoned if he fails in his obligation. Between 1991 and 1993 when the Child Support Act came into force, interim enforcement measures were provided by the Maintenance Enforcement Act 1991 which came into force in October 1991. We shall treat the detailed enforcement measures later in Chapter Six. These legal and administrative adjustments were necessary for the implementation of the concept of parental responsibility introduced by the 1989 Children Act.

By contrast, the writer is unaware of any such changes having taken place in Cameroon. Indeed, when the field work trip was undertaken in 1990, the judges and parliamentarians spoken to were unaware of these recent changes in English law. For the Children Act to be implemented in Cameroon, a Cameroonian legislation similar to the Child Support Act and administrative structures to function as the Child Support Agencies would be necessary. It would be absurd to suggest that the English Child Support Act 1991 and the Child Support Agencies specifically developed to make maintenance payments in and trace absent fathers in England would be extended in application to Cameroon. It could be concluded, therefore, that the application of the Children Act 1989 in Cameroon is not yet in sight.

Second, the social framework within which the 1989 Children Act was enacted may be seen as a second reason for the reservation made earlier regarding the application of the Children Act in cameroon. As discussed earlier, the spirit behind the Act is to encourage joint parental responsibility on divorce. The contact and residence orders introduced in S. 8 of the Children Act replacing custody and access orders are intended to eradicate the negative effects of legal labels, such as, "custodian and non-custodian". Writers have put forward the view that references to one parent as custodian and the other as non-custodian have usually been misconstrued as official state approval of the custodian parent qualities as against the non-custodian's.[11] On the basis of this conception, many parents referred to as non-custodians withdraw from parental responsibility.[12]

The 1989 Children Act circumvents this problem by introducing orders which ostensibly

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(11). PARKINSON, L., "Custody Orders - A Legal Lottery?" (1988)18 Family Law 26 at p. 26. See also, DAVIS, G., "Public Issues and Private Troubles : The Case of Divorce,"(1987) Family Law 299 at p. 306. Cf. KING, M., "Playing the Symbols-Custody and the Law Commission," (1987) 17 Family Law 186 at 188.

(12). EEKELAAR, J., Divorce and Children - Some Further Data," (1982) 2 Oxford Journal of Legal Studies, 63 at p. 63; RICHARDS, M., "Post - Divorce Arrangements for Children : A Psychological Perspective," (1982) Journal of Welfare Law 135 at pp. 135-136. Supra, note 10.

avoid the use of such custody labels. Both parents are encouraged to uphold their joint parental responsibility for the upbringing of their children after the marriage has come to an end regardless of who the residence order is in favour of, as we have discussed. The intention of the law is to increase the participation of parents in deciding their children's post-divorce future and this is demonstrated by reduced state intervention. Under S. 1(5) of the 1989 Act, an order under section 8 is to be made only if making it would be better for the child than if no order is made.[13] From a social perspective, therefore, co-operation between divorcing parents and consideration of their children's interests in making arrangements for the children's future would be significant in order to realise the aim of section 8 of the Children Act.[14] Recent research in Britain[15] indicates a high level of co-operation and less hostility between divorcing parents. These conditions are necessary if satisfactory arrangements are to be made by divorcing parents about the future of their children. The limited number of contested custody cases in England[16]is illustrative.

By contrast, we had discussed earlier that statutory divorce in Cameroon is still generally obtained on the establishment of fault on one or both spouses. As a consequence, there are bound to be deep hostilities between parties at the centre of which claims and counter-claims for custody of children of divorcing parents stand. Hence, S. 41 of the Matrimonial Causes Act 1973 (now in its amended form in the Children Act 1989) is rather insignificant in the Cameroonian custody process as parental custody arrangements independent of the courts are rarely made. The consequence for children of divorce is that decisions about their upbringing are hardly a condition precedent to the granting of a divorce decree. S. 41, the purport of which is to protect children of divorce[17]by making satisfactory

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(13). For a discussion on the principle of non-intervention, see, BROMLEY and LOWE, op. cit., note 6: pp. 346-347. Cf. BAINHAM, Non-interventionism, op. cit., note 9.

(14). See, STEVENS, op. cit., note 6: p. 341.

(15). See, KELLY, J. B., Children's Post-Divorce Adjustment" (1991) Family Law 52 at pp. 52, 53-54.

(16). About 94% of custody cases are uncontested and arrangements for their upbringing have until the 1989 Act came into force, been made under S. 41 of the Matrimonial Causes Act of 1973. See, BROPHY, op. cit., note 10: p. 220. The section has been an object of criticisms leading to its amendment in the 1989 Child Act. For a discussion on the criticisms, see, MAIDMENT, op. cit., note 3: pp. 19-21; DODDS, M., "Children and Divorce,"(1983) Journal of Social Welfare Law 228 at 229-236. For a discussion on the amended section, see, BROMLEY and LOWE, op. cit., note 6: pp. 368-369. See also, WELLS, T., "The Children Bill: The Implication for Divorce Court Welfare Officers,"(1989) Family Law 235 at 235.

(17). See, INGMAN, T., "Reform of the Ground for Divorce,"(1989) Family Law 94 at pp. 95-96. Cf. DAVIS, op. cit., note 11: p. 300.

arrangements for children a condition precedent to the granting of a divorce applies solely in cases of consensual divorce. As mentioned earlier, this is a rare occurrence in Cameroonian statutory court divorces.

A society in which hostility between divorcing parents still takes the primate position is not yet ready to accommodate a law which is intended to reduce parental feuds in divorce and encourage parenthood beyond divorce. This is a fact which has judicial acknowledgement as the following intimated opinion of a judge regarding the application of the children Act in Cameroonian courts illustrates:

> "It will be difficult for the 1989 Children Act to work... . The Social Welfare Department would need to carry out an enormous campaign to educate the parent with the contact order that the parent in respect of whom the resident order is made is no more of a parent than the parent with the contact order."[18]

The opinion of Mr. Justice Bawak quoted above is a reflection of social attitude in Cameroon. The same disposition is portrayed by legal practitioners in drafting divorce petitions which, as treated in Chapter Three, are founded on the fault-based factors in S. 1(2) of the Matrimonial Causes Act 1973 to establish irretrievable breakdown. The concept of parental responsibility envisaged in the 1989 Children Act is a social phenomenon which has to be accepted in the society before the practicality of applying it as law. The increase in number, of consensual divorce in England in recent years[19] demonstrates the readiness of the society to embrace such a change in divorcing parents' attitude towards each other for the sake of the welfare of their child(ren). This is not to suggest the total absence of hostility. At least, the fact that most parents agree to divorce without much fuss and make necessary arrangements for their children, shows a realisation in the English society of the effect of animosity on their children. It could be concluded that the society in which the 1989 Children Act is now in force was ready to embrace the changes. The same cannot be said of the Cameroonian society which fact is acknowledged by the judiciary. The following case decided December 1991 in the High Court of Buea supports the conclusion that the future upbringing of children of statutory divorce in Cameroonian courts is still based on the concept

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(18). Per Bawak B. B(Court of Appeal Judge)during my interviews with him; Mrs. Wacka(Judge in the High Court in Buea 1990); Mr. Asuh(Judge in the High Court in Buea 1990); Mr. Fombe(President of the High Court in Kumba 1990); Chief Justice Endeley and Mr. Justice Ekema(retired Chief Justice and Justice of the Supreme Court respectively) conducted in January 1989 and between August-October 1990.

(19). Supra, note 16.

of custody.

In Teh Christine v. Teh Mathias[20], a petition for divorce was filed by the wife under S. 1(2)a, b of the Matrimonial Causes Act 1973 in which she claimed custody of their two children, a girl and a boy aged nine and eleven respectively. In addition to denying the petitioner's allegation of adultery and cruelty against her, the respondent cross-petitioned and counter-claimed for custody. Nevertheless, the petition succeeded but custody of the two children was awarded to their father. Tembong J., pronounced as follows:

> "... In deciding which parent to be awarded custody, the welfare of the children is the first and paramount consideration. I have to take into account, in this regard, the physical, material and the moral welfare of the children concerned... ."[21]

The mention of custody and reference to the welfare of the child as the first and paramount consideration by Mr. Justice Tembong in this case, are two facts which indicate that decisions are still made under the Guardianship of Minors Act 1971, which is no longer the law in England.

Judicial Interpretation of the Welfare Principle Under Cameroonian Statutory Law:

The principle of welfare of the child provided for in the Guardianship of Minors Act 1971 is the standard for custody decision-making in Cameroonian statutory courts. Section 1 stipulates as follows:

> "Where in any proceedings before any court...
>
> (a) the legal custody or upbringing of a child; or
>
> (b) the administration of any property belonging to or held on trust for a child, or the application of the income thereof;
>
> is in question, the court, in deciding that question, shall regard the welfare of the child as the first and paramount consideration, and shall not take into consideration whether from any point of view the claim of the father in respect of such legal custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father."[22]

The use of these words in English statute law goes back to the Guardianship of Infants Act

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(20). Suit No. HCSW/18^{mc}/91. Unreported.
(21). On p. 6 of judgement.
(22). Quoted in, BROMLEY, P.M. and LOWE, N. V., Bromley's Family Law, 7th ed., Butterworths, London, 1987, p. 313.

1925. Hence, there are a large number of precedent cases[23]on which Cameroonian courts may draw on especially, as the judiciary looked to English precedents for guidance in the interpretation of the welfare principle. It could be asked, however, whether the courts are correct in doing so. Two reasons for looking into English practice may be put forward.

The first reason is that Cameroonian courts are applying the English welfare principle as stated in the Guardianship of Minors Act of 1971. The courts are directly applying the principle under the same legal requirements as the English courts. For there is no Cameroonian enactment in which the welfare principle has been re-stated as in other former British colonies.[24]Secondly, English common law was also received under section 11 of the 1955 High Court Laws and it is largely judge - made law.[25]This makes English cases in which the welfare principle had been elucidated legal authority in Cameroon. However, in areas which are already covered by local precedents, courts are not to follow English decisions. Cameroonian judges are not equally bound to follow English decisions if in the circumstances, a different approach to the case before the court is dictated by local conditions, in particular, cultural influences. Ordinarily, the judges would conform to English precedents.[26]

The welfare principle in Cameroonian courts: meaning:-

The following pronouncements by judges indicate that in custody adjudication, the courts recognise the applicable law that the only consideration that should be made is the welfare of the child:

> "... I have to remind myself of the cardinal principle that in considering matters like this issue, the court must regard the welfare of the children as the first and paramount consideration without any much regard to the claim of the

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(23). English cases generally may be authority in areas not covered by local precedents. See ANYANGWE, C., The Cameroonian Judicial System, Publishing and Production Centre for Teaching and Research, (CEPER), Yaounde, 1987, p. 234.

(24). See, ALLOTT, A. N., New Essays in African Law, Butterworths, London, 1970, pp. 21-22. Cf. O'DONOVAN, K., "Defining the Welfare of the Child in Contested Custody Cases Under Malaysian Law,"(1980) Journal of Malaysian and Comparative Law 29 at 30.

(25). ANYANGWE, op.cit., note 23: p. 251. Cf. ANYANGWE, C. Introduction to English Legal System, National Printing Press, Yaounde, 1981, Chs. 6 and 11 at pp. 241-243.

(26). Ibid., p. 257.

parents...."[27]

A similar dictum was made by Monekosso J, eleven years later in the case of Atem v. Atem[28]:

> "... in proceedings for divorce, nullity or judicial separation whether defended or undefended, the court is regardless of the requirements or wishes of the parties, concerned with the welfare of any child of the family."

The welfare principle confers on the judges a considerable measure of discretion in interpreting and determining welfare. Discretion arises because the welfare standard for deciding custody is indeterminate[29]and what constitutes the welfare of the child has mainly been elucidated by the courts.

In this regard, English courts have been guided by the interpretation of Lindley L J., in the 1893 case of Re McGrath (An infant)[30] where he pronounced as follows :

> "... But the welfare of the child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well - being, nor can the ties of affection be disregarded."[31]

English courts have given a wide interpretation to the welfare of the child. Regard has been had to the child's physical[32], moral[33], and educational welfare.[34] The welfare of the

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(27). Per Endeley J, in Paul Bamela Engo v. Beatrice Viola Engo, suit No. WC/48/72 (unreported) at p.13 of judgement.

(28). Atem Ebako Bisong v. Atem Marie Dominique, suit No. HCSW/ 77mc/82 (unreported) at p.2 of judgement.

(29). See, MNOOKIN,R., Child Custody Adjudication : Judicial Function in the Face of Indeterminacy,"(1975)35 Law and Contemporary Problems 226 at pp.257-261.

(30). (1893) 1 Ch. 143.

(31). At p.148.

(32). Jane v. Jane (1983) F.L.R. 712 ; Fam Law 211, C A.

(33). S v. S (1978) 1 F.L.R 43. Cf. Re P (a minor) (custody)(1983) 4 F.L.R. 401, where the Court of Appeal granted custody to a lesbian mother. A similar decision was taken by the Court of Appeal in C. v C (a minor)(custody appeal)(1991) 1 F.L.R. 223, (1991) Fam Law 175. See also, BEARGIE, R.,"Custody Determination Involving the Homosexual Parent,"(1988) Family Law Quarterly 71.

(34). May v. May (1986) 1 F.L.R. 325 ;(1986) Fam Law 105, CA. Writers have posited also that a child's educational achievements are affected by the parents' divorce. See, EEKELAAR, op.cit., note 12: p. 73. Cf. ELLIOT, J and RICHARDS, M., "Parental Divorce and the Chances of Children,"(1991) Family Law 481 at 481 and 483; GOLSTEIN, J., FREUD, A., and SOLNIT, A., Beyond the Best Interests of the Child, Free Press, New York, 1973, p.34. Cf. KELLY, op.cit., note 15: p. 53.

child has also been held in English courts to include good religious[35] upbringing. These elements which guided the courts in determining welfare, now make up part of the statutory checklist under the children Act 1989.[36]

Like in England, Cameroonian courts have been guided in their interpretation of welfare by His Lordship's elucidation in Re McGrath.[37] Judges intimated[38] that they are concerned about the physical, moral, educational material welfare and religious upbringing of the child. By contrast with English law, these elements of welfare are not yet applied as a legal checklist in Cameroonian courts for, as discussed earlier, the 1989 Children Act is not yet in application.

In exercising their discretion under the welfare principle to interpret welfare, Cameroonian judges are more concerned with some of the welfare interests. They are particular in securing the physical welfare of the child. The courts also aim to protect the child's well-being as far as material advantages can offer. Although less consideration is given to moral welfare, psychological and emotional needs are disregarded entirely.

Welfare of the child : physical welfare and material security :

Decision-makers in Cameroonian statutory courts are concerned about protecting the child's physical integrity. In Atem v. Atem,[39] the desire to secure the physical health of the children was the rationale for awarding custody of all four children to their father. Their mother's attempt to kill or to make her husband impotent by the use of traditional herbs was held as potential danger to the physical welfare of the children. Similarly, a father who was

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(35). In England, custody disputes were for long more concerned with the soul of the child than the body, as stated by Scrutton L J, in Re J M Carroll (1931) 1 K. B. 313 at p.331. Today, however, courts refuse to pass judgement on the beliefs of parents. It is also inconceivable that a parent will now be denied custody on grounds of atheism: H v. H (1975) Fam Law 110. The question of religion in determining custody now depends on the effect which having or not having religious instruction will have on the child's welfare : Hewison v. Hewison (1977) Fam Law 207 , CA; H v. H, supra. See generally, BROMLEY and LOWE, op.cit., note 22: p. 329-330.

(36). S. 1(3)a-g of the Children Act 1989 contains the checklist to guide the courts in interpreting and determining welfare. For a discussion on the checklist, see, BROMLEY and LOWE, op. cit., note 6: pp. 338, 385-392.

(37). Supra., note 30.

(38). See interviews cited earlier at note 18.

(39). Atem Ebako Bisong v. Atem Marie Dominique, Suit No. HCSW/77^{mc}/82. (Unreported).

physically violent to his wife and her family was denied custody in Agbortoko v. Agbortoko.[40] Wacka J, held that granting custody to the father in those circumstances would be against the physical welfare of the children. An order was made for the children to be in the care of their mother. Furthermore, the child's physical well-being was stated by the Court of Appeal as one of the two grounds on which a mother may be denied custody of her very young children[41]in Temple-Cole v. Temple-Cole.[42]

Besides physical welfare, the courts also give priority to the material advantages the child can have. Indeed, the availability of means to provide the child with better accommodation,[43] nutrition, health care and education is regarded most crucial in the welfare of the child.[44] There is a belief in the society that a sound financial background is a pre - requisite if the educational welfare of the child is to be guaranteed. It is also seen to provide security for the child's health care.[45]As it was in England, statutory court decisions made on the basis of the welfare of the child are informed by dominant socio-cultural ideologies.[46] For example, in Mbiaffie v. Mbiaffie,[47] the father's prosperity as opposed to the mother's poor condition seems to be the only ground on which two boys aged nine, and one girl aged five were held to be in their father's custody. In his judgement, Epuli J, referred to both parents' living conditions as illustrated by the following excerpt:

"... the father is living in his own spacious personal accommodation while the

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(40). Agbortoko Emmaculate Enyebe v. Agbortoko Richard Tanyi, suit No. HCF/60^{mc}/89. (Unreported).

(41). We shall discuss the influence of the presumption that young children need to be in the care of the mother in Cameroon later, post, Ch. 5.

(42). Samuel Esukise Temple-cole v. Francisca Enanga Temple-cole, Suit No. CASWP/CC/63/87. (Unreported)

(43). In English courts, accommodation would be significant only if a parent is so poor that one is unable to provide a home for the children. Even then, the accommodation factor will be weighed against other elements. See generally, BROMLEY, and LOWE, op.cit., note 6: p. 330 old; BEVAN, H. K., Child Law, Butterworths, London, 1989, p. 95.

(44). Information obtained from my interviews cited earlier at note 18. Fifteen parents interviewed in each of the towns of Buea, Kumba, Mutengene, Muyuka and Tombel between August-October 1990, responded to that effect when asked about their responsibilities towards their children.

(45). The word healthy has been used in a dual sense. Firstly, adequate nutrition of a child entails substantial expenditure on quality food. Secondly, in order to have proper medical health care one needs specialised medical attention which is very expensive. This discussion will be returned to in Chapter 6.

(46). For a discussion on social and cultural influences in English divorce custody courts, see, MAIDMENT, op.cit., note 3.

(47). Mbiaffie Justine v. Mbiaffie Andre, suit No. HCSW/30^{mc}/85. (Unreported).

mother lives in a rented quarter in very straightened and narrow circumstances...."

A similar dictum was made by Njamsi J., in Mayiba v. Mayiba.[48] The judge referred to the father's lucrative job on granting custody of the five children aged between nine and fourteen to their father. He intimated that the father's employment in a well paying company was lucrative and ensured the future educational well-being of the children.

These recent cases are reflective of an old judicial tradition as the case of Ojong v. Ojong[49] indicates. In that case, the judge awarded custody to the father. In doing so, Endeley J., compared the mother's poor condition with the father's comfortable life :

"... the mother up to the time of judgement had no house of her own, not yet earned a salary. By contrast, the respondent is well provided for and lives comfortably."

Although the importance of continuity in a child's upbringing[50]was mentioned, there is little doubt that the court was concerned in this case to promote the material welfare of the child. The child had been registered in the most reputable and privileged primary school in the area.

These cases can be contrasted with the English decisions in which it was held that material advantages have a very limited significance as far as the welfare of the child is concerned: The courts are interested in securing the child's happiness and this is not provided by material advantages alone.[51] The socio-economic and cultural circumstances under which Cameroonian judges operate account for their refusal to follow English precedents on this matter.

Judges' interpretation of welfare in a socio-cultural and economic context:-

The economic circumstances, social and cultural values in the Community within which judges make custody decisions have a significant influence on how courts exercise their discretion to interpret the welfare of the child. This may be seen from two perspectives. Firstly, parental responsibility amongst the inhabitants of towns and cities, like in the villages

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(48). Ebenezer Mayiba v. Catherine Lea Mayiba, suit No. HCF/22^{mc}/86. (Unreported).
(49). Martina Ojong v Daniel Ojong, suit No. WC/6/88.
(50). See, GOLDSTEIN et al., op.cit., note 34: ch. 3. Cf. MAIDMENT, op.cit., note 3: pp. 207-210, 246-247.
(51). See, Lindley J., in Re McGrath, supra, note 30; BEVAN, op.cit., note 43: p. 95. See also, Wood J., in Stephenson v. Stephenson (1985) F.L.R. 140 where he said that in most cases disadvantages of a material sort must be of little weight.

is focused on the provision of food, accommodation, clothing, education, and medical care.[52] The presence of these facilities in a balanced case ensures a secure upbringing of a child. Lack of parental love and contact is not generally[53] seen in Cameroonian communities to disturb the happy upbringing of a child. Therefore, where the children are provided with daily necessaries, the presence of a substitute mother to discharge the daily child care obligations, in the view of decision- makers, guarantees the welfare of the children. This phenomenon is made practical by the kinship system.

The system of kinship is the second reason which may explain the narrow interpretation given to the welfare of the child in Cameroonian courts. In Cameroonian communities, as in most African countries, there is a system of greater reliance and inter-dependence between kin relations. Inter-personal relationships between members of the extended family as discussed in a previous Chapter[54] is a characteristic of the kinship structure. These social circumstances may make it easier for arrangements to be made with grand parents or relatives to care for the daily upbringing of the children, if, for example, custody is granted to the father or to a working mother. Indeed, household structure reflects large family sizes[55]half of which are usually made up of sisters, brothers, mothers, or other members of the extended family. Besides, the absence of basic facilities of modern life, for example, free education and other township attractions in the villages makes it possible for parents living in the towns and cities to employ "House-maids" who come from the villages to do various house-hold duties. The duties of these employees involve taking daily care of the children as well.[56]The social circumstances mentioned serve the welfare of children only to the extent that its meaning has been reduced to physical and material satisfaction to the

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(52). Supra, note 44. Cf. A variety of children's needs are recognised in the English society. See, ROBINSON, M., "Children's Experience of Separation and Family Change," (1987) Family Law 361 at pp.361-362.

(53). An exception is made in the case of very young children, post, Ch. 5. We will be returning to the social realities regarding children in this community regardless of this social and judicial presumption later in Chapter Six.

(54). See Chapter Two.

(55). A survey which was conducted in 1973 by the women's wing of the Cameroon National Political Party in conjunction with the Ministry of Health proved the existence of large families as the dominant family size. See, LANTUM, D. N., Cameroon Women Leaders Speak on Population Matters, A Knowledge, Attitude and Practices Survey of W.C.N.U. in 1973, University of Yaounde, Cameroon, 1974, p.23.

(56). LLOYD, P. C., Africa in Social Change, 5th ed., Penguin Books Ltd., Harmondsworth, Middlesex, England, 1972, pp. 182-183.

exclusion of other needs.[57]

Similarly, the possibility that one of two divorcing parents would be violent underlies judicial concern for the physical welfare of the child. Cruelty or physical violence appears as one of the facts in proof of irretrievable breakdown of marriage in almost every divorce petition.[58] Hence, as seen in Chapter Three, divorce is a matter of culpability of one or both spouses. This increases the chances of hostility between divorcing spouses, which is likely to continue after divorce and extend to the children.

The fact that the courts are more concerned about the physical welfare and material security of the child does not mean that other welfare interests of the children, for example, moral welfare and religious upbringing are entirely disregarded. There are decisions in which the judiciary has made pronouncements relating to moral welfare considerations.

Moral welfare was cited in Temple-Cole v. Temple-Cole[59] as one ground on which a mother may be denied custody of a very young child.[60]Similarly, Inglis J, upheld the joint-custody arrangements between the parents in Yufanyi v. Yufanyi[61]because in his view, the parental arrangements were in the moral and physical welfare of the child. Indeed, morality is advanced[62] as the reason why in the opinion of judges they would prefer to grant custody to the father in a case where it would equally be in the welfare of the child to award custody to either parent. Parental conduct is, therefore, significant in the balancing exercise of determining welfare as we shall see.[63] We will examine next the interpretation of welfare in customary law.

B. CUSTOMARY LAW AND THE WELFARE OF THE CHILD ON DIVORCE:

The concept of custody after divorce has been treated in Chapter Three. To determine the existence or absence of a custody concept in customary law, a distinction has to be made

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(57). We shall return to this discussion later, post, Ch. 6.
(58). This is an inference made from decided cases, supported by the cases advanced by Ngwafor in proof of this fact. See, NGWAFOR, E. N., Family Law, 2nd ed.,Institute of Third World Art and Literature, London, 1987, pp. 51-52.
(59). Supra, note 42.
(60). The influence of the presumption that young children need to be in the care of their mothers will be discussed later, post, Ch. 5.
(61). Suit No. HCSW/25mc/84. (Unreported).
(62). Response of the five male judges in my interviews cited at note 18. Cf. English court practice, see, KNOTT, P. "Paternal Custody," (1987)Family Law 218 at p.219. Cf. BROMLEY and LOWE, op. cit., note 6: p. 391.
(63). Post, Ch. 5.

between traditionalism and traditional law. In speaking of traditionalism, reference is made to the application of customary law in customary courts with a well established judicial structure. Traditional law, by contrast, represents the application of customary law informally villages.

This distinction is necessary, for, as discussed earlier, there is no concept of custody in indigenous customary law.[64]On the termination of a marriage by the "family" head, quarter-head or the chief and his council, nothing is said about the children. In Customary Court divorce, however, the courts are obliged to make orders regarding the custody of the children of the particular marriage.[65] Based on this fact, the argument of the revisionist scholarship that contemporary customary law is a colonial creation[66]may be justified. This argument had been pursued in Chapter One. Furthermore, it was discussed in the previous chapter that Customary Courts operate within the legal framework of the Customary Court Rules 1965. In custody matters, the Customary Court Rules incorporate the statutory principle of welfare which is to be applied in custody adjudication in Customary Courts. This is not the case in extra-judicial divorce.

The Welfare of the Child in Customary Court Divorce:

The customary Court operating in the tribal area in accordance to which tribal custom the marriage was celebrated has jurisdiction in the event of a divorce. In the Mbonge, Bakundu, Bafaw, Barombi and Bakossi tribes marriages are celebrated in accordance with the customs of the bride's tribe.[67]On divorce, therefore, the Customary Court within the bride's tribal area is competent regardless of where the parties live.[68]

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(64). Indigenous customary law is referred to the law as it was before colonialism. For a discussion on the influence of colonialism on customary law, see, FITZPATRICK, P., "Is it Simple to be a Marxist in Legal Anthropology?" (1985) 48 Modern Law Review 472, especially at p.479. Cf. WOODMAN, G. R., "How State Courts Create Customary Law in Ghana and Nigeria," in FINKLER, HARALD, W., (Compiler, 1983). Paper of the Symposia on Folk Law and Legal Pluralism, Xth International Congress of Anthropological and Ethnographic Sciences, Vancouver, Canada, August 19-23, 1983. Ottawa: Commission on Legal Pluralism, 297 at pp. 298-318.

(65). The full discussion will be made later in the Chapter.

(66). See references of revisionists in our earlier discussion, in Ch. 1, p. 41 at note 69.

(67). Information obtained from the Customary Court officials, village chiefs and some village elders in interviews cited earlier in Ch. 3, notes 4 and 10.

(68). This is customary law in all the tribes studied for, the same information was given to me by all the court officials spoken to in the different courts. Where a petition is filed to the wrong court, it is either transferred to the appropriate Customary Court or experts in the custom according to which the marriage was celebrated are invited to

Where the jurisdiction is established, the court is required to follow the Customary Court Rules. The Rules direct Customary Courts to make custody orders where the divorce petition contains a claim for custody or if the court deems it necessary for the welfare of the child.[69]This can be contrasted with statutory courts which are required under S. 42(1) of the Matrimonial Causes Act to make custody orders before a decree absolute of divorce can be granted, whether custody is claimed or not. Thus, state intervention in deciding post-divorce upbringing of children through Customary Courts is reduced to cases of necessity.[70]Courts are to adjudicate on custody only where such interference is required or, if they deem such intervention necessary for the sake of the child. In so deciding, Customary Courts are directed to consider the welfare of the child as stated in the Customary Court Rules which provide as follows:

> "The first and paramount test to be applied by a court in an order for custody of the child is what will best promote the physical and spiritual welfare of the child."[71]

Thus, the paramountcy principle as contained in the Customary Court Rules restricts courts' discretion in interpreting welfare of the child to spiritual and physical welfare. This is in contrast with the interpretation of the judiciary which, as seen in a previous discussion, extends welfare to moral well-being of the child. Again, as in statutory courts, no regard is made to psychological and emotional welfare.

Discretion of the Customary Court judge in the interpretation of welfare of the child:-

The decision-maker in a statutory court is simply directed under S. 1 of the Guardianship of Minors Act 1971 to regard welfare of the child as the first and paramount consideration in deciding custody. His discretion is very wide in deciding what is welfare and how to determine welfare in the absence of any legal checklist as that provided in S. 1(3) of the

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testify on customary law. This option was taken by the Customary Court of Kumba in the case of Folifac James Ajongaku v. Ajongaku Roselyn, Civil Record Book No.2/86-87. (Unreported).

(69). See, General Section, ch.10 of the Customary Court Rules.

(70). This Customary Court position is analogous to the conditions for making contact and resident orders in S. 1 of the Children Act 1989. See, BROMLEY and LOWE, op. cit., note 6: pp. 345-347. Cf. BAINHAM, A., "Children Act 1989: Welfare and Non-Interventionism,"(1990) Family Law 143.

(71). Rule 3 of the Circular Instructions Regarding the Custody of Children in the Customary Court Rules.

Children Act 1989. By contrast, Rule 3 of the Circular Instructions in the Customary Court Rules does not confer such wide discretionary power on the judges in Customary Courts. Welfare of the child is specified therein as physical and spiritual welfare. Furthermore, the factors to be considered in determining the welfare interests are specified in the Customary Court Rules. They include: a father's right to his legitimate children;[72] conduct of parents,[73] age,[74] sex,[75] and the claimant's social status.[76] These factors will be discussed in the next Chapter. The welfare principle which is basically indeterminate in statutory law, is reduced to rules in the context of its application in Customary Courts. In practice, however, application of the welfare principle in Customary Courts is very limited. Judges in Customary Courts even forget that there is a statutory set of rules which they are obliged to apply.[77] In the Customary Courts of the town of Kumba, the villages of Kombone, Bekondo, and Mbonge, the Customary Court Rules are totally disregarded.[78]

Such an attitude in Customary Courts towards the statutory Customary Court Rules is not surprising for two reasons. Firstly, the Customary Court Rules are constituted of statutory law since, as mentioned earlier, they were adopted from a colonial Ordinance and have been made to be applied generally in all Customary Courts. Thus, purporting to introduce uniform customary law of general application in Customary Courts in which the indigenous tribal customary laws ought to be the law applicable. Uniform law contained in the Customary Court Rules disregards the differences in matters of detail that exist in the various tribal laws. Besides, Customary Court Rules introduce the concept of custody which is not known in the tribal customs. On the basis of this difference in ideology between the Customary Court Rules and the customary laws as known in the villages, "judges'" desire to derogate from the provisions of these Rules may be explained. Discretion conferred on customary Courts as regards when to make orders facilitates "judges'" choice of whether to comply with the Customary Court Rules which derogate from indigenous customary law or not. This is the second reason on which "judges'" refusal to comply with the Rules may be

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(72). Rule 12 of the Customary Court Rules.
(73). Rule 16 of the Customary Court Rules.
(74). Rule 11 of the Customary Court Rules.
(75). Rule 11(i)(ii) of the Customary Court Rules.
(76). Rule 16 of the Customary Court Rules.
(77). In just two out of the six Customary Courts studied was there any mention of the Customary Court Rules. In one of the two courts the "judges" told me that they do not remember that they have the Rules.
(78). Only the "judge" and the registrars in the Customary Court in Tombel intimated to me that in Customary Court divorce, they apply the Customary Court Rules.

explained.

Under the Customary Court Rules, Customary Courts are directed to make orders for custody only if custody is claimed or if the decision-maker in a Customary Court considers it necessary for the interests of the child. There are rarely any claims for custody in the petitions for divorce.[79] Besides, the welfare of the child on divorce is not in the various tribal laws an issue, as seen in a previous discussion. The main concern is the termination of the marriage and assessment of dowry to be returned, if any.[80] Therefore, decision-makers in Customary Courts in practice, endeavour to apply the law as it exists in the tribes as much as they can. In most cases custody orders are made only if specifically claimed, an issue already discussed in Chapter Three.

Writers have put forward in this regard, that the Customary Court Rules were provided to guide "judges" in deciding custody, and that they were not intended to be the law.[81]Such an interpretation of the Rules is doubtful, considering that Rule 1(b) of the Circular Instructions in the Customary Court Rules provides that the Rules should prevail in case of conflict with any tribal law. It could be said that the application of the welfare principle in the Customary Court Rules 1965 is adapted to suit cultural demands. This indicates the influence of cultural ideologies on received Western law.

Even if Customary Courts were widely deciding custody in compliance with the Rules, the children whose welfare would be considered specifically on the divorce of their parents would still be negligible. Customary marriages are mainly brought to an end extra-judicially.

The Welfare of the Child in Extra-Judicial Divorce:

The traditional way of terminating an African customary marriage and the customary law rule that a father is entitled to the "possession" of his legitimate children as a determinant of a child's post-divorce upbringing had been discussed in Chapter Three. The fact that no specific adjudication on "custody" of the children is made on termination appears to indicate absence of concern for the children's welfare as known in statutory law. The intention in this discussion is to identify and analyse the existence of welfare concerns for children within this

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(79). All the petitions seen simply requested for a divorce and assessment of dowry to be returned.

(80). Information obtained from the interviews with Customary Court personnel cited earlier in Ch. 3, at note 10.

(81). ANYANGWE, op.cit., note 23: p. 75.

traditional framework.

Welfare in a cultural context:-

Traditional Cameroonian societies have different socio- cultural values and economic circumstances from the inhabitants of towns and cities. Hence, children are raised in a distinctive background. Firstly, children in customary marriages are the issues of relationships in which the element of romance between the spouses is not, as discussed earlier, apparent. Besides, normal family life is characterised by economic, social, and cultural segregation between ages and sexes. For example, social activities for recreation mainly involve organisation of festivals by different cultural societies and groups. Men and women belong to different groups according to their ages and sexes.[82] Even money contribution and saving groups generally referred to as "njange" groups are basically of the same structure. Therefore, children do not grow up knowing intimacy between their parents.

Separation in family daily life is exacerbated by the existence and practice of polygamy in view of the large family sizes[83]that polygamous marriages give rise to. In addition, polygamous homes are usually structured in a way that gives room for very little contact between all the children, their mothers and father.[84]Hence, independence between spouses, parents and children is an aspect of socialisation and acculturisation. Many children are cared for by relatives and grow up away from their parents in various forms of traditional fostering as treated in a previous discussion.

Thus, termination of marriage may not be as grievous to children in these traditional communities as it may appear.[85]The happy upbringing of children does not generally,

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(82). See, BOSERUP, E., Women's Role in Economic Development, George Allen & Unwin Ltd., London, 1970, pp. 15-39. Cf. ARDENER, E., Coastal Bantu of the Cameroons, International African Institute, London, 1956, pp. 32-33, 68.

(83). Supra, note 55.

(84). The children spend more time in their mother's section of the house and the mother rarely spends time with their father, let alone, sleeping together. See DWIGHT, M., "Cameroonian Women at the Crossroads: Their Changing Roles and Status," (1986-87) Journal of African Studies 126 at 127.

(85). Children ranging between the ages of 16 years downwards from different families of varied social, economic and cultural backgrounds were interviewed. In about 75% of the cases of children in the possession of the father, the children said that they were satisfied with their stay. The reasons advanced were amongst the following: their feeding was adequate; the accommodation was comfortable ; their fathers provide them with school uniforms; and the school fees is paid by the fathers so they are not sent away from school. Some said living with their father allows them enough free time while the father is out. However, negative effects of divorce on the children

depend on continuity of relationship or environment.[86]This is a socially held conception. However, we shall demonstrate in a later discussion[87] that emotional attachments are developed by children in these rural communities in the same way as it is for children raised in towns and cities. Nevertheless, the welfare of the child in the context of indigenous customary law is to be evaluated within a socio-cultural context. In this regard, the structure of the traditional family is significant.

The traditional family:-

Traditional societies recognise an ideal family form: a social unit with the father at the top of the hierarchy in whom all the customary law rights and responsibilities are vested. The father is the "owner"[88] of his children and wife or wives. This has been posited by some writers[89]as compensation for a father's role as breadwinner which makes him primarily responsible to provide for his children and wife or wives.[90]In his position as the head of the family, the father is vested traditionally with responsibility for the upbringing of the children.[91] Upbringing in this case is specified to the provision of food, accommodation, dressing and education.

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were expressed by children below the ages of nine (in cases where a father insisted on having the possession of even the very young children). Some disliked their fathers' yelling and frequent corporal punishment. Others were resentful towards their fathers' restrictions on them to visit the mothers. In general, the restrictive attitude of the fathers as regards the children's daily activities was the main cause for concern amongst the children spoken to.

(86). Cf. GOLDSTEIN et al., op.cit., note 34: Ch. 3. The authors' view has not been uncritical. Post, Ch. 6, note 60.

(87). Post, Ch. 6.

(88). For a brief summary of the term patriarchy, see, O'DONOVAN, K., Sexual Divisions in the Law, Weidenfeld & Nicolson, London, 1985, p. 22. For a discussion on the traditional family in Victorian England, see, DUNBAR, J., Early Victorian Women, George G. Harrap, London, 1953, ch. 2.

(89). HOLT, J.,Escape From Childhood, Penguin Books, Middlesex, 1974, p. 38.

(90). Interviews conducted with parents in four villages and the town of Kumba, cited in Ch. 3, note 17),indicated similar answers when asked about their opinion with regard to maintenance of the household. The response was that the husband is responsible to provide for the family. A few intimated their desire for the wives to contribute if they are in the position to do so. However, no unanimous opinions were got from the women from different provinces who congregated in the town of Mutengene for an Inter-provincial Seminar for the Training of village leaders from the North West and South West Provinces, October 1-5, 1990. The majority opinion was that the husband has to provide for the family.

(91). This issue will be returned to in Chapter Six.

In general, the financial responsibility for household maintenance is ideologically vested on fathers traditionally. Against this is balanced the image of wives in these societies as caretakers[92] of the children and the household. The attitude of some wives towards financial responsibility in their households has buttressed this traditional stereo-type. For example, in the Mbonge tribe, most wives avoid financial commitments for their children even when it is needed and, although they may be capable of providing it.[93]

Financial dependence is, nevertheless, not sufficient justification for the existence of paternal preference in custody. There are cases where mothers are the main breadwinners as will be discussed in Chapter Six, yet there is no reversal of customary law fathers' custody right. This may mean that paternal preference has more to do with dominant cultural beliefs in the society than with household economies. This discussion will be returned to in Chapter Six.

There is, therefore, a generally held opinion even among the women that it is better for the children to be with their father on divorce.[94]Welfare in this cultural context is limited to material advantages. Certain benefits accrue to children in these communities which they would not have but for their parents "divorce". They are material, for example, the existence of double home, possibility of having double pocket-money and even school fees, and other material needs.

Divorce may make it possible for a child to have two homes. Having two homes increases the chances for a child to receive money from both parents even if money from one parent could satisfy a particular requirement. The extra money increases the child's pocket

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(92). We shall return to this issue later, post, Ch. 6.

(93). The case of chief Elangwe Bokwe of Matoh Butu is illustrative. His wives have for long been growing subsistence crops for sale. One of his wives sold crops for 3000frs. CFA(until recently, about £6). The house was in darkness that night because they ran out of fuel for the lamp and, the chief had no money. The wife who was known to have money refused to use her money. The women in the Mbonge tribe show the same attitude towards their children's education - the payment of fees and purchase of uniforms. Information obtained from the Chief of Matoh Village.The continuation of this attitude was regretted by men spoken to in Matoh Butu and Big Butu both villages of the Mbonge tribe in the interviews cited earlier in Ch. 3, at note 17. However, such cases are the exceptions, we shall return to this later, post, Ch. 6.

(94). Women spoken to in the interviews cited earlier in Ch. 3 at note 17, about their feelings towards the customary law father's right over his legitimate children did not feel that it had any thing to do with their status as women. Even one woman, Madame Frida Diale, who was so bitter towards her husband for depriving her of the services of her children, concluded that for economic reasons, it was better for the children to be with their father provided they are not very young.

money and to most children it is a God-sent opportunity. Where both homes are in the same community and if access is allowed, the child may use the other parent's house as a substitute home for food and other necessaries that may be lacking in the first home. Besides, the other parent's home may provide a safe-haven for children avoiding work or punishment from the parent who is raising them.[95] Viewed thus, the welfare of the child is not as a general rule, necessarily jeopardised by the termination of their parents' marriage.

In addition, discharge of fathers' responsibility as breadwinner seems to be contemporaneous with physical possession. In the Bafaw and Mbonge tribes, if the mother has possession of the children[96]she remains legally responsible for the their upbringing. The same custom obtains in the Bakundu and Barombi tribes. There is no customary law obligation in the mentioned tribes to maintain children who are in their mother's possession. Child support in this respect is discretionary and many fathers do not maintain their children in such cases.[97] A father's obligation to maintain the children remains, however, if he voluntarily allows the children to live with their mother. Similarly, in the Bakundu tribe, a certain amount of money is set-off from the bride price assessed to be refunded by the wife or her family to the husband. The sum[98]so deducted is considered as maintenance for the young children who are left to the mother until they are above eight which is the age generally regarded as maximum for tender year age.

Furthermore, it is deemed necessary for children to be in their father's possession in order to avoid the possibility of losing their rights to inheritance. The loss of a father's customary law right of possession of his children could significantly influence his decision as regards the inheritance of his property by the children. He may in his Will, reduce the portion of the part of his estate he intended to relinquish to the children in their mother's custody in favour of any children living with him. Occasionally, the children who are with

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(95). Information obtained from various children of divorce cited at note 85.

(96). The father may lose his right if he is very poor and is unable to provide for his children. In the Bafaw tribe, a mother who insists on divorce that the children should be with her may succeed if the objection is based on the fact that her ex-husband's other wives will be malicious to her children. Information obtained from interviews cited earlier Ch. 3, at note 4.

(97). This attitude was resented by the women spoken to in the interviews cited in Ch. 3, at note 17.

(98). 5.000frs.CFA (until recently, about £10) and 2.000frs.CFA (£4) are deducted four each female and male child respectively.

their mother could lose everything.[99]

In addition, traditional ideology of normal child raising necessarily involves initiation into certain societies. Children have to be identified as members of certain societies for their adulthood status in the community to be recognised. Tradition, therefore, holds that it is in the interests of boys especially[100] to be brought up by their fathers. In patrilineal societies, only the father if alive, can introduce their male children into the status of manhood.[1] If he is deceased, the next of kin, usually the father's older or younger brother initiates the child. In matrilineal societies, however, the responsibility to initiate would be on the maternal uncle of the person being initiated.[2]

The welfare of the child is also evident from the exceptions which are made as regards the rights of a father to the possession of his children. In all the tribes studied, a father will be denied children by customary law in certain circumstances. For example, if he is cruel and neglectful or if he is incapable of providing for the children. In the indigenous tradition of the Mbonge tribe, responsibility passes on to the mother's parents if alive and other relatives of hers. Similarly, where very young children are involved, the customary laws in all the tribes studied uphold the mother as the parent entitled to the upbringing of the children until they are generally above the age of eight. It is also said that it is for welfare reasons that children in their father's possession are transferred to their mothers when a child is taken ill until the child recovers, in the Mbonge custom.[3] Despite the foregoing discussion, it should be said that the purported welfare is incidental to the protection of fathers' customary law right over their children. We will advocate in Chapter Seven for the development of a concept of custody in customary law.

CONCLUSION :

The Chapter has illustrated the various interpretations associated with the application of the principle that in custody disputes the welfare of the child is to be regarded as first and

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(99). For source of information on the above, see interviews cited earlier in Ch. 3, notes 4 and 17.

(100). There are no ceremonies for the initiation of girls in order for them to acquire the status of womanhood in the tribes studied.

(1). Ibid.

(2). Information obtained from the interviews cited in Ch. 3, at note 4. Cf. FONYAM, J. C., The Protection of the Child Under Cameroonian Law, Ph.D Thesis, University of Yaounde, 1986, p. 36.

(3). Information from the interviews cited earlier in Ch. 3, at note 4.

paramount in English courts, Cameroonian statutory courts and in Customary Courts.

The welfare principle which is the standard for custody decision-making is indeterminate. The courts are, therefore, vested with discretion to interpret what constitutes welfare and to determine the child's welfare. This is the topic for discussion in the next Chapter. Welfare in English courts has been interpreted very widely, and the courts are concerned about a variety of interests of the child. In Cameroonian courts, by contrast, child welfare has a more restricted meaning in practical terms. The concept of child welfare is even narrower in the customary law context. This difference in interpretation is dictated by differences in the socio- cultural values in the place where the welfare concept is applied. The effect of the difference in the content of the welfare principle would become even more apparent when examining custody adjudication in Cameroonian courts, in the next Chapter.

CHAPTER FIVE

CUSTODY DECISION-MAKING IN CAMEROONIAN DIVORCE COURTS

The previous Chapter examined the legal framework within which Cameroonian courts make custody decisions. The discussion also covered interpretation of the welfare of the child under S.1 of the English Guardianship of Minors Act 1971 in Cameroonian statutory courts, on the one hand, and under the Customary Court Rules, on the other. The purpose of this chapter is to analyse the reality of child custody decision- making in Cameroonian statutory and Customary Courts. First, the discretion conferred on judges by the use of the indeterminate[1]welfare standard provided in S.1 of the Guardianship of Minors Act, as the basis of custody decision- making will be discussed. This is necessary as indeterminacy of the welfare principle widens judicial discretion and consequently enables in part, the incorporation of customary law fathers' right in statutory custody adjudication. The wide discretion conferred on statutory judges to determine what is in the welfare of the child gives room for cultural values to inform statutory courts' custody decisions made within the framework of the welfare principle. In the second part, we shall examine how Cameroonian statutory courts make custody decisions on the basis of the welfare of the child. Thirdly, custody adjudication regarding children in Customary Court divorce will be treated.

A. CUSTODY DETERMINATION : CONCEPTUAL ANALYSIS:

The legal standard for deciding the post-divorce upbringing of children in Cameroonian statutory courts and in principle, in Customary Courts, as discussed in a previous Chapter, is the English law welfare principle. Custody decision-making on the basis of the welfare principle entails the use of discretion by judges which has been dictated by the indeterminate nature of the welfare standard. Too often, therefore, welfare as a concept is an empty vessel into which the judge pours, however unconsciously, his own interpretations, prejudices, and personal experiences.[2]

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(1). MNOOKIN, H. R., " Child Custody Adjudication : Judicial Function in the Face of Indeterminacy,"(1975) 39 Law and Contemporary Problems 226 at pp.226-261.

(2). O'DONOVAN, K., "Defining the Welfare of the Child in Contested Custody Cases Under Malaysian Law,"(1980) Journal of Malaysian and Comparative Law 29 at p. 29. See also, GOLDSTEIN, J., et al., Beyond the Best Interests of the Child, Free Press, New York, 1973, pp. 106-107; PRIEST, J., and WHYBROW, J., Supplement

Discretion:

Discretion arises when the decision-maker is free to choose different causes of action or inaction.[3] The use of a discretionary standard in law is explained by the necessity of administering individualised justice in certain areas of the law.[4] Custody is one of them. Each custody case presents its own unique facts, the variety of which makes it impracticable to formulate precise legal rules or guidelines capable of covering every situation that may arise.[5] Especially, as there is in society, the existence and recognition of a variety of family forms.[6] The case for individualised justice is even stronger in the absence of consensus in society as regards the best child rearing strategies or an appropriate hierarchy of values to inform a judge's decision.[7] The protection of the welfare of children of divorce, therefore, depends on the judicious exercise of discretion by individual judges.

Discretion in this regard, may become absolute and abusive if it is not checked.[8] The law is thus, trapped in a dilemma. On the one hand, there is need for discretionary legal standards in order to administer individualised justice required to secure the welfare of the child. On the other hand, the possibility of abuse of that discretion dictates a legal machinery which restricts the use of discretion.[9] Nevertheless, legal response to this indeterminacy versus rule debate is to maintain the discretionary standard,[10] subject to review by the Court

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to Law Commission Working Paper No. 96, H.M.S.O, London, 1986, pp. 30 and 40; KING, M., "Welfare and Justice," in KING, M.,(ed.) Childhood, Welfare and Justice, Batsford, London, 1981, p. 129 at 131.

(3). DAVIS, K., Discretionary Justice: A Preliminary Inquiry, Greenwood Press, West Point, Connecticut, 1980, p. 4 at para. 4.

(4). WEXLER, S., "Discretion: The Unacknowledged Side of the Law," (1975) 25 University of Toronto Law Journal, 120 at p.133.

(5). PRIEST, J., and WHYBROW, J., Law Commission Working Paper No. 96, H.M.S.O., London, 1986, para. 6.31 at p.199.

(6). MAIDMENT, S., Child Custody and Divorce, Croom Helm. London. Sydney. Dover, New Hampshire, 1984, p. 4; KELLY, B. J., "Children's Post-Divorce Adjustment: Effects of Conflict, Parent Adjustment and Custody Arrangement,"(1991) Family Law 52 at pp. 52.

(7). MNOOKIN, op.cit., note 1: pp. 260-261.

(8). DAVIS, op.cit., note 3: p. 152.

(9). For a discussion on the rule versus indeterminacy custody debate, see, MNOOKIN, op.cit., note 1: pp. 262-264; PRIEST and WHYBROW, op. cit., note 5: pp. 188-200.

(10). The Law Commission in its Working Paper No. 96, Suggested that the welfare of the child should remain the legal standard for custody decision making and proposed the establishment of a legal checklist to aid the judges in the process of determining welfare. Ibid., pp. 200-202. See, 1989 Children Act, S.1 (3)a-g.

of Appeal. This is a mechanism for checking abuse of discretionary power. Like in England, the principal method of control under Cameroonian law is that of review on appeal.

Appeal Court Review of Custody Decisions:

The Cameroonian Court of Appeal is a superior court and as discussed in Chapter One, it mainly functions as an appellate jurisdiction for decisions from lower courts. Decision-makers in Cameroonian statutory courts are required to make custody decisions in the absence of any form of legal guidelines[11] or even a checklist,[12]which might inform decisions on the welfare of the child. The use of personal values and experiences might result in some unpleasant decisions being made. Decisions may even be influenced by some elements which are only remotely related to the welfare of the child.[13] Hence, without appellate review, discretion could be exercised in a manner which may be detrimental to the welfare of the child. Every judgement in Cameroonian statutory courts, as well as most Customary Courts ends with a notice to the parties of their right of appeal within thirty days of pronouncement of the judgement.[14] However, the control exercised by the Court of Appeal on the decisions of the original courts is negligible in view of the limited role of appellate review. Two reasons may be advanced for this. The first and the main factor, is the failure of parties to exercise their right of appeal which is a direct consequence of the general reluctance by people in the Cameroonian community to litigate. Second, and limited in extent, the restrictive attitude of the Court of Appeal towards overturning discretionary decisions of the Courts of First Instance.

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(11). For guidelines put forward by writers, see, GOLDSTEIN et al., op.cit., note 2: pp. 31-52. Cf. PRIEST, and WHYBROW, op. cit., note 5: pp. 196-200.

(12). Supra, note 10.

(13). In my interviews with judges (Mr. Bawak, judge in the Court of Appeal in Buea; Mr. Asuh (Judge in the High Court in Buea 1990); Mrs. Wacka,(judge in the High Court in Buea 1990); Mr. Fombe (President of the High Court in Kumba 1990); Chief Justice Endeley and Mr. Justice Ekema (retired chief Justice and Justice respectively of the Supreme Court) their responses indicated the influence of the customary law fathers' right over their children in custody decision-making in statutory courts. Cf. KNOTT, P., "Paternal Custody," (1987) Family Law 218 at pp. 219-220.

(14). All the cases studied in the High Court case files contained notices. The same was found in the few Customary Court cases with written judgements.

Failure of parties to exercise their right of appeal is dictated by the general reluctance to litigate at all:-

The number of spouses who resort to the Court of Appeal if dissatisfied with the original decision is insignificant. This attitude is reflective of a wider social conception towards litigation generally. Cameroonians, whether in villages, towns or in cities maintain a negative position towards litigation. Many cases of infringement of civil rights are settled out of the state legal and judicial frameworks. This occurrence may be explained by a number of factors: the availability of traditional techniques of dispute settlement, lack of information about the operation of the judicial system and administrative bureaucracy in the judiciary.

First, inhabitants of towns and cities usually identify themselves under little groupings based on cultural or tribal affinity. Towns and cities are made up of people from different tribes and cultural origins. Hence, different cultural groups are formed by people who identify themselves as members of particular tribes under the leadership of an elder of the tribe in the town or city. Such an elder is usually referred to as the "chief"[(15)] of his tribal people and is regarded as the representative of that tribe in the town. These cultural associations serve as social groups,[(16)]they also act as traditional insurance institutions[(17)]. Perhaps most important of all is the dispute settlement role of these associations. Disputes between members are brought to the group first for arbitration. Furthermore, the cities, villages and towns are sub-divided into smaller administrative units known as "quarters". Quarters group together people who live in the same street or a designated area, regardless of tribal origin for administrative purposes. Each quarter has a leader known as the

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(15). The title of "Chief" is given to such leaders to signify that they represent the Chief of their respective tribes in the town or city. They are not Chiefs in the political sense.

(16). Such groups have the duty of visiting members in case of certain eventualities, for example, bereavement, the birth of a child, presence of important guests, baptisms. Such meetings are essentially ceremonies involving dances, singing drinking and eating.

(17). In some of these tribal groups members form financial institutions generally referred to as "njangi", which basically act as saving banks for the members. Stated amounts of contributions are set, for members to pay in monthly, weekly or every fortnight. One person is designated to receive the amount so collected each meeting. In other meetings members bring in any amount they have which is saved in the group's "bank" for them. Such money is shared as paid to the members at the end of the year. See, ARDENER, E., and ARDENER, S., Plantation and Village in the Cameroons: Some Economic and Social Studies, Oxford University Press, 1960, p. 244.

"quarter-head" and he is the main link between the administration and the quarter. Like the "chief" in the cultural groupings, the "quarter-head" is an arbiter in the event of a dispute. Matrimonial disputes, other civil and even criminal matters of a trivial nature which can be satisfied by compensation are usually settled through arbitration either in the tribal associations or by the quarter-head in towns.[18] In villages, lineage heads in case of matrimonial disputes, and rarely quarter-heads and the village chief and his council in the case of other disputes, settle most of the legal problems that arise. Even if litigants are motivated to use the state legal and judicial systems, for example, in cases of serious crimes, their ability to seek redress in the courts is restrained. The main reason is the absence of adequate information about the functioning of the judicial system.

Second, the bulk of the Cameroonian population consists of "uneducated" farmers living in the villages in the forest area, the grasslands and in the sub-Saharan parts of the Country.[19] Towns and cities also have large areas inhabited largely by uneducated and under - privileged families, or those with a very limited amount of education which is not enough to inform them about their rights, the functioning of the political, legal and administrative systems. There is lack of information about legal rights. These include, for example, rights to litigation, guarantee of ones freedom and liberty in court,[20]the difference between civil and criminal actions.[21] There is widespread misconception among this sector

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(18). Five "chiefs" and "quarter-heads" in the town of kumba were my informants on this point during my interview in September 1990.

(19). These farmers include unmarried men and women, husbands and wives. Together, they constitute about 72% of the total population. See, GEARY, C. On Legal Change in Cameroon: Women, Marriage and Bridewealth, Boston, 1987, p. 4.

(20). In my interview with litigants in the High Courts and Magistrates' Courts in the towns of Kumba, Buea, Limbe, the respondents indicated fear and uneasiness as regards their presence in court or within the vicinity. The same was expressed by non-litigants spoken to in these towns. Some were people who had appeared in court as witnesses only. A young girl aged 20 years told me she had been held in custody for one week on the orders of a Magistrate though she had not committed any crime: her brother, who had escaped from police custody was to be sentenced on that day so she went to court to hear the judgement. In the absence of her brother she was detained in order to have information from her as regards her brother's escape. But, she had no information. "Judges are intimidating," was the general disapproval. Cf. Similar experiences have been had in English Courts. See, DAVIS, G.,"Public Issues and Private Troubles: The Case of Divorce,"(1987) Family Law 299 at p. 300.

(21). Some divorced mothers in the interviews with parents cited in Ch. 4, note 44, intimated that they had been threatened legal action by their husbands. They intimated that the thought of imprisonment scared them. There is, thus, little doubt that mention

of the population about the rationale for the existence of national law and courts: the law is and the courts are for the prosecution of criminals. Therefore, courts are associated primarily with imprisonment or other forms of punishment rather than redress.[22] The general attitude, therefore, is to avoid any sort of involvement with the courts. Distaste for the state system of administration of justice is exacerbated by the bureaucracy involved in litigation.

Third, litigation in Cameroonian courts involves a complicated system of protracted legal action, which leaves litigants in search of justice at the mercy of legal professionals. Deciding cases in these courts is primarily a job between legal professionals.[23]Required assistance from legal advocates is not available to the majority, partly because of the financial cost involved and even physical cost, especially for the people in villages who must journey to the towns where the practitioners are. Villages are remote from state judicial institutions.[24] Accessibility from the villages to the towns where statutory courts and even Customary Courts are located is difficult.[25] Some villages are separated by long distances even from the nearest Customary Court. Hence, judicial redress involves legal and transportation costs, including the cost of maintenance in the court area in the course of the proceedings. Although legal aid is available,[26]its utility is limited: it is not amenable to the under-privileged people who need it most. They are uninformed, and the responsible state department has taken no measures to keep these people informed of the existence of legal aid and conditions under which one may be eligible. Besides, the administrative procedure involved in the application for and award of legal aid puts off many people who may be eligible. The financially and socially under-privileged people whom the legal aid scheme was intended to help do not avail themselves of it.[27] Furthermore, litigation is usually protracted

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of legal action instantly evoked images of imprisonment although they did not know if their husbands had any grounds of action against them and if any what kind of action.

(22). Supra, note 21.

(23). Information obtained from my interviews with ten barristers the towns of Buea, Kumba, Mutengene and Limbe during interviews on statutory law and practice conducted between August-October 1990. Cf. DAVIS, op.cit., note 20: pp. 305-306.

(24). See, GEARY., op.cit., note 19: pp. 9-12.

(25). The roads linking these villages to the main towns are very poor and unmotorable during the wet season. Personal observation.

(26). See, ANYANGWE, C., The Cameroonian Judicial System, Publishing and Production Centre for Teaching and Research (CEPER), Yaounde, 1987, p. 199.

(27). Ibid., pp. 196-198.

and a case may stretch over a long period of time.[28]

Against this socio-economic, legal and judicial background, therefore, cases which require and merit legal redress are not pursued by the aggrieved citizens. It is within this context that the insignificant response of the Cameroonian people to their right of appeal may be explained. As litigation at first instance is not popular, parties who fight the odds to litigate become even more wary to continue if their effort at first instance is not successful.[29] Custody appeals present a more peculiar situation. As we shall see later, fathers are awarded custody in most cases, hence, mothers are the parties more likely to appeal. However, their relatively lower financial position,[30] coupled with judicial pronouncements on the welfare of the child as the basis of custody decisions granting custody to fathers, are likely to deter mothers from appealing. This is compounded by the trauma involved in the court hearings. Undoubtedly, by the end of the hearing at the Court of First Instance, litigants are wary to repeat the process by making an appeal. A decision to appeal is, therefore, given considerable thought. On the contrary, applications are made for original custody orders to be revoked under S. 42(6),(7) of the Matrimonial Causes Act 1973. This statement is made with reservation as it appears to contradict the discussion on reluctance to appeal. It could be argued that if applications could be made for revocation orders, it would be equally easier to appeal as both are proceedings involve re-hearing of cases. The parties likely to make the orders, their financial potency, their physical and emotional resistance are all factors which explain this apparent contradiction.

Unlike appeals, fathers are the parties much more likely to make revocation orders to schange in the order which awarded custody of young children to their mother in view of their tender ages at the time of the original order. A revocation order is requested pursuant to the proviso usually contained in the order granting custody of the young ones to their mother, as we shall see, that the child be transferred to the father on attaining a specified age.

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(28). From my observation in the High Courts and Magistrates Courts in Kumba and Buea towns, the hearing of a case may be adjourned several times and each appointed date requires the appearance of all parties concerned (except in divorce hearings). Usually, the parties wait for more than two hours after the stated time, before the case is called up, still, only for the present parties to be given a fresh date of hearing.

(29). Inference made from the case files and supported by the response of judges spoken to on the issue cited at note 13. Many respondents in the interviews with parents cited in Ch. 4, note 44 intimated the same.

(30). This issue will be pursued in Chapter Six.

The revocation order is, therefore, applied for to secure such transfer if the mother fails to comply with the proviso in the original order. There is little doubt that generally, fathers have in their favour all the odds which mothers who are likely to be the appealing parties have against them: they are better placed financially, and perhaps physically and psychologically capable of withstanding the court scenes. Thus, fathers are in a position to apply for revocation orders. Despite the inhibitions on appeal, however, the Court of Appeal is not liberal in exercising control over the original decisions where appeals are made.

Custody appeal and the review attitude of the Court of Appeal:-

The role of the Cameroonian Court of Appeal[31] in checking the discretion of First Instance Courts in custody has been minimal in view of the constraints on parties likely to appeal as discussed earlier. Despite this inhibition, the Court of Appeal is wary to overturn original courts' decisions.

There was no case found in which the Provincial Court of Appeal has considered its powers to review custody decisions. The most that would be said about the attitude of the Court of Appeal would be an inference from excerpts from judgements and the opinion of individual judges. Overturning custody decisions on appeal occasions an interruption of the child's upbringing in familiar surroundings, schools and relationships which the child has made. In judges' view, stability during a child's upbringing is a factor considered in determining the child's welfare, as discussed earlier.[32] Hence, unless it is obvious that a custody order made by a Court of First Instance is detrimental to the child's welfare, the original decision would be upheld. There is no guideline or local precedent which exemplifies the circumstances under which a review may be made.

It seems, however, that a lower court's decision may be overturned if the judge was wrong in making the balancing exercise in determining the welfare of the child.[33] This is inferred from the words of Bawak J., in the Court of Appeal judgement of Temple-Cole v.

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(31). For a discussion on appellate jurisdictions in the Cameroonian judicial system, see, ANYANGWE, op.cit., note 26: pp. 164-175.

(32). We shall return to this point later in the Chapter.

(33). The House of Lords' dictum in G v. G(minor)(custody: appeal) (1985) Fam Law 32, represents current English law on the issue. We shall return to this later in the Chapter.

Temple-Cole.[34] This was an appeal against a decision of the Customary Court in Limbe where the custody of a three years old girl was granted to her mother against the father's claim. After analysing the facts, the court arrived at the decision that the grounds of appeal were unfounded since the Customary Court had jurisdiction, contrary to the appellant's claim. On the question of custody, the court stated, that "it is generally presumed that a child of tender years such as the one involved here is better off with her natural mother." The court then qualified the presumption and stated thus:

> "...this presumption can, however, be displaced when it is proven that the mother is incapable of looking after the child by her conduct or otherwise. The type of conduct to be considered consists usually of the following - persistent neglect, immorality on the part of the mother of the child, etc."[35]

The court concluded by saying that their study of the record of the proceedings did not reveal the existence of any such conduct. It was, therefore, held as follows:

> " In our view the trial court acted properly in according the custody of the child to the respondent."

In granting custody to the mother, the Customary Court took into consideration the young age of the child involved for the father's customary law right does not generally extend to children of tender age.[36] Besides, the father in this case had forfeited his right as he ceased to maintain the child from when he sent the mother and the child out of the matrimonial home. Hence, in the view of the Court of Appeal, the trial judge had exercised his discretion properly. Similarly, on allowing the appeal and overturning the Customary Court decision in Mofor v. Mofor,[37] which has been discussed in Chapter Two, Monono J., in the Court of Appeal in Buea stated thus:

> "... the hearing of this case in the court below was most unsatisfactory. ... the court was already biased against the defendant/appellant whose behaviour they described as below expectation... the defendant appellant was not given the opportunity to cross-examine the plaintiff/respondent ... we are firmly of the view that there was no sufficient sub-stratum of evidence to support the finding and order of the Kumba

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(34). Suit No. CASWP/CC/63/87. (Unreported).
(35). At p.4 of judgement.
(36). We shall return to this point later in the Chapter.
(37). CASWP/CC/49/88. Unreported.

Central Customary Court ... ."[38]

It discerns from the excerpt and the decision that the lower court acted improperly by acting on allegations with uncorroborated evidence.

The conclusion that may be made from the Court of Appeal judgements in Temple-Cole v. Temple Cole and Mofor v. Mofor is that improper or wrongful exercise of discretion is a ground on which a decision may be overturned. This is similar to the current review attitude of the Court of Appeal in England. The English Court of Appeal would overturn a First Instance Court's decision only if it is satisfied that the exercise by the lower court of its discretion was, on the face of the judgement, plainly wrong. This was the position adopted by the House of Lords in the case of G v. G(minors)(custody:appeal)[39] in which the ground on which the Court of Appeal can reverse a lower court's discretionary decision on child custody was stated.[40]

In current English law, therefore, the ground on which a lower court's custody decision can be overturned has been made certain by the House of Lords' pronouncement in G. v. G (minors)(custody: appeal),[41] and has been cited as the locus classicus for ground of reversal.[42] By contrast, the situation remains speculative in Cameroonian law since there has been no such authoritative dictum from a higher court. It seems however, as expected, that Lord Fraser's dictum in the House of Lords' judgement in G v. G is being followed by the courts. Although the said English case was not mentioned in any of the two Cameroonian appeal cases, the pronouncements therein are in line with what was said in this respect in G v. G.

In view of the limited amount of control exercised over lower courts in custody adjudication, the discretion of the judge in Cameroonian statutory courts in deciding what factors to be weighed in determining the welfare of the child is wide.

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(38). At pp. 3-4 of judgement.

(39). Supra, note 33.

(40). See, BROMLEY, P.M., and LOWE, N.V., Bromley's Family Law, 7th ed., Butterworths, London, 1987, p. 310. For the position prior to the said House of Lords' decision, see, MAIDMENT, op.cit., note 6: pp. 54-59.

(41). Supra, note 33.

(42). See, BRADNEY, A., "Developments in Child Custody Law," (1987) Family Law 246 at p.247.

B. CUSTODY ADJUDICATION IN STATUTORY COURTS:

As discussed earlier, custody of children is usually contested by divorcing parents in Cameroonian statutory courts. Post-divorce parenthood is frequently challenged. Custody claims reflect personality bargaining, in which parents, usually through barristers, discredit the parental qualities of each other in a bid to prove personal competence as a parent.(43) Contest is not proof of the claimants' interest in the child for the sake of the child's welfare. Parents may be motivated by self- interest and personal reasons to contest custody.(44) For example, it is possible for contest to be motivated by parents' determination to fight and win the so called, "custody battle"(45)as a means of preserving one's social prestige in the community.(46) Similarly, others may be determined to "fight" for custody as a future manifestation of their love to the child if there is loss of contact in the future. In this bid to "fight", a fit and caring parent is likely to be tainted with negative parental qualities in court. The reverse is true. Under these circumstances, the judge is not in the position to know the exact parental qualities of the contestants from the evidence before him and testimonies. It is difficult to determine with which of the claimants the welfare of the child would be well served. The contribution of the Social Welfare Department is significant in this respect. The additional evidence required to enable the judge to reach a custody decision in such cases is provided by a welfare report.

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(43). Impression from my interviews with divorced parents in the interviews cited earlier in Ch. 4, note 44. The desire to contest for personal reasons was mainly evident from the expressions of fathers. Cf. Personality bargaining in the few English cases of contested custody. See, BROPHY, J., "Custody Law, Child Care and Inequality in Britain," in SMART, C., and SVENHUIJSEN, S., (eds) Child Custody and the Politics of Gender, Routledge, London and New York, 1989, p. 217 at 236.

(44). Even fathers who were in statutory marriages in the interviews in Ch. 4, note 44 intimated when interviewed that children belong to their fathers, where the mother is challenging that right they are determined to fight for custody.

For various reasons for contesting custody, in English courts, see, KING, M., "Playing the Symbols - Custody and the Law Commission," (1987) Family Law 186 at p. 188.

(45). All the parents interviewed on this point mentioned the word "fight" for custody. This was indicative of the fact that custody contest is regarded as an extension of the divorce feud. Cf. Ibid., pp. 186-188.

(46). In view of the traditional father's right over his children, a father who fails to get custody of the children above the tender year age feels degraded, in the society. Response from fathers in the interviews cited in Ch. 4, note 44.

Welfare Reports:

A welfare report produced by an appointed social welfare officer supplies the judge with additional information about the claimants and the child whose custody is claimed, to enable him to make an order. Hence, welfare reports would be requested by the courts if the information available to the judge is not sufficient to justify the award of custody to either party. The main purpose of investigation by a welfare officer is to determine with which of the parents it would be convenient for the child to live.(47)

The Cameroonian judge in a High Court faced with a divorce case involving custody adjudication is empowered to request a welfare report on the case from the Department of Social Welfare. However, there is no government legislation stating the power of the courts to order welfare reports.(48) The courts, thus, rely on English law on the matter, which is Rule 95 of the Matrimonial Causes Rules 1977,(under the Children Act, the courts' power in this respect derives from S. 7(1)) to do so.(49) Application of the section is, however, adapted to local conditions.

The registrar in the Cameroonian divorce court is void of the administrative power over divorce vested in him by Rule 48 of the Matrimonial Causes Rules.(50) Divorce is never obtained by administrative process under the special procedure in the Matrimonial Causes Rules, which makes divorce obtainable from a registrar without a court hearing.(51) This is

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(47). Information given to me by Mrs. Kabouin Veronica, Chief of social affairs in the Ministry of Social Affairs in Buea; Mme Nyoum Georgette Claire, social worker in the Ministry of Social Affairs during interviews conducted between August-October 1990; the national Director of Social Affairs in the Ministry of Social Affairs in Yaounde during my interview in January 1989.

(48). Supra, note 47.

(49). The Matrimonial Causes Rules 1977 have in English Law been replaced by the Family proceedings Rules 1991. For a table of the new rules replacing various rules of the 1977 Rules, see, BURROWS, D., "Family Proceedings Rules 1991, Matrimonial Causes Rules 1977, Derivation and Destination Tables," (1991) Family Law i at ii-vii.

(50). Rule 48 of the Matrimonial Causes Rules 1977 is now Rule 2.36 of the Family Proceedings Rules (FPR).

(51). Cf. MAIDMENT, op.cit., note 6: p. 19.

explained by the insignificance of divorce by consent in Cameroonian divorce legal practice, as seen in Chapter Three. Administratively processed divorce by registrars is only possible where divorce is by consent. In view of the fact that petitions do not indicate a concerted resolve by parties to divorce without the necessity of proving fault, the registrar's powers in this respect are not in practice exercisable, despite the fact that the law makes such provision. Hence, the registrar's power to order a welfare report provided by the Matrimonial Causes Rules is of no practical significance.

Unlike in England,[52] therefore, judges alone in practice, exercise the power to order welfare reports. Furthermore, although the parties concerned may legally request a welfare report to be made, this is not the case in practice. The judge has the discretion of ordering a welfare report when he thinks fit but not on request. Usually, a social worker is appointed from the Department of Social Welfare in the Ministry of Social Affairs in the court area by the head of the Department to investigate the case.

Content of a welfare report and its relevance in the ensuing custody order:-

There is no legal or judicial guideline as regards the manner in which a welfare report should be prepared. It remains a matter of good practice by the Social Welfare worker charged with the investigation. The investigation into the affairs of the family is done through, on the spot observation, and inspection of various documents relating to social and economic status. Interviews are also conducted with parents, relatives, neighbours, close friends and the children involved. At times, school teachers are spoken to.[53] Furthermore, documents in support of certain information given by parents during investigation, for example, pay slips or, in case of self-employment, other documents indicating monthly earnings are examined.

Most of the information contained in a welfare report is on the economic status of the

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(52). By the provision of Rule 95 of the Matrimonial Causes Rules, either a judge or the registrar may order a welfare report. The parties themselves may also request the registrar to order a report. It seems that under S. 7(1) of the 1989 Children Act, only a Judge has the power to order a welfare report. See, BROMLEY, P. M., and LOWE, N. V., Bromley's Family Law, 8th ed., Butterworths, London, Dublin, Edinburgh, 1992, p.378.

(53). Information obtained from interviews cited earlier at note 47. Cf. WILKINSON, M., Children and Divorce, Blackwell, Oxford, 1981 cited in MAIDMENT, op.cit., note 6: p. 74.

parents. For example, there is information about both parents financial status, the type of accommodation they each have since separation. The moral status of the parents is also investigated, as well as their social lives. Thus, a welfare report contains information with regard to both parents' profession, their sense of responsibility and care as parents. Parental responsibility may override their financial status in the welfare report. For example, a persistently drunk father is unlikely to be recommended[54] to have custody regardless of his financial position. The welfare report invariably contains a suggestion as regards who should be awarded custody.[55]

The social worker who investigates a case and produces the report is required to recommend at the end of the report which claiming parent to be granted custody. The recommendation is based on the investigation that has been made. However, two considerations inform the recommendations: financial status and the child's age. The report usually recommends, where everything is equal, that custody should be awarded to the father if the child is above tender age. Social workers accept that it is not in the welfare of very young children to be brought up by their fathers. The report, thus, recommends that very young children should be left with their mother.[56] These two considerations are a reflection of the dominant ideologies in the society vis-a-vis the upbringing of children. Welfare officers are informed by the general belief, that as the breadwinner, it is in the interests of the child for the father to have custody of the children as long as they are above eight years of age.[57] Fathers' refusal to comply with maintenance orders and the incapacity of the Welfare Department to ensure compliance, are reasons advanced by social welfare workers as justification for making fathers the parents to be granted custody, as a general rule, in their recommendation.[58] Similarly, the recommendation in the welfare report is informed by the

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(54). We shall examine the recommendations in a welfare report later in the Chapter.

(55). Information form interviews cited at notes 13 and 47. Cf. The findings of Eekelaar et al., that 70% of the reports ordered in English courts in 1977 contained recommendations. EEKELAAR, J., et al., Child Custody After Divorce, Centre for Socio-Legal Studies, Oxford, 1977 cited in BROMLEY, and LOWE, op. cit., note 52: p. 381.

(56). Inference from the welfare reports which were read, supported by information from the social workers cited earlier at note 47.

(57). This point will be pursued later.

(58). The realities of women's economic life will be discussed in Chapter Six.

view held in society that the mother is the parent best suited for the upbringing of a child below the age of ten.[59] The courts are not, however, bound to the suggestions in the welfare report.

Nevertheless, the courts are legally[60] obliged to give a reason for departing from the recommendations in the report where the judge decides not to comply with them. The practice indicates that decisions in cases where welfare reports are requested do not usually depart from the suggestions in the report.[61] This is not to say that there has developed any general rule of compliance. It very much depends on the individual judge.[62]

The use of welfare reports in Cameroonian Courts as an aid in determining the welfare of the child raises questions as to fairness with regard to welfare. This issue will be discussed later in Chapter Seven.

The importance of welfare reports in deciding custody in Cameroonian courts is evident from the fact that, a custody ruling is not made if there are insufficient facts until a welfare report has been produced. The additional information in the report assists judges in the exercise of balancing and weighing the factors to determine welfare.

Custody Decision-Making : Legal Analysis:

In making custody orders on divorce, Cameroonian statutory courts apply S.1 of the Guardianship of Minors Act 1971, the full text of which had been reproduced in a previous discussion. The section makes the welfare of the child the first and paramount consideration when deciding custody of a child or on the administration of a child's property. Thus, on divorce, custody matters are to be decided within the legal framework of the principle of welfare, as seen in an earlier discussion. How do Cameroonian courts interpret the paramountcy of the welfare of the child?

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(59). Information generally obtained from interviews cited earlier at note 47.

(60). See, Stephenson v. Stephenson (1985) F.L.R 1140, Fam Law 253, CA and Dickenson v. Dickenson (1983) 13 Fam Law 174, CA.

(61). This is an inference from the cases, supported by information from the interviews cited at note 47. For a discussion on welfare reports in English law, see, MURCH, M., Justice and Welfare in Divorce, Sweet & Maxwell, London 1980, pp. 129-130. Cf. MAIDMENT, op.cit., note 6: p. 75. Cf. BROMLEY and LOWE, op. cit., note 52: pp. 377-381.

(62). Information obtained from interviews with judges cited earlier at note 13.

The paramountcy principle in Cameroonian statutory courts:-

There is no Cameroonian case in which the meaning of the provision that the welfare of the child is the first and paramount consideration has been elucidated, hence, the courts look to English cases on the issue for guidance. The current English law on the meaning of first and paramount in S.1 of the Guardianship of Minors Act 1971,(now S. 1(1) of the 1989 Children Act) is the House of Lords' pronouncement in J v. C,[63] where it was stated as follows :

> "These words must mean more than the child's welfare is to be treated as the top item in a list of items relevant to the matters in question. I think they connote a process whereby, when all relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and paramount consideration because it rules upon or determines the course to be followed."[64]

The case of J v. C established the child's welfare in English law, as overwhelmingly important that it would out-weigh claims of even unimpeachable parents[65] in the custody of their own children against a total stranger. In custody disputes between parents, the welfare of the child is the dominant consideration in English courts.[66] Writers have posited in this regard, that the interpretation of the meaning of first and paramount since the judgement in J v. C is tantamount to making the child's welfare the sole consideration in

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(63). (1970) A C, 668; (1969) 1 All ER 788, 820-821, H L.

(64). Per Lord McDermott, quoted in BROMLEY and LOWE, op.cit., note 52: p. 336

(65). Unimpeachable parent may mean a parent against whom there is no proof of a matrimonial offence. See, Ormrod L.J, in S(BD) v. (DJ) (1977) Fam Law 109 at pp. 115-116 cited in ibid, p. 341

(66). ibid., p. 341.

custody determination after divorce.[67] This conclusion is now confirmed by the re-phrasing of the principle under the Children Act 1989, as seen in an earlier discussion. Under S. 1(1) of the Children Act 1989, the welfare of the child is stated simply as the paramount consideration. The case of J v. C is the locus classicus in English law on the interpretation of the paramountcy of the child's welfare echoed in the welfare principle. It remains the same under the new law.[68] Therefore, earlier cases that suggested the existence of other considerations besides the welfare of the child[69] are no longer considered current law.

The practice in Cameroonian courts when interpreting the welfare of the child as the first and paramount consideration is adapted to the local conditions. In determining the welfare of the child, judges engage in an exercise of balancing and weighing various factors which are considered relevant in making orders which would in their view, be in the child's best interests. In exercising discretion conferred on statutory court judges under the welfare principle to determine what is in the welfare of the child in any given case, judges give regard to cultural values when deciding which factors to consider. In consequence, too much weight is given to certain factors, such as customary law fathers' custody right in determining welfare. The weight given to some factors in the balancing exercise marks the divergence of Cameroonian court practice from the interpretation in J v. C.[70] Thus, such factors appear as other custody considerations rather than just factors. For example, the significance attached to a father's right over his children, subject only to the age of the child, a factor to which considerable weight is also given; financial status of parents; and the conduct of parents in deciding custody, gives them the appearance of custody considerations. Other

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(67). BROMLEY and LOWE, op.cit., note 52: p. 340; MAIDMENT, op.cit., note 6: p. 15. Cf. CRETNEY, S.M. and MASSON, J.M. Principles of Family Law, 5th ed., Sweet & Maxwell, London, 1990, p.518.

(68). BROMLEY and LOWE, ibid., p. 341.

(69). In Re F (1969) 2 All ER 766, Megarry J., held the claims of justice between the parents as a relevant consideration in deciding custody of the child under the welfare principle. He intimated that the word "first" in the section implies that there are other circumstances that are to be considered. He went on to say that in doing so, a special weight must be given to the welfare of the infant.

See also, Lord Denning in Re L (1962) 3 All ER 1, where he pronounced that while the welfare of the child is the first and paramount consideration, the claims of justice cannot be overlooked. Cf. The dictum of Ormrod LJ., in S (BD) v. (DJ). (1977) Fam Law 109; Re K (minors)(children, care and control) (1977) Fam Law 179; Re P(A minor)(custody) (1983) 4 F.L.R. 401.

(70). Supra, note 63.

factors taken into account, at least in principle, are: a child's need for continuity and to a lesser extent, sex of the child. These elements will be discussed seriatim.

Welfare of the child : Father's custody right:-

Decisions on the welfare of the child are informed by socio-cultural ideologies. The child's welfare is interpreted in terms of customary law father's right of custody over his legitimate children which had been discussed in Chapter Three. Judges accept in most cases that the father knows what is best for the welfare of his children.(71) Courts are, therefore, reluctant to deprive the father of the custody of his children. This explains, although it does not justify, why custody would be granted to the father in a balanced case where there is no evidence that awarding custody to either parent would be against the welfare of the child. Fathers' custody right was the ground on which the original custody order was revoked in Engo v. Engo.(72)

In making the original order, Endeley J., (as he was then called) awarded custody of the two younger girls, aged six and seven to their mother. The silence of this judgement over the custody of the two older children,(73) a girl aged ten and a boy aged eleven, meant that the father's custody right over children above the tender age was presumed to be obvious to both parents. Accordingly, the order which granted custody of the younger two children to their mother was revoked by Njamsi J., some years later. Although no circumstances had occurred which warranted a change of custody from the children's mother to their father on grounds of the welfare of the child, the original order was revoked and custody was awarded to their father. The judge advanced as his rationale, the father's settled family position as evident in the following pronouncement by Njamsi J.,

> "... The father who was at the time of the original order in diplomatic service abroad is now in Cameroon and settled in Yaounde where he is now working. He has since been remarried to another woman who is a caring and loving step-mother... especially, as the two children can no longer be regarded of tender age."(74)

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(71). This information was obtained from judges and social workers spoken to in the interviews cited earlier at notes 13 and 47 respectively. An analogy with English practice will be made later in the Chapter.

(72). Suit No. Wc/48/72. (Unreported).

(73). Nothing was said with regard to the older two children.

(74). At p. 14.

From this excerpt, it is obvious that the changed circumstances which the judge based his decision on were: the father's settled life in the country and the fact that the children were no longer very young to need their mother's care. These are the two factors which at the time of the original order mitigated against upholding cultural demands to award custody to the father. Although there was no evidence that continuous stay of the children with their mother would be detrimental to their welfare, a revocation order was made. This was a decision to uproot the children from their settled surroundings. With claims of making custody decisions on the basis of the welfare of the child by the judiciary, it is to be believed that this transfer was in the children's welfare.(75)

By contrast, one conclusion is discernible from this revocation order - that the judiciary consider a father's customary law right as the main factor in determining the welfare of the child. This conclusion is also evident from the decision in Lissouck v. Lissouck.(76) This was a petition for divorce filed by the wife alleging cruelty and desertion against her husband. The court was satisfied that sufficient evidence was adduced to prove the respondent's cruelty and violence towards the petitioner and irresponsibility towards her and their three children aged seven, nine and eleven. By contrast, the husband's allegations of adultery, cruelty and neglect against the petitioner in his cross-petition, in which he claimed custody of the three children, were not established in court. The wife's petition succeeded and a divorce decree was granted. Custody of the three children was, nevertheless, awarded to the respondent without any rationale for the decision and no written judgement.

This case is an extreme demonstration of the prevalence of the customary law father's custody right over the welfare of the child and the influence of culture in statutory custody adjudication. The decision disregarded the father's proven irresponsibility towards his children. In addition, the fact was disregarded, that one of the children was not even up to eight years old, the age above which children are generally considered no more within tender age, as we shall see later in the Chapter.

These cases may be compared with English judicial practice from 1857 when judicial divorce was introduced.(77) Dominant beliefs and ideologies(78)informed judicial decision-

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(75). We shall put forward an argument against this purported judicial child protection later in Chapter Six.

(76). Lissouck née Eyenga Amba v. Lissouck Marcel, Suit No. HCSW/39^{mc}/85. Unreported.

(77). See our earlier citation on history of divorce in English Law discussed earlier in Ch. 3, p. 120 at note 5.

making in custody matters.[79] Before 1886, mothers had no right of custody and could not apply for access to their children, who were generally considered their fathers'. The case of Mrs. Caroline Norton[80] who had been forced by her husband's cruelty to separate from him is illustrative. She lost her three children aged between three and six and was even denied the privilege of knowing where they were kept by their father for three days.[81] Although under the 1886 Guardianship of Infants Act[82]a mother could apply for custody or access, custody decisions indicated paternal preference.[83]

The decision in the Lissouck case may be contrasted with the case of Besong v Besong,[84]where long-term neglect and irresponsibility to the children by their father was held tantamount to relinquishing his right of custody. The mother who had cared for the child from birth was awarded custody. The total absence of the father in this case, from the life of the child whose custody he was claiming is the basis on which this decision may be reconciled with the earlier discussed case of Lissouck v. Lissouck.[85]

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(78). In Cartlidge v. Cartlidge (1862) S W & Tr 567, a father was allowed to keep custody of a seven months old baby pending suit. The rationale was that the court must exercise its discretion under the Matrimonial Causes Act 1857, S. 35 in accordance with the common law right of the father; and that to displace it, the mother had to show more than the mere natural desire of the mother to have custody of the child.(Quoted in MAIDMENT, op.cit., note 6: p. 120).

The Victorians believed in an ideal family form in which the father's authority in the family was supreme and the children, as their mother were subordinated to him and considered his dependents. See, HOLLIS, P. Women in Public: The Women's Movement 1850-1900, George Allen & Unwin, London, Boston, Sydney, 1979, pp. 179-183. Cf. DUNBAR, J., Early Victorian Women, George G. Harrap & Co. Ltd., London, Toronto, Wellington, Sydney, 1953, ch. 2. Cf. O'DONOVAN, K., Sexual Divisions in the Law, Weidenfeld & Nicolson, London, 1985, pp.22 ; MAIDMENT, ibid., pp. 4, 108, 124.

(79). See the pronouncements of Cotton LJ., in Re Agar Ellis and Lord Ellenborough in R.v. De Manneville (1804) 5 East. Supra, note 78.

(80). Infra, note 81.

(81). See the excerpt of Mrs. Norton's letter to Parliament in HOLLIS, op.cit., note 78: p. 180, para. 4.

(82). S. 5 of the Guardianship of Infants Act 1886 reproduced in MAIDMENT, op.cit., note 6: p. 99.

(83). Ibid., pp. 5 and 6.

(84). Catherine Besong v. Makepeace Besong, Suit No. HCF/64^{mc}/89. (unreported).

(85). Supra, note 76.

It is evident from the decisions[86] that unless it is apparent that the child's welfare would be jeopardised by granting custody to the father, traditional values are upheld and the mother would be denied custody of the children if they are above eight years of age.[87] This is indicative of paternal preference in statutory custody adjudication, done in the process of exercising judicial discretion inherent in the welfare principle.[88] Orders, therefore, involve separation of siblings[89]in cases of young children. It is usually the case that older children are awarded to their father's custody while children within the tender age are generally, left in their mother's temporary custody unless there is sufficient cause to rule otherwise. The following cases which we shall discuss later are illustrative of this practice: Engo v.Engo[90]; Manga Williams v. Manga Williams [91]; Ojong v. Ojong[92]; Foma v. Foma.[93]

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(86). This inference was confirmed by the response of judges in the interviews cited earlier at note 13.

(87). We shall return to this discussion later, post, Ch. 6. Cf. Current practice in English courts indicates that in most cases custody is awarded to the mother in about 74% of cases in which sole custody orders were made. See, BROPHY, op. cit., note 43: p. 220. Cf. KNOTT, op. cit., note 13: p. 218. Cf. MAIDMENT, S., "A Study in Child Custody," (1976) 6 Family Law 195 at pp. 198-199.

(88). We shall return to this issue, post, Ch. 6.

(89). Cf. See English judicial practice. See Cosey v. Cosey (1980) 11 Fam Law 56, AC, where the Court of Appeal disapproved of an order separating two sisters though the parents lived very near, on opposite sides of the road. It was also held in Clarke-Hunt v. Newcombe(1983) 4 F.L.R. 482; 13 Fam Law 20, CA, that as it was in the younger boy's interest to be with his mother, and as it was inappropriate to separate the brothers, custody of both boys should be granted to her. see also, Dunn LJ., in Adams v. Adams (1962) 1 W.L.R 724, CA.

(90). Suit No. WC/48/72. (Unreported).

(91). Jesco Manga-Williams v. Anna Manga-Williams, suit No. HCSW/41^{mc}/81. Unreported.

(92). Martina Ojong v. Daniel Ojong, Suit No. WC/6/88, p. 5.

(93). Foma Longchi v. Foma Juventine Yemetio, Suit No. HCSW/34^{mc}/85. Unreported.

Father's custody right is subject to the tender year presumption:-

The presumption that it is better for younger children to be brought up by their mothers has over the years permeated the minds of custody decision-makers in most common law jurisdictions, for example, English and Cameroonian courts. Although the tender year presumption, as it is called,[94] is not a rule of law in English law,[95]it is common to find judicial statements on maternal preference in cases involving young children. The following pronouncement in the 1958 case of Re S[96] is demonstrative:

> "The prima facie rule (which is now quite clearly settled) is that other things being equal, children of this tender age(a boy of under five) should be with their mother."

A similar utterance was made by Lord Denning, M.R.,(as he then was) in the Court of Appeal case of Re L[97]where he said that "as a general rule it was better for little girls to be brought up by their mothers."[98] Although not a rule of law, maternal preference in English courts has been recognised in judgements as a dictate of nature.[99] There is evidence indicating judicial opinion in English courts that, however good a sort of man the father may

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(94). Bowlby's theory on the young ones' need for their mother's care was the most influential: what is believed to be essential for mental health is that any young child should experience a warm, intimate, and continuous relationship with his mother (or permanent mother-substitute-one person who steadily mothers him) in which both find satisfaction and enjoyment. See, BOWLBY, J., Child Care and the Growth of Love, Penguin, Harmondsworth, 1972, p. 13. Cf. PRIEST and WHYBROW, op.cit., note 5: p. 31 at note 16. Cf. Donovan LJ., in Re B (1962) 1 All ER 875. Infra, note 95.

(95). In Re B, supra, note 94, Evershed LJ., Harman LJ., Donovan LJ., agreed that there was no such rule of law. The point that there is no such rule has recently been extended to absence of any presumption to that effect, by the Court of Appeal, in Re A(a minor), The Times, June 20, 1990 cited in (1991) Fam Law 204.

(96). (1958) 1 All ER 783.

(97). (1962) 3 All ER 1.

(98). Cf. Their Lordships' pronouncement Re B, supra, note 94; Harman LJ., in Re C(A) (1970) 1 All ER 309.

(99). See, Donovan LJ., in Re B, supra, p. 300, note 94. In H. v. H (child custody) (1984) Fam Law 112, Purchas LJ., stated that: where a young child of three or four is involved, one must put considerable weight in the balance of the special capacity of the mother to care for a young child in the day-to-day ups and downs of family life, times of illness, times of stress, times in the middle of the night when comfort is needed and so on.

be, he cannot perform the functions which a mother performs by nature to a little girl.[100] Hence, although English judges nowadays choose to avoid such comments, the tender year presumption is still a socially and judicially recognised practice, though, to a lesser extent.[1]

Like in English law, the tender year presumption is not a rule of law in Cameroonian law, nor is it recognised as a settled judicial principle. The following statement by Njamsi J., in Engo v. Engo[2] is illustrative:

> "There is no settled rule that a child of tender years should be committed to the custody of the mother... ."[3]

Nevertheless, the age of the child is a significant factor in the exercise of balancing and weighing factors to determine the welfare of the child. Judges accept the social presumption that mothers are best suitable to care for their young children.[4]

Where children of tender ages, usually, below eight years are involved, therefore, a father's custody right is overlooked. The judiciary say this is done because it is in the welfare of the child. This discussion will be returned to later in the Chapter. Custody under these circumstances is granted to the mother unless it is evident that awarding custody of the young child to the mother would be detrimental to the child's welfare. A statement made in this regard in the Court of Appeal judgement in Temple-Cole v. Temple-Cole,[5] in which Bawak J., made the following pronouncement is illustrative:

> "In law, it is generally presumed that a child of tender years such as the one involved here (just over one year) is better off with her natural mother...."[6]

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(100). See, Stamp LJ., M v. M (1980) 1 F.L.R. 77. See also, PRIEST, and WHYBROW, op.cit., note 2.

(1). MAIDMENT, op.cit., note 6: p. 156; KNOTT, op.cit., note 13: p. 218. See also PRIEST, and WHYBROW., ibid. Cf. The pronouncements of Butler-Sloss LJ., in Re S (A Minor)(Custody)(1991)2 F.L.R 388 at 390, CA; Re A (A Minor)(Custody)(1991)2 F.L.R 394 at 400, CA. Cf. BROMLEY and LOWE, op. cit., note 52: p. 387.

(2). Suit No. WC/48/72. (Unreported).

(3). At p. 13 of case file.

(4). Information obtained from interviews with judges cited earlier at note 13. We shall return to an analysis of the tender year presumption in statutory custody adjudication later in Chapter Six.

(5). Suit No. CASWP/CC/63/87. Unreported.

(6). Per Bawak J., at p. 4 of typed judgement. He, however, qualified the rule. See, our earlier reproduction of this excerpt on p. 180.

In the Temple-Cole case, the original decision which awarded custody of the one year old girl to her mother was upheld on appeal against her father's claim. Similarly, in Ondoa v. Ondoa,[7] the young age of the twins was decisive in granting custody of the children to their mother despite her low financial status. It was also held in Foma v. Foma [8] and Manga-Williams v. Manga-Williams[9] that while the father had custody of the older children, it was in the best interests of the very young for their mother to be awarded custody of them.

The question that may be asked is, how is it that the courts accept that it is in the welfare of the child to award custody to a mother even if her financial status is low in cases where young children are involved, but refuse to hold the same when adjudicating on the custody of children above tender age? Two conclusions may be made from this: First, it is plausible to infer that the relatively low financial status of mothers advanced by the judiciary as the justification for paternal preference in custody does not in fact, justify custody bias in favour of fathers. This argument will be pursued in Chapter Six. Second, we may also conclude that award of children of tender years to their mother's custody is not necessarily motivated by judicial desire to protect the welfare of children. Rather it may be seen as a means of avoiding the inconvenience to a father of having to raise a young child, a point which will be pursued in Chapter Six. The proviso usually inserted in orders awarding custody of tender year children to their mothers supports this conclusion.

The rulings granting custody of young children to their mothers usually contain orders requiring the father to pay monthly maintenance to the mother for the upbringing of the children in her custody.[10] It is common for maintenance orders made in Cameroonian statutory courts to contain a proviso stating when the father's obligation to pay maintenance ends - when the child in question is no longer within tender age. Once the child whose custody is awarded to the mother by virtue of the young age attains the age specified in the order, custody reverts to the father although there may have been no changed circumstances

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(7). High Court, Buea, 1984.
(8). Suit No. HCSW/34^{mc}/85. (Unreported)
(9). Suit No. HCSW/41^{mc}/81. (Unreported)
(10). Where orders are made(judges are wary to make orders requiring fathers to pay child support on the basis that mothers misappropriate the money for themselves. Such orders usually oblige a father to pay maintenance to the mother for support of the young children in her custody. In only one out of all the cases consulted was a mother (she had better financial status) asked to pay maintenance to the father for child support: Lissouck v. Lissouck, Suit No. HCSW/39^{mc}/85. (Unreported)

to warrant such a transfer. This is tantamount to saying that the custody of the child who has just out-grown the tender age reverts to the father who is rightly entitled to it. The basis of his entitlement is not in statutory law. Father's custody right which the proviso in this circumstances is a customary law right. This right is, nevertheless, incorporated in statutory court custody adjudication, thus demonstrating the influence of cultural values in statutory custody decision-making under the welfare principle. In Foma v Foma,[11]custody of the younger girl was granted to her mother while the older boy who was just over ten years old, was left to the father's custody. The order for maintenance read as follows:

> "The applicant to pay maintenance to the respondent until she attains the age of eight years when the father petitioner will have to get her from the respondent and maintenance will cease."

Certainly, such transfer to the father is not prompted by the desire to protect the welfare of the child. In contrast with English judicial practice,[12]this indicates disregard for the importance of maintaining status quo in a child's upbringing as a factor in the balancing exercise of determining the child's welfare. Although there are judicial pronouncements which posit continuity as a factor considered by the Cameroonian judiciary, we shall see in a later discussion[13] that relatively less significance is attached to it as a factor. This means that the status quo of a child can easily be uprooted to protect customary law father's right in statutory custody adjudication. This is illustrated by the mandatory ordering of transfer of children from mother to father when they are no longer within tender age, as the orders awarding custody of young children to their mothers usually state. The father's right in case of failure to transfer by the mother is enforceable in court. There are, however, cases in which the mother is awarded permanent custody of children against the father's claim, regardless of the age of the child. Usually, this is done in cases where the father is seen by the judiciary to have forfeited his customary law custody right.[14] Indeed, it is in such cases that other factors may be balanced in determining the welfare of the child.

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(11). Supra, p. 195, note 8.
(12). The status quo factor will be discussed later in the Chapter.
(13). Post, pp. 201-202 and Ch. 6, p. 221-222 and 228-229.
(14). We shall discuss loss of customary law father's custody right later in the Chapter.

Welfare of the child: Other factors:-

Besides the father's custody right and the tender year presumption, there are factors which, through experience in family matters and familiarity with custody cases, judges consider necessary in determining the child's welfare. For example, the conduct of parents; parents' financial status; the necessity of continuity in the upbringing of a child; and to a lesser extent, sex of the child, are factors said to be given thought.

The conduct of parents is considered by the court in deciding whether the child's welfare would be served if custody is awarded to the mother or father. As in English courts,[15] parental conduct is relevant as an issue if the conduct in question would prejudice the child's welfare in any way. A parent's moral and physical character is weighed against the other factors. In Agbortoko v. Agbortoko,[16] the father who was proven to be physically violent, was denied custody on the ground that granting custody to him could have put to danger the physical welfare of the children. Similarly, conduct was stated in Temple-Cole v. Temple-Cole,[17] as a ground on which a mother may be denied custody of a very young child. The type of conduct referred to by Bawak J., in that case, was neglect and immorality.[18] Neglect by a parent is conduct directly relevant to the welfare of the child as it affects the parenting capability of the parent. Thus, the mother who was guilty of neglect in the case of Ojong v. Ojong[19] was denied custody of her four year old daughter.

Reference to morality as conduct that is relevant in deciding the welfare of the child in the Temple-Cole case has a different connotation. It implies that conduct as it relates to immorality is particularly significant for the sake of justice between the claiming parents rather than the desire to preserve the child's welfare. The words of Njamsi J., in Engo v. Engo[20] on the revocation of the original custody order which awarded custody of the two younger children to their mother are indicative. He stated thus:

> "... Mindful of my responsibility to the general welfare as well as the long-term benefit of the children of the dissolved marriage.... Also, in the interest of justice...."

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(15). Post, p. 198.
(16). Suit No. HCF/60^{mc}/89. Unreported.
(17). Suit No. CASW/CC/63/87. (Unreported).
(18). See the excerpt reproduced earlier on p. 184.
(19). WC/6/88, p. 5.
(20). Suit No. WC/48/72. (Unreported)

Although it is not stated whose interest of justice was being considered, the fact that the children who had since settled with their mother, were by the new order transferred to their father, has one implication: that the order was revoked partly in the interest of justice to the father. Justice in this case was for the father to re-establish his right of custody which was suspended by virtue of the young age of the children when the original order was made. This right of custody is a customary law right, which nevertheless, informs statutory court custody decision-making in exercise of judicial discretion under the welfare principle.

It follows that, custody decisions in these courts also reflect the interest of justice to the parent not held blameworthy for the breakdown of the marriage. In Doh v. Doh[21] the mother who was found guilty of adultery which was one of the facts established on divorce, was denied custody. The order awarding custody to the father was justified as the court advanced, on the ground that the children's moral welfare would be prejudiced if custody was awarded to the mother. A similar justification was put forward for the decision in Mensah v. Mensah [22] another divorce case based on the mother's adultery.

The cases can be compared with English cases that were decided under the old divorce law[23]when divorce was solely fault based. The English Court of Appeal in Re L, (infants)[24]gave care and control of two girls aged six and four years to their father, taking the view that the mother had broken up the home by going to live with another man, thus, causing the contest over custody to arise. Lord Denning, M.R., stated that although "as a general rule it is better for little girls to be brought up by their mother," simple justice between the parties demanded that the father should have custody. "Whilst the welfare of the children is the first and paramount consideration, the claims of justice cannot be overlooked."[25] Similarly, although custody was granted to the mother who was responsible for the breakdown of the marriage in Re F (an infant),[26] the formulation of Megarry J., in

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(21). High Court, Buea, 1973.
(22). West Cameroon High Court, 1968-70.
(23). We are referring to divorce law as it stood before the 1969 Divorce Law Reform Act, which made irretrievable breakdown the sole ground for divorce, now contained in S. 1 of the Matrimonial Causes Act 1973. Although the question of fault is still relevant as facts to be adduced in prove of irretrievable breakdown, divorce by consent was introduced by the new law. S.1(2)a-e. This had been discussed in Ch. 3.
(24). (1962)3 All ER 1, CA.
(25). At p. 4.
(26). (1969) 2 All ER 766.

that case was along the lines of the Court of Appeal decision in Re L(infants).[27] His pronouncement indicated that there are other considerations apart from the child's welfare, such as the conduct of the parties.

These cases were decided before their Lordships' elucidation of the meaning of first and paramount in the case of J v.C,[28]which had been discussed earlier. Thus, the significance of factors[29]which the courts give regard to is limited to the determination of the child's welfare. Lately, therefore, there has been a tendency for the English courts to confine questions of behaviour to ascertaining parental abilities of the parties. On this interpretation, justice between the parties is irrelevant. Conduct as an issue only arises in relation to the determination of welfare. That is, if the conduct is such that would prejudice the child's welfare as demonstrated by the decisions in Re K (Minors)(children, care and control);[30]S(BD) v. S(DJ);[31] Re P(a minor)(custody).[32] The recent Court of Appeal decision in the case of Re H(Minor:Custody appeal)[33] is illustrative.[34].

By contrast, the importance of conduct as a factor in Cameroonian courts is not so limited to assessment of parental ability. A parent's character is considered in its entirety. Courts take into account behaviour, such as, matrimonial misconduct in the sense of responsibility for the divorce. These include, for example, adultery, persistent neglect, desertion, cruelty and physical violence. This extended significance attached to conduct of parents may justify an inference that the Cameroonian courts give regard to other "considerations". Thus, conduct, and father's custody right, are factors given the appearance of custody considerations rather than mere factors to be weighed in determining welfare of

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(27). Supra, note 24.
(28). (1970) A C, 668; (1969) 1 All ER 788, 820-821, H L.
(29). See BROMLEY and LOWE, op.cit., note 52: pp. 385-392. Cf. CRETNEY and MASSON, op.cit., note 67: pp. 517-520.
(30). (1977) Fam Law 179.
(31). (1977) Fam Law 109.
(32). (1983) 4 F.L.R. 401.
(33). (1991) Fam Law 422.
(34). In that case, Lord Butler-Sloss LJ., in the Court of Appeal upheld the decision of a First Instance Court judge who awarded custody of a 14 years old boy to his mother, despite allegations of perjury, theft, blackmail, assault, battery and adultery by the child's father against her. Similarly, see, C v. C (a minor) (custody) appeal (1991) Fam Law 175, where the Court of Appeal granted custody of the child to the mother though she was homosexual and lived with her lesbian friend.

the child which is legally the first and paramount consideration. It may be asked whether the judges are right in attaching significance to parental conduct if it would not affect one's parental qualities. A decision based on such considerations is unlikely to be motivated by the need to serve the welfare of the child. Perhaps socio-legal and economic conditions under which the courts operate[35] account for this Cameroonian judicial practice. The significance attached to status of the parents can also be explained within this context.

Financial status is another factor to which great weight is given in the balancing exercise of determining welfare in divorce custody adjudication.[36] The parent with a better financial position is likely to be given more consideration since securing the material welfare of the child, as seen in Chapter Four, is of greater concern. Indeed, the financial status of parents is intimately linked with the socially and culturally informed judicial view that it is in the welfare of the child for custody to be with the father. Fathers are much more likely to be in a better financial position than mothers.[37] Viewed from this economic perspective, therefore, a sound financial position is a pre-requisite for granting custody to mothers. Especially, as there is lack of effective legal enforcement of maintenance orders which most fathers refuse to comply with.[38] Besides, the courts are reluctant to make maintenance orders which are deemed necessary where custody is granted to a mother who has not got sufficient means of providing for the children. This reluctance is founded on the view held

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(35). See our earlier discussion on this in Ch. 4, p. 159.

(36). Information obtained from judges interviewed on the point, cited earlier on p. 174, note 13.

(37). Fathers are legally and socially better placed for public or private employment, an historical fact which has only recently began to change. This point will be pursued in Ch. 6.

(38). Information obtained from the social welfare workers cited earlier at note 47. This was confirmed by divorced mothers in the interview cited earlier Ch. 4, note 44. Cf. PEARSON, J., and THEONNES, N., "Supporting Children After Divorce: The Influence of Custody on Support Levels and Payments,"(1988) 3 Family Law Quarterly 319 at pp. 319-320.

in society that mothers misuse child support money for their own purposes.[39]

Unlike, the discussed factors, relatively little weight is given to the importance of continuity in a child's upbringing and the sex of the child. However, there are pronouncements which indicate that judges are reluctant, as in England,[40] to remove children from familiar surroundings. It has been held that it is in the welfare of the child to remain in the custody of the parent who is already in possession of the children. On awarding custody to the father of the four year old girl in Ojong v. Ojong,[41] Endeley J., stated thus:

> "... child had started attending a primary school at Bota where the dad was. It would not be in the child's best interest if she be removed from it."

Similarly, in Agbortoko v. Agbortoko[42]where custody of two children aged nine and seven was granted to their mother, they had been living with her since birth. Furthermore, evidence adduced that the five children in Mayiba v. Mayiba[43] who were left to their father's custody had since been living with and cared for by their father was one of the factors said to have been considered in making the decision.

It is difficult to reconcile judicial concern for status quo to be preserved with the order for mandatory transfer inserted in orders awarding custody of young children to mothers discussed earlier. This makes the conclusion we made earlier regarding the relationship between granting of custody of young children to their mothers, the welfare of the child and

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(39). Information obtained from interviews with judges cited on p. 174, note 13.

(40). The importance of continuity of care as a factor to be weighed in determining welfare, had been judicially recognised since the nineteenth century in the case of Re McGrath(1893)1 Ch 143. Lindley LJ., in that case stated that the duty of the court is to live the child alone. He further said that the ties of affection cannot be disregarded. The current attitude is exemplified by the dictum of Ormrod LJ., in D v. M (1982)3 W .L. R. 891, where he stressed the importance of continuity of care and urged that disruption of bonds should be avoided. See also, the pronouncement of the Court of Appeal in Stephenson v. Stephenson,(1985) Fam Law 253; (1985) 2 F.L.R 1142. See, BROMLEY, and LOWE, op.cit., note 52: pp. 389-390. Cf. GOLDSTEIN et al., op.cit., p. 172, note 2: Ch. 3. Cf. MAIDMENT, op.cit., p. 173, note 6: pp. 207-210. GOLDSTEIN et al., the principal advocates for the necessity to maintain continuity in a child's growing up have been criticised on various issues. See post, Ch. 6, note 59.

(41). Suit No. WC/6/88, p. 5.

(42). Suit No. HCF/60^{mc}/89. (Unreported).

(43). Suit No. HCF/22^{mc}/86. (Unreported).

the father's right,[44] the plausible explanation for judicial recognition of the tender year presumption.

Like the status quo factor, there exists judicial opinion on the necessity to consider the sex of the child as a factor to be weighed in the balancing exercise.[45] The social ideology[46] that it is better for little girls to grow up with their mother is recognised, in principle, by the judiciary as revealed in the interviews. Cases consulted do not, however, indicate the development of this opinion as a rule of law.

It has emerged from the foregoing discussion that statutory courts adapt the welfare principle to social and cultural realities. Importation of customary law rules, such as, a father's right over his legitimate children in statutory court custody adjudication is illustrative. Cultural values founded on customary law engender the use of customary law father's custody right in statutory courts. This is evidence of adaptation of the English welfare principle to Cameroonian society in order to conform to its cultural beliefs. We shall examine in the next two Chapters whether such adaptation enables the making of custody decisions which reflect the spirit of the welfare principle.

C. CUSTODY ADJUDICATION IN CUSTOMARY COURTS:

We had discussed earlier that the principle of welfare exists in customary law regulating decision making on the custody of children after divorce. The principle is not applicable where divorce is extra-judicial. No custody ruling is required by the various customs. Application of the welfare principle is restricted to cases where divorce is obtained in a Customary Court. Customary Courts are required to make custody decisions within the

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(44). We shall return to this discussion later in Chapter Six.

(45). Judges spoken to in the interviews cited earlier (on p. 174, note 13) intimated the importance of little girls to grow up with their mothers. No particular preference was expressed in respect of little boys.

However, the retired Chief Justice Endeley posited that in his experience as a father, little girls have not been inclined to their mothers. Cf. The pronouncement of Lord Denning M.R., in Re L (1962) 3 All ER 1, CA. See also, the pronouncement of Butler-Sloss LJ., in Re S (A Minor) (Custody) (1991)2 F.L.R 388, CA at p. 390. Cf. BEVAN,H.K., Child Law, Butterworths, London, 1989, p. 88. Cf. BROMLEY and LOWE, op. cit., note 52: p. 390. Cf. S. 1(3)d of the 1989 Children Act.

(46). Nearly all the parents spoken to in the interviews cited earlier (in Ch. 4, at note 44) were of the opinion that it is better for little boys to be in the care of their father, while girls grow up with their mothers in case of divorce.

framework of the Customary Court Rules which are statutory in origin. The interpretation of welfare in Customary Courts had also been considered. We intend to concentrate the present discussion on custody adjudication in Customary Courts. Arrangements for the future upbringing of children whose parents divorce extra-judicially have been examined.[47] The purpose of this discussion is to consider if custody decision making in Customary Courts is aimed at securing the welfare of the child. If so, we shall examine the manner in which Customary Courts determine the welfare of the child. Before that, however, we shall treat the question of the descretion of Customary Court "judges" in making custody orders.

Customary Court's Discretion in Making Custody Orders:

Unlike in statutory courts, Customary Court judges are not automatically required to make custody orders once there are children of the marriage to be dissolved.[48] The powers of Customary Courts to make custody orders as discussed earlier, are derived from the Customary Court Rules. Under the Rules, Customary Courts are empowered to make orders under certain conditions only : an order may be made if custody is specifically claimed in the petition or if the court deems it necessary to make an order in the interest of the child.[49] This provision which empowers Customary Court judges to make custody orders is of limited practical effect for two reasons: First, as mentioned in a previous discussion, the Customary Court Rules are almost non-existent as far as application in Customary Courts is concerned. Rather, the courts apply their tribal customary laws regulating divorce.[50] Secondly, even if the Rules are applicable as in the Customary Court of Tombel, petitions do not, usually contain claims for custody. Instead, the petitions for divorce usually contain an invitation for assessment of bride price to be refunded as discussed earlier. Therefore, whether a particular Customary Court is applying the Rules or not, the decision to make custody orders is basically on the decision-makers' discretion.

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(47). See our earlier discussion on these matters in Ch. 4.

(48). See the analogy we made between this Customary Court Custody rule and the making of S.8 orders under the children Act 1989 in Ch. 4.

(49). See the general section, ch. 10, Customary Court Rules.

(50). Information obtained from my interviews Pa Dibo Ngoh and Mr. Sona S; Mr. Dituke and Mr. Ikongi; Mr. Panjumba and Mr. Nanje; Mr. Stanislaus - all Customary Court personnel in the Customary Courts of Kumba, Kombone, Mbonge and Tombel respectively during interviews conducted between June-August 1990.

Generally,[51] Customary Court judges choose not to be concerned about the children of the marriage, hence, remain silent about custody after pronouncing the divorce, unless there is a claim for custody. Where custody is specifically claimed,[52] the judge still has the discretion of deciding whether to interfere with a father's customary law right over his children or not.

Is the welfare of the child an issue in custody adjudication in Customary Courts?:-

The Customary Court Rules 1965 provide that in deciding custody, Customary Courts should regard the welfare of the child as the first and paramount consideration.[53] The rules provide further that in the event of conflict between the Rules and the customary law of a particular tribe, the Rules should prevail.[54] Unlike the welfare principle under statutory law, the Rules indicate guidelines as regards the factors that are to be weighed in determining welfare. They are, the father's right over his legitimate children, the age of the child, parental social and financial status, and conduct of the parties.[55] In practice however, greater regard is given to the father's custody right, and only exceptionally, if at all, are the other factors considered.[56] Therefore, there is no difference in practice, between Customary Courts that apply the Customary Court Rules and those that apply customary law as it obtains in cases of extra-judicial divorce discussed in chapter four. Custody decision-making is informed by the traditional rule of a father's right over his legitimate children.

To make a custody order simply requires the ascertainment of one fact: are the children

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(51). Hardly was there any mention of children in the cases consulted.

(52). Mothers may claim custody on the ground that their father will not be able to provide for the children, or that he has got wicked wives who will not care for her children. This information was obtained from interviews with the Customary Court personnel in kumba cited in this page at note 50.

(53). Rule 3 of the Circular Instructions Regarding Child Custody in the Customary Court Rules.

(54). Rule 1(a) of the Circular Instructions Regarding Child Custody in the Customary Court Rules.

(55). Rule 11 in chapter 10 of the Customary Court Rules, and Rule 16 of the Circular Instructions Regarding Child Custody in the Customary Court Rules.

(56). Information obtained from Mr. Stanislaus, the registrar and "judge" in the Customary Court of Tombel, (the only court in which the writer was told the Rules are in application) in the interviews cited on p. 203, note 50.

whose custody is to be ordered the legitimate[57] children of the divorcing father and his wife? Once legitimate affiliation is established between the father and the children, custody is granted to the father, in accordance with the customary law rule in the various tribes that the father is the "owner" of his legitimate children. This customary law rule is relaxed where children of young ages are involved. As a general rule in all the tribes studied, young children are left in the care of their mothers, unless, the father insists on his right regardless of the children's tender age.[58] Custody of children who are left in their mother's custody due to their young ages, reverts to the father as soon as the children are no more seen to be within the tender year age. Furthermore, a father's custody right may be lost by his conduct or poor financial condition as seen in Chapter Four.

Against this Customary Court practice, the question may be asked how the welfare principle provided for in the Customary Court Rules may be reconciled with the traditional father's right which in practice determines custody decisions. This point will, however, be pursued in the next Chapter.

Determination of the child's welfare in Customary Courts is adapted to socio-cultural values in the society. Courts do not generally apply the principle of welfare since customary law obtaining in the different tribes studied is applied rather than the Rules. In indigenous customary law, the welfare of the child is associated with fathers' custody right. Like in statutory courts, it is a socio-cultural belief that the father knows best what is in the interests of his children. This is an ideology founded on prevailing socio-cultural and economic conditions examined in a previous discussion. Trust in fatherhood seems to be the reason why a father's custody right would be upheld if he insists on having custody against a good mother even in cases where very young children are involved. Nevertheless, customary law in the various tribes recognises the special suitability of mothers to care for their young ones.[59]

This is not to say, however, that the interest of the child is investigated as an independent issue on divorce. Rather, custody of children in customary divorce is eschewed in the divorce

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(57). Legitimacy in the tribes of Mbonge, Bakundu, Bafaw, Barombi, and the Bakossi tribe had been treated in Chapter Two.

(58). Information given to me by Customary Court officials in the interviews cited earlier on p. 203, note 50. Confirmed by information from the interviews cited earlier in Ch. 3, note 4.

(59). Information obtained from interviews cited Ch. 3, note 4.

and only considered when specifically claimed in the petition, despite the provision in the Rules empowering orders to be made if deemed necessary in the welfare of the child.

CONCLUSION :

The Chapter has sought to explain how Cameroonian statutory courts apply English legal principles when making custody decisions. Judicial determination of the welfare of the child in these courts. It has also been discussed that the concept of custody does not exist in indigenous customary law. Despite statutory attempt at introducing that concept in Customary Court divorce, the practice of these courts still very much reflects indigenous customary law. Custody is rarely an issue in Customary Court divorce as in extra-judicial divorce, unless it is specifically claimed in the divorce petition. We will return to this issue in Chapter Seven.

It also emerged from our discussion that there is diversity in custody decision-making between English courts and Cameroonian statutory courts. This difference in practice exists notwithstanding the fact that the English law principle of welfare is the law applicable under Cameroonian law as well. Basically, the determination of the welfare of the child is fundamentally divergent, with much significance attached to material well-being closely annexed with customary law fathers' right in Cameroonian courts. By contrast, relatively less significance is attached to this factor in English courts.

There is no doubt that there are different social, environmental, economic and cultural factors in the Cameroonian society, where English laws developed to meet the particular circumstances of the English society are applied. Hence, adaptation of these laws to local circumstances is indeed warranted. Despite this need for adaptability, however, paying lip-service to the principle of welfare in custody adjudication, for the purpose of upholding the traditional father's right would not be seen as judges' adaptation of English laws to local conditions. Rather, it appears to be unreasonable exercise of discretionary power conferred by the indeterminate welfare principle. This attitude may lead to unpleasant custody decisions being made to the detriment of children of divorce. This is our discussion in the next Chapter.

CHAPTER SIX

DIVORCE CUSTODY AND PATRIARCHAL RELATIONS IN CAMEROON

It has emerged from the discussion of custody law and practice that customary law traditional values are still fundamental in determining post-divorce upbringing of children both in statutory and customary divorce. Hence, customary law has not been suppressed by statutory law as some writers[(1)]have feared. The rights of the father over his children based on indigenous customary law[(2)] inform custody decision-making by the judiciary. It is the view of judges that the welfare of the children is served by awarding, as a general rule, custody to their father.This is done in exercise of judicial discretion called for by the indeterminate welfare principle.

As regards children of customary divorce, paternal custody may be explained in a cultural context. A customary marriage transfers the wife into her husband's family, her main function being to procreate children for him and his family. Undoubtedly, barrenness or infertility, as seen in Chapter Three, is a fundamental cause of instability in marriages and divorce in customary law. The filial status of children in a customary marriage is, therefore, determined from the day of the marriage - any children of the marriage "belong" to their father and his family. They remain as such during marriage and on divorce. The justification advanced for this rule and the arguments against it have been made in an earlier discussion.

The incorporation of customary law father's custody right rule in statutory custody adjudication by the judiciary is of greater concern. Unlike in customary divorce, customary law father's custody right is not a rule of law in statutory court divorce. Rather it is paternal preference in custody adjudication. Undoubtedly, paternal preference is not overtly stated in judicial pronouncements as the basis on which custody decisions are made by the judiciary. Rather, the welfare of the child is interpreted and custody decisions are made in a manner which upholds customary law paternal custody rule. In consequence, custody adjudication in

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(1). In his book on family law in francophone Cameroon, Nkouendjin opens up in the general section with a remark to this effect. See, NKOUENDJIN, Y.M., Le Cameroun à la Recherche de son Droit De la Famille, Tome xxv, Paris, 1975, p. 41.

(2). This distinction has been used throughout in a paper on folk law. See, WOODMAN GORDON, R., "How State Courts Create Customary Law in Ghana and Nigeria," in FINKLER, HARALD. W., (Compiler, 1983). Paper of the Symposia on Folk Law and Legal Pluralism, X1th International Congress of Anthropological and Ethnographical Sciences, Vancouver, Canada, August 19-23, 1983; Ottawa: Commission on Folk Law and Legal Pluralism, p. 297 at pp. 298-319.

Cameroonian statutory courts is informed by paternal preference, a reality which had been examined in the previous Chapter. This custody bias in favour of fathers is, however, usually disguised in judicial pronouncements by references to the gender-neutral standard for custody adjudication laid down by statutory law - the welfare of the child.

The apparent superior financial position of fathers in families is generally put forward by decision-makers as justification for awarding custody to fathers. This is premised on the mistaken belief that the father is the breadwinner in the family. We shall return to this discussion later in the Chapter. Complete separation between custody decision-making under customary law jurisdictions and statutory law judicial institutions is yet to be achieved in practice. No doubt, the legal framework appears unambiguously clear: Statutory courts are asked to apply the welfare principle under the Guardianship of Minors Act 1971 without any legal guidelines on what constitutes the welfare of the child. By contrast, Customary Courts are directed to apply the welfare principle as it is stated in the Customary Court Rules 1965 which incorporate indigenous customary law father's custody right as the test for determining the welfare of the child. The indigenous customary law right of fathers over their children determines post-divorce future of children in extra-judicial divorce settlements in villages. However, statutory court custody practice as discussed earlier, interprets the welfare of the child in terms of customary law father's custody right. The discussion in the foregoing paragraph supports the conclusion made earlier that complete separation between custody adjudication in statutory courts, Customary Courts and in extra-judicial divorce settlements is yet to be achieved. For, indigenous customary law paternal rule informs decisions on the post-divorce future of children in the three jurisdictions. At least, this is the situation until the judiciary ceases to be dominated by the same fathers in whose favour customary law rules on marriage work.[3] The judiciary is dominated by male judges. Some are married under customary law and those who celebrated statutory marriages benefit from the influence of indigenous customary law father's right on custody decision-making, as the welfare principle

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(3). See, NKOUENDJIN, op.cit., note 1: pp. 33,41,43. Cf. GEARY, C., On Legal Change in Cameroon: Women, Marriage and Bride Wealth, Boston, 1987, p. 4. Cf. WANITZEK, U., "Integration of the Personal Laws and the Situation of in Ghana: The Matrimonial Causes Act of 1971 and its Application by the Courts," in FINKLER, HARALD, W., (Compiler, 1991). Paper of the Commission on Folk Law and Legal Pluralism, Proceedings of the VIth International Symposium, Ottawa, Canada, August 14-18 1990, Vol. II, Themes II and III, p. 716 at p. 718.

is interpreted in statutory courts to uphold customary law father's custody right.

As has already been discussed, the content of the welfare principle is indeterminate. This allows judges the discretion to interpret the welfare of the child as they think fit. It has also been seen that imported Western law did not suppress social values and cultural beliefs dominant in Cameroonian society. Rather, values such as customary law father's custody right inform custody decision-making on the basis of the welfare principle. We have seen in a previous discussion that judges hold that it is generally in the welfare of the child to award custody to the father.

In light of cultural influences in statutory custody adjudication, an assertion could be made that judges are mis-applying the law. An objection may be raised against this assertion considering the indeterminate nature of the welfare principle. The welfare principle is the legal framework within which statutory court judges incorporate indigenous customary law father's custody right into statutory custody adjudication. It could be argued that the welfare principle confers discretion on decision-makers to determine in any particular case what is in the welfare of the child. Apart from expressing their personal preferences, opinions and prejudices, it could be argued that interpreting welfare in terms of indigenous customary law father's custody right is judicial exercise of their discretionary power under the welfare principle. Following this line of argument, it would be inapt to say that the judiciary is mis-applying the law.

This is no doubt a plausible argument. However, applying the welfare principle means more than making judicial pronouncements which advance the welfare of the child as the basis of decision-making. The courts are obliged to ensure that custody decisions on the basis of the welfare principle aim at protecting children of divorce. The law, is not being complied with if decisions are not made in the best interests of the children. This is the implication of founding custody decisions on rules of thumb such as customary law father's custody right, without regard to what welfare considerations demand in any particular case. Customary law father's custody right was not developed to protect children of divorce. Rather, it protects the right of a father over his legitimate children. Besides, statutory judicial practice basing custody decisions on customary law father's custody right destroys the essence of the welfare principle. The welfare principle was made indeterminate in order to ensure that each case is approached individually depending on the attendant circumstances. The decision as regards what in a given case would be in the child's best interests is to be determined by the

weighing of factors surrounding a particular case, as treated in an earlier discussion. Making customary law father's custody right the premise of determining what is in the welfare of the child as a general rule, goes contrary to the legal desire for individualised justice in custody adjudication. Judicial use of customary law father's custody right as the prime test for determining the welfare of the child means that statutory courts are not applying the indeterminate welfare principle which is the law. Especially, as customary law father's custody right consideration makes the welfare of the child consideration a secondary issue. This discussion will be returned to later in the Chapter.

The purpose of this Chapter is primarily to show that paternal preference in statutory custody adjudication is not done for the welfare of the child. It is unreasonable exercise of judicial discretion which places statutory marriage mothers and their children on an equal footing with customary marriage mothers and their children. The Chapter has three parts. First, the reality of women's economic life will be discussed to rebut the presumption on which paternal preference in statutory courts and paternal custody in customary law is currently justified. Second, we will argue that neither father's right as a rule of thumb as used in statutory courts nor as a rule of law (customary law) exist in most cases for the sake of welfare of the child. Third, we shall concentrate on an analysis of patriarchal dominance. Although with its roots in customary law father's right rule has far reaching implications in statutory marriage, divorce and the custody of the children.

A. CUSTODY AND WOMEN'S ECONOMIC STATUS:

Women in Black Africa were for long and to a large extent are still regarded socially as caretakers of the children and the household.[4] In this capacity, they were primarily

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(4). DWIGHT, M., "Cameroonian Women at the Crossroads: Their Changing Roles and Status,"(1986-87) Journal of African Studies 126 at p. 128 ; BRAIN, R., Bangwa Kinship and Marriage, Cambridge University Press, 1971, pp. 117-139; GEARY, ibid., p. 10. Cf. MACALMAN, K., We Carry a Heavy Load: Zimbabwian Women Speak Out, A Report of the Survey Carried Out by the Zimbabwian Women's Bureau, 1981, pp. 19-40. This is similar to the status of women in Victorian England. See, HOLLIS, P. Women in Public: The Women Movement 1850-1900, George Allen & Unwin, London, Boston, Sydney, 1979, pp. 171-176. Cf. DUNBAR, J., Early Victorian Women, George G. Harrap & Co., Ltd., London, Toronto, Wellington, Sydney, 1953, pp, 21-31. O'DONOVAN, K., Sexual Divisions in Law, Weidenfeld & Nicolson, London, 1985, p. 53. Cf. SACHS, A., and WILSON, J.H., Sexism and the Law, Martin Robertson, Oxford, 1978, Chs. 1, and 3 at pp. 22-35 and 136-137

associated with domestic work which includes, household chores and care for the children. Their economic capabilities in the labour market, evidenced by farm work and women's commercial activities[5] were disregarded.[6]Their enormous effort in this domain is still overlooked by the judiciary in evaluating financial positions of parents when making custody orders. The traditional responsibility vested on women as primary child carers is not accompanied by corresponding rights. Mothers are denied custody of their children under the pretext that they are economically dependent and by themselves, would not afford to raise children if awarded custody. This statutory practice places Cameroonian women in a position analogous to the plight of mothers in Victorian England, such as, Mrs. Caroline Norton.[7]The difference, however,is that whereas common law denied mothers custody overtly on the basis of the common law paternity rule discussed in a previous Chapter, Cameroonian statutory law is not the basis of denial of custody to mothers in statutory marriages. The custody bias in favour of fathers is a judicial creation, the existence of which, women's purported economic dependence is intended to obscure.

If the judges are unaware of the role of women as the economic mainstay in conventional two parents families, the existence of single parent families headed by mothers living in mutual or unilateral separation[8]is revealing. Usually, there are young children involved and

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respectively.

(5). See, BOSERUP, E., Women's Role in Economic Development, George Allen & Unwin Ltd., London, 1970, pp. 16-18 and Ch. 4. Cf. GEARY, op. cit., note 4: pp. 9-10; MACALMAN, ibid., pp. 19-40. Cf. NKWI, P., "The Changing Role of Women and their Contributions to the Domestic Economy in Cameroon," in PARKIN, D., and NYAMWAYA, D., (eds) Transformations of African Marriage, Manchester University Press, Manchester, 1987, p. 307 at pp. 310-318. Cf. DWIGHT, ibid., pp. 127-128. Cf. BURNHAM, P. "Changing Themes in the Analysis of African Marriage," in PARKIN and NYAMWAYA, ibid., p. 49. Cf. PEIL, M., "Female Roles in West African Towns," in GOODY, J., (ed.) Changing Social Structure in Ghana: Essays in Comparative Sociology of a New State and an Old Tradition, International African Institute, London, 1975, p. 73 at 73-76.

(6). They were until the 60s kept out of the labour market. DWIGHT, Ibid., p. 128. We shall return to this discussion later in the chapter.

(7). For a discussion on the common law father's custody right, see, MAIDMENT, S., Child Custody and Divorce, Croom Helm, London. Sydney. Dover, New Hampshire, 1984, Ch. 5. Cf. DUNBAR, op.cit., note 4: pp. 173-176. Cf. HOLLIS, op. cit., note 4: pp.179-183.

(8). Separation may be mutual but usually it is unilateral. For example, the husband may leave the matrimonial home or he may order the wife to leave. This information was obtained from the women in the interviews with parents in Ch. 4, at note 44.

they stay with their mothers, many of whom had no education and are not professional women. Hence, they do not earn a monthly salary. The fact is: they cope with the responsibility of raising the children, usually with very little or no assistance from relatives. This reality is acknowledged by judges, through socialisation,[9] although no formal legal proceedings are involved. The question that we are asking is - do women become economically dependent stereo-types only when decisions about the custody of children on granting of a legal divorce are being made?

It is plausible to say that the only reason for judicial refusal to adopt a pragmatic approach to the analysis of family economic reality is to uphold the father's traditional supremacy over the mother and children of the marriage. The fact remains, that, the economic capabilities of women (mothers) should not be overlooked, as custody decision-making in our statutory courts seems to be based on them.

The Unrecognised Side of Women's Economic Contribution:

The stereo-type of Cameroonian women as economically dependent was engendered by the evaluation of women's economic capacity within the context of capitalism.[10] Introduction of modern economy based on a cash nexus, during the colonial period destroyed the traditional peasant economy[11] in which the contribution of women in terms of labour and production of subsistence crops was phenomenal and recognised.[122] Until recently, the economic capabilities of women were excluded in the process of national economic development. Sexual discrimination by colonial administrators in training for modern agricultural techniques, and for the acquisition of professional qualifications and skills left the women folk in Cameroon and elsewhere in black Africa, unprepared for the challenges of the

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(9). During my interviews with judges, they admitted knowledge through socialisation of the existence of many couples leaving in separation and in which the children, usually, within custody age are their mothers' responsibility. Information obtained from interviews with, judges cited earlier on p. Ch. 5, p. 174 at note 13.

(10). DWIGHT, op.cit., note 4: p. 127. Cf. O'DONOVAN, op.cit., note 4: pp. 35-36.

(11). DWIGHT, ibid.

(12). Cf. GATLIN, A., and STEPTOE, J., "Cameroon and its Economic Development," in AZEVEDO'S Cameroon and its National Character(Jackson, Miss. : Educators United for Global Awareness), 1984, pp.42 and 45; BINET, J., Condition des Femmes dans la Région Cacaoyère du Cameroun, Cas Internationaux de Sociologies, xx (Paris), 1958, pp.109-123.

newly introduced capitalist economy. Generally, women did not possess the qualifications nor the skills required in public employment.[13] Furthermore, unlike the situation in the pre-colonial traditional peasant economy, domestic activities of women, such as, the production of food for household consumption, and the labour force they provided for their husbands in the farm needed a monetary value to be regarded as significant.

Unfortunately, the fact that women's economic contribution did not generate cash was crucial to the emergence of the economically unproductive and dependent status which is now the traditional stereo-type of women.[14] Women's domestic and farm labour was not equated to the cash crops production of men since newly introduced crops, such as, cocoa, coffee, rubber, which were exclusively grown by men were for the export market in exchange for cash.[15] The consequence was that men traders sold cash crops and other introduced consumer goods, for example, soap, sugar, milk, clothes, hoes and other household utensils. By contrast, women who engaged in trade were reduced to selling local food stuff, such as, garri,[16] plantains, cocoyams, palm oil, salt, and pepper.[17] With a few exceptions, this division in trade remains the same. Thus, whereas women traded nearer the home and seldom engaged in international commerce, the world of heavy investment business was and is still largely male dominated.[18] The implication of this new economic reality was that fathers were better placed financially, either as employed salary workers or self-employed in farms or other businesses. Notwithstanding the changed economic situation, it has been established by writers[19]that responsibility for domestic economy has for long been on the women.

Even before the emergence of professional women in Cameroon, as in other black African countries, women were solely responsible for the production of food crops for household consumption in their husbands' farms if married, or on "family" farms if single. Men

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(13). See generally, DWIGHT, op. cit., note 4: pp. 128-129; BOSERUP, op. cit., note 5: Ch. 3. Cf. MACALMAN, op. cit., note 4: pp. 9-12 and 19-22. See also, The Ministry of Women's Affairs Two Years After its Creation, SOPECAM, Yaounde, 1986, p.14.

(14). Cf. O'DONOVAN, op.cit., note 4: p. 36.

(15). See, DWIGHT, op.cit., note 4: p. 127. See also, BLEDSOE, C., Women and Marriage in the Kpelle Society, Stanford University Press, California, 1980, p. 89, para. 1.

(16). Food made out of cassava roots.

(17). DWIGHT, op.cit., note 4: p. 127.

(18). Ibid., p. 128.

(19). See our earlier citations on note 4. See also, ROBERTSON, C., "Ga Women and Socio-Economic Change," in HAFKIN, N., and BAY, E., (eds) Women in Africa, Stanford University Press, Stanford, California 1976, p. 111 at 149.

produced cash crops for sale.[20] This division of labour in marriages, in which both parties are farmers, is still the same today in a relatively less rigid manner. The financial value of women's farm production is now obvious since they can sell their farm produce. In addition, some of these women have additional sources of revenue through various commercial activities. Women trading is a peculiar economic activity among West African women.[21] Lack of capital is not a deterrent to the commercial capacity of these women[22]because many mothers are involved in non-investment small businesses. These include, the preparation and sale of food in the markets, streets, in off-licences, in motor parks where transport vehicles load passengers; sale of subsistence farm produce, such as, pepper, vegetables and plantains. In many families, daily needs of children including educational needs are provided for by such finances from mothers struggling for the welfare of their children.[23]

Furthermore, many women are now salaried employees in the public and private sectors, and occupy various positions of responsibility and influence in the country.[24] Although the number of professional women is on the increase,[25]they remain in general terms, better equipped for the responsibility of primary child care as opposed to the fathers. This assertion draws support from the personal commitment by mothers, subject to a few exceptions[26]to bring up their children as best they can.[27] We do not deny the fact that in the majority of

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(20). DWIGHT, op.cit., note 4. Cf. GEARY, op.cit., note 4: pp. 9-10. Cf. BOSERUP, op.cit., note 5: pp. 16-18.

(21). See, NKWI, op.cit., note 5: pp. 310-318. Cf. BOSERUP, ibid. Ch. 5. Cf. PEIL, op. cit., note 4: pp. 73-76.

(22). Lack of capital was a hinderance to most women who may have liked to engage in heavy trading or commerce in the immediate post-independence period in view of the discriminatory attitude of colonial administrators. See earlier citations on this, supra, note 12.

(23). Information obtained from the mothers in the interviews with fifteen parents in each of the towns of Buea, Kumba, Mutengene, Muyuka and Tombel between August-October 1990. Supported by information from the mothers in the interview with fifteen parents in each of the villages of Butu, Matoh Butu, Kombone, Mbonge and Barombi Kang between June-August 1990. Cf. NKWI, op. cit., note 5: pp. 313 and 317.

(24). DWIGHT, op.cit., note 4: p. 127.

(25). Ibid., p. 129.

(26). There are some mothers who are not willing to make financial sacrifices for their children both in the towns as well as in the rural areas. See the example of the wife of the chief of Matoh Butu village cited earlier in this work, Ch. 4., note 93.

(27). Response of the mothers in the interviews cited at note 23.

families, fathers have better financial positions than mothers.[28] Nevertheless, the message needs to be conveyed, that a child may better off in the custody of a mother, who is personally committed to sacrifice the little she has for her children, than in the care of a father, who may not in practice, provide for his children, though he is financially well placed. It is bizarre that fathers are seen to support children if granted their custody, but refuse to support these same children if custody is with the mother. It is pathetic that such denial of responsibility is buttressed in judicial practice by advancing the refusal of fathers to comply with maintenance orders as a good reason for paternal preference in custody adjudication.

The reality is - the responsibility for household maintenance is radically being reversed in this society where fathers are gradually dissociating themselves from their traditional role as breadwinner.[29] Some fathers even collect family allowances, which are state welfare benefits to support parents in providing for their children,[30]and use the money collected monthly for their own purposes in the same way as they use their earnings.[31] In a family where the father leaves the house in the morning to return at night after work for six days in a week and provides for the children for one week out of four in a month, there is no doubt that the mother is the breadwinner.[32]

Despite this economic reality, father's customary law custody right has not been reversed in customary law and in statutory court practice. On divorce, the inquiry of the welfare officers into the financial position of the parties, where a welfare report is ordered, does not go beyond salary levels or monthly earnings. In other words, they want to know if both parties have a monthly salary, or earning, in case of private businesses, and the amount. There is no investigation into how the economy of the house is actually run, for example,

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(28). See, The Ministry of Women's Affairs Two Years After its Creation, op.cit., note 13: p. 14. Cf. SMART, C., The Ties that Bind : Law, Marriage, and the Reproduction of Patriarchal Relations, Routledge & Kegan Paul Ltd., London, Boston, Melbourne and Henley, 1984, pp. xi-xii, 11, and 12. Cf. HAYES, M., "Making and Enforcing Child Maintenance Obligations,"(1991) Family Law 105.

(29). Information obtained from the mothers in the interviews cited earlier at note 24. This was confirmed by the interviews in the Departments of Social Welfare in the towns of Kumba and Buea,Yaounde, cited earlier in Ch. 5, p. 183 at note 47.

(30). S.1 of the Cameroonian Labour Code.

(31). Information from mothers in the interviews cited at note 23. See also, FONYAM, B.J., The Protection of the Child Under Cameroonian Law, Ph.D Thesis, University of Yaounde, 1986, p. 46. (Unpublished).

(32). Supra, note 31.

who is actually the provider. Yet, this may be the appropriate test. The economic contribution of a mother who has no pay-slip or whose monthly return from a business is not presented as a monthly earning, is forgotten in the custody decision making process. The conclusion is either, "she has never earned a salary" or "her salary is very low",[33] hence, she is financially dependent on her husband. Thus, the father obtains custody on the strength of a pay-slip.

It is certainly not in the welfare of the child for custody to be awarded to a father, who despite being ideologically portrayed as the breadwinner, in practice, does not provide for his children. Besides, the welfare of the child as a concept in custody warrants that regard should be given to other developmental needs of children other than material satisfaction. We shall elaborate on this next.

B. PATERNAL PREFERENCE IN CUSTODY ADJUDICATION IS NOT DONE FOR THE WELFARE OF THE CHILD:

It is not an overstatement to say that father's custody right which, as a general rule, underlies decisions in statutory courts and which is the custody test in indigenous customary law is not in the interests of the child. Three reasons may be advanced to support this claim. First, undue significance is attached to the relatively low financial position of mothers, by statutory court judges. Second, the weight given to material welfare which in the present state leaves the fathers with pre-emptive custody rights, is done at the expense of other developmental needs of the children. Thirdly, paternal preference undermines the importance of continuity in the child's upbringing. We shall discuss them separately.

The Low Financial Position of Most Mothers is no Justification for Paternal Preference: There is an Alternative Gender-Neutral Solution:

S. 42(2) of the Matrimonial Causes Act 1973 empowers the courts to make orders for child support ancillary to the custody order. Maintenance orders as they are called, are usually made requiring the non-custodian parent to pay to the parent with custody a certain amount of money monthly for the maintenance of the children. The purpose of this provision

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(33). See, Epuli J., in Mbiaffie v. Mbiaffie,Suit No. HCSW/30^{mc}/85.(Unreported) and Endeley J., in Ojong v. Ojong, Suit No. WC/6/88. (Unreported); Njamsi J., in Mayiba v. Mayiba, Suit No. HCSW\22^{mc}\86.(Unreported)

is to make up for the low financial position of the parent in whose custody the welfare of the children will be best served. In the few cases where orders for child support are made, they are generally made against fathers, as seen in chapter five. Maintenance orders are mainly made in cases involving very young children, if there is evidence to show that the father is the parent who is better placed financially to provide for the children. While custody of the older children is awarded to their father, on the basis of the tender year presumption, which had been discussed earlier, the very young ones remain with their mother. She is presumed to be the primary child carer, hence, best suited to care for the needs of the very young children. Temporary custody of such children is awarded to the mother until they attain an age specified in the order, after which, they are to be transferred to their father, usually, at the age of eight. Maintenance orders are made in such cases for the father to pay child support in respect of the children in their mother's custody until they attain the age at which they are to be transferred to their father.[34] There are also few other cases where sole custody of all the children is granted to the mother and the father is ordered to pay maintenance. Exceptionally, however, the obligation could be on the mother to pay child support where custody is awarded to their father.[35]

The failure of fathers to comply with maintenance orders has been advanced by courts, confirmed by social welfare workers, in support of their father custody preference. We contend, however, that arguments based on non- compliance with maintenance orders are a convenient disguise of the court's gender based preference. There is a minimum of judicial effort made towards the enforcement of maintenance orders. Compliance is entirely left to the goodwill of the parent required to pay maintenance and the Social Welfare Department. Yet the Social Welfare Department is powerless as regards measures it can take to secure compliance since there is no law to protect its actions.[36] In the absence of legal protection for its action, the Social Welfare Department is not able to explore all possibilities[37]for

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(34). See the analysis of this point earlier in Ch. 5.

(35). Only in one case out of all the cases consulted was a mother ordered to pay maintenance as seen in Chapter Five. See, p. 173, note 10.

(36). Information obtained from the interviews in Social Welfare Departments cited earlier on p. 183, note 47. Cf. S.1 of the English Social Security Act 1990, empowers the court to order the liable parent to pay maintenance, if a claim for non-payment is made. This power and other additional measures are now provided under the Maintenance Enforcement Act 1991. We shall discuss this later in the Chapter.

(37). We shall discuss this under suggestions for reform in Ch. 7.

securing compliance. Besides, the failure of fathers to comply with maintenance orders is a phenomenon which has been associated with non-custodial fathers in other jurisdictions.[38] They have not resorted to paternal preference in custody as a solution.

For example, research [39]in Britain has highlighted the general failure of most fathers to comply with maintenance orders after divorce and that contact with non-custodial fathers sharply declines. The increase on the number of single parent families[40]with a corresponding increase in percentage of those receiving income support[41] brought the problem of non-compliance with maintenance orders to the foreground. Contrary to the response to this problem by the Cameroonian government the apparent private problem has been identified as a public issue and tackled as such. The Government White Paper entitled "Children Come First", released in 1990[42]specifically addressed the problem of refusal to pay child support by British fathers.

The White Paper, which is now the Child Support Act 1991,[43]identified the causes of non- compliance and proposed legally backed administrative measures as a solution. The theme behind the new English law approach to the problem of refusal to comply with maintenance orders by fathers was: to coerce fathers to face up to their parental responsibility which was increasingly borne by the state - "parenthood is for life," said Mrs. Thatcher in the White Paper.[44] The Child Support Act 1991, contains provisions aimed at tracing fathers who lose contact. Child Support Agencies have been established, as discussed in Chapter Four. These Agencies are charged with the duty of assessing and making maintenance

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(38). Infra.

(39). See, EEKELAAR, J., "Child Support Scheme for the United Kingdom- An Analysis of the White Paper," (1991) Family Law 15 at 15. Cf. HAYES, op.cit., note 28: p. 44. Cf. BROPHY, J., "Custody Law, Child Care, and Inequality in Britain," in SMART, C., and SEVENHUIJSEN, S., (eds) Child Custody and the Politics of Gender, Routledge, London and New York, 1989, p. 217 at p. 223. PEARSON, J.,and THEONNES, N.,"Supporting Children After Divorce: The Influence of Custody on Support Levels and Payments,"(1988) 3 Family Law Quarterly 319 at pp. 319-320.

(40). Increased from 8% and 6% in 1971 and 1961 respectively to 14% in 1987. Percentages quoted in EEKELAAR, ibid.

(41). Increase from 40% and 20% in 1979 and 1961 respectively to 66% (stated simply as now), percentages quoted in EEKELAAR, ibid.

(42). Quoted in EEKELAAR, ibid.

(43). Which came into force in April 1993.

(44). Quoted in EEKELAAR, op.cit., note 39.

payments and to trace absent fathers.[45]

In order to provide interim enforcement measures before the coming into force of the Act, The Maintenance Enforcement Act 1991[46]was passed. Based on the themes that, family responsibility should be encouraged and that it is better to avoid default occurring than to take action once it has occurred,[47]the Maintenance Enforcement Act makes out a plan to prevent default in payment. This has been done by vesting the courts with two powers under S. 1 of the Act. First, under S. 1(4) a and S.1(5), High Courts and County Courts are empowered when making a maintenance order to order payment by standing order or some other similar method. In case of default, S.1(6) enables the courts to order a defaulting father to open a bank account for this purpose. The second power is that provided under S.1(4)b. This sub-section gives the courts an unfettered power to make attachment of earnings orders regardless of the father's consent, whether he is guilty of wilful neglect or culpable fault or not.[48]

The indifference of Cameroonian policy-makers towards the problem of enforceability of child support orders if made, leads to the conclusion that non-compliance buttresses courts' justification for paternal preference in statutory custody adjudication. We shall make our suggestions as regards the solution to this problem in Chapter Seven. Paternal preference in statutory custody adjudication on the basis of fathers' better financial position and their refusal to pay maintenance indicates that the courts are concentrating on the material and physical welfare of children at the expense of other developmental needs.

The Significance Attached to Father's Right Undermines Other Welfare Needs of Children:

The weight given to material welfare of the child disregards other needs of children

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(45). See generally, EEKELAAR, ibid., pp.15-20. Cf. HAYES, op.cit., note 28: pp. 106-109. See also, BROMLEY, P. M., and LOWE, N. V., Bromley's Family Law, 8th ed., Butterworths, London, Dublin, Edinburgh, 1992, pp. 688-692. Cf. Infra.

(46). The Act received Royal Assent on June 27 and came into force in October 1991. See, WIKELEY, N., "The Maintenance Enforcement Act," (1991) Family Law 353 at 353.

(47). WIKELEY, ibid.

(48). For an analysis of the recovery procedure, see, WIKELEY, ibid., pp. 353-354. Cf. HAYES, op.cit., note 28: pp. 106-109. A number of criticisms have been made against this new legal framework. See, EEKELAAR, op.cit., note 39: pp. 20-21. Cf. HAYES, ibid., p. 109. Cf. "Newsline", (1991) Family Law 44 at 44-45.

which are not based on material things. In a society where the upbringing of children is focused on the provision of food, physical and medical health care, and the need to educate and provide accommodation for the children, other developmental needs of children are regarded as sentimental. For example, the fact is overlooked, that there are nuclear elite families, in which the children are raised with the Western concept of parent-child relationship.[49] Hence, children in some homes who grow up with overt love and physical warmth, emotions and passion from their parents. In the African context, this notion of a Western family is adapted to the local social and cultural conditions. Where as the father, as a general rule, goes out to drink after work with his friends, the mother in general terms, resumes her domestic functions. This means that the mother is the parent with whom the children in most cases can establish a psychological relationship.[50]

The same may be said as regards children in customary marriages and in other statutory marriages in general, not necessarily within those who maintain the Western concept of child-parent relationship mentioned above. Cameroonian children, as children in other black African countries, appear not to need psychological or emotional welfare as evident in our earlier discussion on welfare in a cultural context. This characteristic is a direct result of the failure of parents to manifest express love and emotion to their children. This does not mean, however, that there is absence of psychological or emotional parent-child link. The form and language of expressing mutual emotional and passionate feelings between parents and children is different from the Western ideal of express words of love, cuddles, kisses, tucking in bed and reading children to sleep.

Cameroonian parents, in particular, mothers, manifest their love for their children in various ways other than express language. For example, it is common for mothers to use pet names such as, "mamy" or "papi"[51] or "bo"[52] particularly to their most loved children. Naming a child after a deceased relative who was most cherished and missed after death is

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(49). These include children who were either born or were being brought up with their parents in one of the countries of the west. This information was given to me by parents in five families in the interviews conducted in towns cited at note 23, who had recently returned from England, Germany and the U.S.A. Cf. LLOYD, P. C., Africa in Social Change, 5th ed., Penguin Books Ltd., Harmondsworth, Middlesex, England, 1972, Ch. 7.

(50). Supra, note 49.

(51). The words mean "mother" and "father" respectively.

(52). This means "friend", a term usually used by intimate friends.

a manifestation of love from the parent who named the child. That parent shows the same love and respect which the parent had for the deceased after whom the child was named.[53]

Besides, the circumstances under which children are born and reared in their early years naturally lead to the creation of an emotional link between the children and their mothers. Apart from the fact that fathers are not allowed to be present in the delivery room during the births of their children,[54]sexual division of role in the area of child care is rigid. Few fathers in Cameroon would even conceive of the thought, that, they should be involved in daily child care activities, such as, carrying and playing with the baby, and spending time with it during its growing up. The number becomes even more insignificant when talking of fathers in the Cameroonian communities who take part in changing nappies or wet pants, let alone bathing and feeding the children.[55] Generally, the birth of a new child in a home automatically leads to separation of bedrooms. The mother moves into another room with the new born child and if necessary, with other children. Occasional visits in the room by the father, usually lasting for about five minutes per visit, is all the child knows of its father's presence in a day. This is the general trend, hence, there are exceptions.

We are also not to forget the particular case of polygamous families in which, with a few exceptions,[56] children spend most of the time with their mothers in their respective

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(53). Information got from interviews cited earlier at note 23.

(54). Apart from personal observation, this information was supported by the response of the medical personnel interviewed in the towns of Kumba, Buea and Muyuka and women who act as midwives in the villages of Butu, Matoh Butu and Kokobuma in cases of birth in the villages. There was no explanation for this practice in hospitals and clinics. In the villages, the women said it is a taboo for a man to be present in a delivery room. Interviews conducted during field work in the month of September 1990.

(55). Information from interviews cited at note 23. Fathers who were asked whether they take part in such duties mainly responded simply by asking me a question: "Why should I do this work? Why do I have a wife?" Cf. LLOYD, op. cit., note 49: p.173. Cf. SMART, C., "Power and the Politics of Child Custody", in SMART and SEVENHUIJSEN, op.cit., note 39: p. 1 at 11-20. Cf. BATES, J. N., "Gender, Social Security and Pensions: The Myth of the Everyday Housewife? "in McCLEANS, S., and BURROWS,N.,(eds) The Legal Relevance of Gender MacMillan Press, Houndmills, Basingstoke, Hampshire and London, 1988, p. 123.

(56). In few polygamous homes, especially in the cities, there is just one household, hence, all the children, their mothers and their father have one sitting room in which most activities are done.

sections.[57] In some polygamous marriages, some of the wives live in other towns away from where the matrimonial home is with their children. All the children see of their father is when he comes down for the week-end to visit them or occasionally, on holidays. This type of arrangement is common in polygamous homes where the wife who lives separately is also working. It is against this background that we can state that there is mother-child psychological attachment from the birth of the child and during growing up in most cases.[58]

On divorce, however, paternal preference in statutory courts and paternal custody law in the case of customary marriages disregards the psychological relationship that a child has established with its mother under the prevailing social circumstances from birth. A custody order is not an instrument of social re-organisation. Hence, the social circumstances under which children are brought up do not suddenly change after divorce because of a custody order. The traditional image of an African father does not suddenly become associated with primary child care, the father remains non-domestic. In the absence of a caring mother substitute, the child is not only deprived of its psychological parent,[59]but the child lacks child care as well. Paternal preference as a rule of thumb in this respect is not in the interests of the child regardless of the father's financial position. Orders granting temporary custody of young children to their mother and requiring mandatory transfer support the conclusion made above.

Father's Right Versus the Status Quo Factor:

In the determination of the child's welfare, statutory court judges, as discussed earlier, make pronouncements referring to the need to maintain the child's status quo as one of the

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(57). DWIGHT, op.cit., note 4: p. 127; GEARY, op.cit., note 3: p. 16.

(58). In particular, because attachment of children to parents develops more quickly with young children. See, CRETNEY, S. M., and MASSON., J. N.,Principles of Family Law, 5th ed., Sweet & Maxwell, London, 1990, p. 522.

(59). GOLSTEIN, J., FREUD, A and SOLNIT, A., Beyond the Best Interests of the Child, Free Press, New York, 1973, Chs. 3 and 7. The work of these writers has been criticised on various grounds. See, MAIDMENT, op. cit., note 7: pp.208-209. Cf. RICHARDS, M., "Behind the Best Interests of the Child: An Examination of the Arguments of Goldstein, Freud and Solnit Concerning Custody and Access at Divorce,"(1980) Journal of Social Welfare Law 77 at 82. See also, CRETNEY and MASSON, ibid. Cf. CROUCH, R.E., "An Essay on the Critical and Judicial Reception of Beyond The Best Interests of the Child," (1979) XXIII Family Law Quarterly 49.

factors to be considered if the child's welfare is to be preserved. It is surprising that in order to protect the traditional sacred rights of a father over the children, these same courts have developed a practice which has the effect of uprooting children from familiar environment and the parent with whom a psychological relationship has been established.(60) This point had been pursued in Chapter Five demonstrating that such mandatory transfer, as a general rule, is not in the welfare of the child.

One may conclude that the underlying judicial concern in statutory custody courts is to uphold customary law father's custody right against the mother. Paternal preference appears to be the reason for courts' disregard of a child's status quo even considering the particular circumstances in which children are born and raised in Cameroonian society. Paternal preference in this regard is not in the welfare of the child.

C. DIVORCE CUSTODY AND PATRIARCHAL RELATIONS:

The first two parts of this Chapter refute claims by the judiciary that mothers are denied custody because they are not usually capable of providing for the children. We propose in this part of the Chapter to advance the customary law institution of bride price as the basis of paternal preference in statutory custody adjudication and paternal custody rule of law in customary divorce. Although the bride price is irrelevant as far as the legal validity of statutory marriage is concerned, it is the basis of the customary law father's right which informs judicial custody decisions. The reason being, that statutory marriage fathers, the judges included, also pay bride price for purely cultural reasons, on marriage. This has been discussed in Chapter Two.

Bride Price: Purchase Price of Wives and its Impact on Custody:

Payment of bride price as a condition precedent to the existence of a legally valid marriage is restricted to customary marriages, as seen in Chapter Two. Although bride price is irrelevant to the legal validity of a statutory marriage, the payment of bride price by

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(60). See our earlier discussion on this in Ch. 5, pp. 195-196 and 201-202. Cf. EEKELAAR, J., "Children in Divorce: Some Further Data," (1982)2 Oxford Journal of Legal Studies 63-65 at pp. 76-77.

statutory marriage husbands is a fact recognised by statutory law.[62] We discussed in Chapter Two the usual two-tier celebration of customary and statutory marriage formalities performed by parties intending to contract statutory marriages. It was also stated that in the tribes under consideration, as in most other black African tribes in which bride price is paid, the most significant of the requirements of a customary marriage is the bride price. Despite its irrelevance on the legal validity of a statutory marriage, the marriage is not recognised by one's kinsmen if no bride price was paid. Like those celebrating customary marriages, therefore, statutory marriage husbands generally pay bride price on their wives.

The question of whether bride price renders a wife her husband's property is arguable. Whereas some writers hold a contrary view,[63]we intend to put forward an argument in support of the assertion that bride price is in fact, the purchase price of a wife on marriage.[64] Three points will be advanced to illustrate this: the traditional father's right over children of the marriage; claims of omnipotence and superiority by fathers; bride price as a commercial transaction.

First, the husband in a customary marriage does not acquire the traditional father's right over a woman's children unless bride price was paid to marry her. Once payment is established, she loses any identity with her children on a socio-cultural perspective. This is tantamount to stating that the bride price is paid, in order to establish the husband's exclusive rights over the proceeds of her womb. All she does is carry the baby in her womb for nine months, give birth to it and provide daily care. In effect, the wife is property bought for

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(62). The Civil Status Registration Ordinance does not expressly or impliedly denounce the payment of bride price. The provisions regulating bride price simply make it unenforceable. By stating that the legality of a marriage shall not be challenged by non payment of bride price, the legislator was clearly referring to bride price in statutory marriages. For, bride price establishes legality of a customary marriage. See generally, Civil Status Registration Ordinance 1981, Part V1, Ch. V.

(63). DWIGHT, op.cit., note 4: p. 127. Cf. CUTRUFELLI, M.R., Women of Africa: Roots of Oppression, Zed Press, London, 1983, pp.41-49; ADE, A., African Marriage, Afosi Books, Buea, 1980, pp. xi-10. MAIR, L., An Introduction to Social Anthropology, Clarendon Press, Oxford, 1965, p. 83.

(64). See, BRAIN, op. cit., note 4: pp. 120-143; NKOUENDJIN, op.cit., note 1: p.43; GEARY, op.cit., note 3: p. 1. Cf. NGUMBANE, H., "The Consequences for Women of the Marriage Payments in Societies with Patrilineal Descent," in PARKIN and NYAMWAYA, op.cit., note 5: p. 173 at 179. Cf. HARRIS, G., "Taita Bride Wealth and Affinal Relationships," in FORTES, M., (ed.) Marriage in Tribal Societies, Cambridge University Press, Cambridge, 1962, p. 55 at 60.

procreation and to render services to the husband. This explains why a customary law wife's child by another man is held in customary law to be her ex-husband's child if bride price has not been refunded. Custody of the ex-wife's child in such cases would in customary law, be considered as her ex-husband's right, whose only link with the woman's child by another man she may even be cohabiting with, is bride price pending refund. The consequence of this for the children involved has been discussed in Chapter Two.

Second, bride price establishes fathers' moral grandeur reflected in their claims of ownership of children even for those in statutory marriages. Statements commonly made by statutory as well as customary law husbands to their wives are illuminative. Women are usually emotionally played down with statements, such as, "ah pay money for ya head" and "if you di leave this house, you no di go with my picken them". Translated literally, these statements mean, "I did pay money to have you" and "if you plan to leave this house, do not think of taking away my children" respectively.(65) Such statements are made by the husbands to assert their proprietary right and overlordship over their wives. They epitomise the inequality inherent in this social institution of marriage in which spousal rights are determined directly or indirectly by the bride price. This is the social significance of statements of these sort, although it is not readily admitted. Again, the right of the father over the children in case of divorce overrides the individual identity of the child even in statutory courts which are bound by law to consider the welfare of the children.

Third, commercialisation of the bride price, a phenomenon which had been discussed in chapter two, also illustrates further the status of bride price wives in general, as property. This current nature of the bride price indicates that a monetary value is ascribed to women in the same way as it is to ordinary commercial goods. It appears that the bride price is paid to compensate(66) the bride's relatives for the financial expenditure that has been involved in her upbringing. Its payment secures the surrender of the rights of the bride's father and his kin over her to the husband. He then becomes the owner of his wife and most important, the children she procreates as long as the bride price paid on her subsists. This is the possible reason why on divorce, the children remain their father's property although bride price has been returned as, its return is crucial to the validity of a divorce in customary law. The

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(65). Information given to me by the mothers in the interviews cited at note 23.
(66). See the discussion on the nature of bride price in Chapter Two.

difference with other commercial transactions is that a husband who pays bride price recovers it together with its proceeds (the children) on divorce.

In addition, the image of a customary marriage wife as a commodity purchased by the bride price is also evident from the practice of inheritance of wives, as it is the case with widow-inheritance and leviratic marriages discussed earlier. The next of kin who inherits the deceased's property is entitled to inherit his kinsman's wife as part of the inheritance.(67) Hence, if this wife and mother refuses to be inherited, it will be tantamount to termination of the marriage. As regards future upbringing of her children, the father's right now transferred to the inheritee, is in customary law upheld against her - the only surviving parent the children have.(68) Although widow inheritance does not affect wives/mothers in statutory marriages, the bride price paid for their hands in marriage equally places them at a disadvantage.

Whereas a customary law mother knows that she has no claim over her children as the paternity rule denies her any such claim, a statutory law mother who is divorced and loses custody to her husband, is led to believe that the judge based his decision on what in his view, is best for the child. Thus, unlike in customary divorce, the social implication of paternal preference in custody in statutory divorce founded on traditional father's right is not readily seen. We shall argue against a continuation of the paternity customary rule as a determinant of post-divorce upbringing of children in customary law, in Chapter Seven. The implication of judicial custody practice is to be considered next.

Judicial Practice in Social Context:

Operating in a society where there is attachment to cultural values, beliefs and ideologies, there is little doubt that paternal preference by the judiciary in statutory court custody adjudication is a feature of patriarchal dominance. This internalisation of cultural values by judges is seen from their readiness to award custody to a father in balanced cases where the welfare of the child could be equally served regardless of which parent has custody.

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(67). The position of a customary law wife as property has recently been discussed in an article in the Cameroonian Students' journal. See, ENONGCHONG, N., "Women in Cameroon: Equality Before the Law?" (1992) 4 The National Union of Cameroonian Students Journal 5.

(68). See the cases discussed on this issue in Chapter Two. See the cases discussed in Ch. 1, pp. 44-49.

The justification usually advanced to support paternal preference in such cases where the economic argument will be illogical, is immorality socially associated with single parent families headed by mothers. It is a common belief in Cameroonian society that single women are exposed to social pressures which could easily be a motive for their involvement in acts that could be detrimental to the child's moral and even physical welfare.[69]

This is analogous to the social presumption in English society in which children in single parent households headed by mothers are associated with long-term delinquency, under-achievement and future social, emotional and even political unrest.[70] Indeed, this is judicial acknowledgement of the traditional ideal family form, reflecting a respectable Cameroonian woman as one who is married and takes care of her house. This is obvious from the following statement of the President of the Republic of Cameroon in 1985 when he asked Cameroonian women to bear in mind: "the wise woman builds her house and the foolish woman turns it upside down with her own hands."[71] No doubt, a woman petitioning for divorce will be regarded as a foolish woman who with her own hands destroys her household.

This imagery of a woman is not limited to custody decision-making, for, in several respects, policy-making is informed by the belief that for a woman to be respectable in society, she has to be married. For example, the relatively low number of women in highly paid jobs [72] means that in most cases, the salaries of working women, as in England,[73]are intended to be supplementary to the main house budget which is expected to be that of the husband. However, in a society where the responsibility scale, as seen in an earlier discussion, is sharply weighing on the women,[74] the upbringing of children to a large extent depends on the proceeds of these low pay packets. Yet, the significance of the traditional father's right over his children in this society undermines the economic and social roles of motherhood. Decision-makers fail to realise that, though the means of mothers may be minute, their meagre earnings are fundamental to the upbringing of their children in most

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(69). Information obtained from interviews with judges cited in Ch. 5, p. 174, at note 13.
(70). BROPHY, op.cit., note 39: p. 227.
(71). See President Biya's policy statement in the General Policy Report of the Bamenda New Deal Congress of March 1985, quoted by Mrs. Yaou Aissatou, The Minister of Women Affairs in The Ministry of Women Affairs Two Years After its Creation, op. cit., note 13: p. 4. Cf. DUNBAR, op.cit., note 4: pp. 22 and 26.
(72). See, The Ministry of Women Affairs Two Years After its Creation, ibid., p. 12.
(73). See. BATES, op.cit., note 55: pp. 121, 130-131.
(74). Cf. BROPHY, op.cit., note 39: p. 227. Cf. BATES, ibid., pp. 122-123.

cases. Of course, it is clear from the mandatory requirement on mothers to transfer children to their fathers that the interest of the courts is in protecting customary law right of a father rather than the welfare of the child.

When a judge makes an order granting temporary custody of a young child to the mother, she is directed to transfer the child to the father on reaching the age that the child is no longer seen by the judges as in need of constant mother's attention and tender care. Usually, transfer is to be made when the child attains the age of eight. At that age, the father who in judges' mind is the "owner" of the child resumes his father's right. It is hard to believe that the order which awards custody of the tender years child to the mother with a proviso requiring mandatory transfer to the father at certain stage is motivated by the desire to protect the child's welfare. No doubt decision-makers intend such orders awarding custody of the young to their mothers to be seen as decisions made to protect the welfare of the children. By contrast, our discussion in this chapter so far gives us reason to believe that such orders are motivated by the desire to save fathers from the troubles that raising very young children entail. In any case awarding the custody of children to the mother would not fit with cultural assumptions.

The early years of a child's upbringing are the most demanding as regards daily care. The pressure being at the highest in the first few months when many adjustments and physical sacrifices have to be made by the parents. For example, washing, ironing, changing of nappies and clothes as many times as the child needs in a twenty four hour day; regular feeding of the child, special medical needs which include regular enemas.[75] It has been discussed earlier that, as in England, mothers are culturally regarded suitable to cater for these needs as they are associated with primary child care. Besides, men in Cameroonian society are rarely socialised to withstand the frequent crying and nagging of young children, let alone, the sleepless nights that raising very young children usually entail especially, in the early months.

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(75). The purgative in the traditional sense involves inserting a rubber tube in the anus of the person to whom it is administered, connected to a jar containing liquid of squeezed herbs. The jar has to be held up and in case of children, they need somebody to hold it, usually, it is the mother. In some cases the end of a small wooden funnel is inserted in the child's anus. The mother or female relative places the child on her lap, puts the herb liquid into the funnel and blows in the water. Usually she ends up with faeces in her lap, jaws and legs.

A mother figure is required for the father to cope with these demands which only decrease in intensity rather than disappear as the child grows older. In case of a divorce, there are few mistresses or second wives who may be willing to cope with another woman's baby. Furthermore, the very tender age may make it difficult to arrange for a substitute mother, even from within the kinship lineage, for example, the grandmother, auntie or sister. They may be less willing to take responsibility for daily care of the child who is still breast-feeding or otherwise very young.

It is not difficult to see why there is unanimous agreement in customary law, as in statutory courts, that, children of tender years are to be left to the custody of their mother until they attain the specified age. The mother nurses the children until they attain the age when the father, who is regarded as the "owner" can conveniently manage their upbringing. By the age of eight when they are to be transferred, children are able to render services to their parents, for example, assistance with household work, fetching of water, running of errands. The child is to be transferred just in time for the father in whom right over children of the marriage is vested to benefit from the child's services.(76) The children are actually transferred, either by a fresh custody order revoking the original order or in compliance with the old order. Most mothers are very bitter about this, especially as some fathers deny their children access to their mothers and likewise, deny mothers access to their children.(77) Regrettably, we shall not discuss the response of mothers to father dominance in this work, in view of the limitation on the length of the thesis.

CONCLUSION:

This Chapter has examined the divergence in custody practice between the Cameroonian judiciary and English courts despite the fact that English custody law is the legal framework within which the judiciary operates. In particular, we have sought the basis of current judicial practice of paternal preference in custody adjudication despite availability of empirical evidence as regards the mother's suitability for primary child care.

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(76). WEINRICH, A.K.H., African Marriage in Zimbabwe, Mambo Press, Holmes McDougal, Edinburgh, 1982, p. 104. See also OBI S.N., CHINWUBA, Modern Family Law in Southern Nigeria, Sweet & Maxwell, London, African University Press, Lagos, 1966, p. 322-323. Information obtained from the mothers in the interviews cited at note 23.

(77). Supra, note 76.

An attempt has been made to establish that paternal preference in statutory custody upholds customary law father's right over his children. An argument has been made in the Chapter against the purported economic justification of paternal preference in custody adjudication. It is bizarre that the same fathers who refuse to comply with maintenance orders, if custody is awarded to the mother, are seen by the courts to serve the welfare of the children by providing for them when in their custody. We have demonstrated in this Chapter, however, that the reality is that father preference as a general rule, is not done for the welfare of the child. Rather, it preserves traditional customary law values which are oppressive to the mothers, in disregard of the welfare of the children. Ironically, this is what the judiciary has been charged by the law to do.

We may appear to have left out children of extra-judicial customary divorce, but this is not the case. It is our opinion that it is only after the child has been made the centre of decision-making in statutory courts as the law demands that, society may be able to realise the plight of children in customary divorce. We may hope that policy-makers could then do more than lay down a set of rules for guidance in customary custody adjudication with no intention to see them enforced. Perhaps then, policy-making regarding private family life could also be directed towards the sensitisation of village law-makers[78] to start thinking about their children as independent human beings. This discussion will be returned to in Chapter Seven.

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(78). The chiefs and village elders in their council are capable of amending customary law since they have the power of the people to pronounce a particular conduct unlawful.

CHAPTER SEVEN

FACING THE FUTURE: SOME CONCLUSIONS

This thesis has explored the law of custody in Cameroon and how the courts make custody decisions. It has emerged that unlike in pre-colonial times, the law of custody after divorce falls under two jurisdictions - statutory and customary law. Despite the different legal framework, determination of the upbringing of children by the judiciary in statutory courts, by Customary Courts and in cases of extra-judicial termination in the villages is not in practical terms, different. Customary law father's custody right is fundamental in custody determination regardless of the jurisdiction. As regards children of customary divorce, paternity is the "legal" determinant of which parent the child stays with on divorce. The morality of this rule had been addressed in Chapter Three, a discussion which will be returned to at the end of this Chapter.

This Chapter will re-highlight certain problem areas in which reforms are deemed necessary and suggestions for changes will be made. First, ambiguity under current law, with regard to the distinction between a statutory and a customary marriage will be addressed. Second we shall focus on the absence of a Cameroonian law governing divorce and custody, compounded by uncertainty regarding applicable English law. These two problems will be treated in the first part of the Chapter. The second part will deal with judicial bias in favour of fathers and the consequence on the welfare of children. The effect of using in a disguised manner, customary law father's custody right by the judiciary as the test for determining welfare is that decisions do not protect the welfare of children of divorce. Three points are put forward in support of this assertion. They are: judicial response to non-payment of maintenance by fathers; the question of objectivity of welfare reports relied on; and total judicial disregard for wishes of the child. In part (C) we will advocate for a custody concept to be developed in indigenous customary law.

A. THE NEED FOR CLARITY IN THE NATURE OF MARRIAGES AS WELL A COMPLETE BODY OF DIVORCE AND CUSTODY LAW.

Absence of a clear distinction between a customary and statutory marriage widens judicial discretion in determining the nature of a marriage, hence, its jurisdiction and governing law, as seen in Chapter Two. That discretion is further broadened by the liberty

bestowed on the judiciary, as discussed earlier, to pick and choose which English laws to apply in the absence of Cameroonian law regulating divorce and custody or any guidance on applicable English laws. These two problems will be re-examined and recommendations for reforms made.

The Need for a Clear Distinction Between a Statutory and Customary Marriage:

There is no clear distinction between a marriage celebrated under the ordinance and a customary one. This is accounted for by two main of factors.

First, S. 49 of the Civil Status Registration Ordinance states polygamy which is traditionally associated with customary marriages as a form of a legally valid statutory marriage. Uncertainty arises as a result of the extreme interpretation of statutory polygamous marriages by the judiciary. Despite their legality, statutory polygamous marriages are converted into customary marriages by judicial interpretation. The reason being that judges use the classic English definition of marriage in Hyde v. Hyde[1] as the standard for determining a statutory marriage, which has to be a monogamous marriage, in judicial interpretation. The cause of this practice is our second point.

Second, there is no legal or judicial definition of a statutory marriage for the purpose of the Ordinance. The courts, therefore, rely on the English definition of marriage to determine whether a particular marriage is a statutory one or not. It is inconceivable that the English definition in Hyde v. Hyde is used as the test for determining a statutory marriage under the Civil Status Registration Ordinance 1981, which unambiguously states polygamy as a valid form of statutory marriage. As a consequence, statutory marriages which do not satisfy the monogamy test are characterised as customary marriages. Such marriages become customary marriages.

Third, the effects of polygamy in statutory law and the absence of a definition are compounded by the combined marriage certificate currently issued to spouses who contract statutory marriages and those who register customary marriages. There is no apparent indication in the certificate as to whether specific sections of the certificate are to be completed only by parties registering a customary marriage. The consequence of this ambiguity is the unconventional procedure of conversion of otherwise valid statutory

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(1). (1866) LR I P & D 130, 133.

marriages into customary marriages by the judiciary, as discussed in Chapter Two.

In all three instances, the implication is that divorces which otherwise would be entertained in statutory courts become subject to the jurisdictions of customary law, which gives no regard for the individuality of children. One could say that, it does not matter whether divorce is obtained in a statutory court or under customary law. For, we began this discussion by stating that customary law father's custody right is the main consideration. However, the difference in legal terms is that in customary divorce, father's custody right is a customary law rule. By contrast, paternal preference in statutory courts is the influence of cultural values on statutory custody adjudication. Paternal preference is done in exercise of the discretion conferred on statutory courts under the welfare principle. Statutory law provides a legal framework for the protection of the welfare of children. It seems, however, impossible for this goal to be achieved in the face of cultural beliefs which are held sacred, in Cameroonian society. The welfare of the child in statutory divorce would be served if statutory judges allow flexibility in the custody decision-making process. Making decisions on the basis of customary law father's custody right as the test for determining the welfare of the child, does not accommodate flexibility. By contrast, it increases the number of children whose welfare is forgotten in the area of divorce.

The judiciary would not easily convert a valid statutory marriage into customary marriage if the law had made the distinction between the two types of marriages clear. We, therefore, are making the following suggestions towards change.

Proposals for Reform:

There is an urgent need to clarify the current complexity that surrounds the nature of marriages in Cameroon. The attention of policy as well as decision-makers is being drawn to the following:

1). To provide a legal definition of a statutory marriage, taking into consideration the socio-cultural circumstances within which the Western concept of marriage, which will be the model of any local definition, has to be applied. That is to say, it has to be a definition that reflects the fact that polygamy, for example, which was traditionally associated solely with customary marriages had since become a reality in statutory marriages. Polygamy as a form of statutory marriage has won the admiration of, and is practised by parties to statutory marriages as well as those in customary marriages. Those who celebrate potentially

polygamous statutory marriages largely represent the body of educated people in the society living in towns and cities. These are people who do not live under circumstances with which polygamy in the traditional sense was associated. Polygamy is deeply rooted in the society and practised by policy and decision-makers. Therefore, any legal definition of a statutory marriage in Cameroon which does not reflect this feature will leave the current problem unsolved.

Similarly, a definition of a statutory marriage in Cameroon has to acknowledge the cultural significance of customary law marriage rites even for those intending to celebrate a statutory marriage. The presence of customary ceremonies in statutory marriage is a reality which the law- makers cannot continue to ignore, thereby, prejudicing the interests of children born in such marriages. A definition of statutory marriage, therefore, which considers this reality should clarify the fact that an otherwise valid statutory marriage will not be seen as a customary marriage solely because the parties performed certain customary marriage requirements. Customary marriage rites are always demanded by the kinsmen of the to-be spouses regardless of the type of marriage they intend to celebrate. Respect for culture should not become prejudicial as it is the case now to mothers and children of such converted "hybrid statutory marriages" who are the main protagonists of customary law rules on family status.

A definition of a Cameroonian statutory marriage has to reflect these two characteristics. This means that the classic English definition in Hyde v. Hyde[(2)]is not suitable for a mutatis mutandis transfer into Cameroonian courts as it is currently the case. A definition which could either be by legislation, or by a superior court decision could be the first stage to tidying up the mess.

It will establish an objective test for determining the nature of a marriage. Any marriage that does not satisfy the properties of the legal definition, will automatically be known to be a customary marriage. Borderline marriages which are now at the mercy of judicial interpretation of their nature, with the attendant consequences would be wiped out. Clarity on the nature of marriage would reduce the embarrassment of mothers who on divorce, suddenly realise that their marriage is under customary law jurisdiction, although to them it was a statutory marriage. They are suddenly faced with the horror of losing their

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(2). Supra.

children and having no property rights, in accordance with the customary law of the tribes. Besides, knowing the true nature of the marriage may help to adjust the timing of divorce. A mother who knows that her marriage is in practice, a customary one contrary to what she thought, might be more tolerant and reluctant to petition for divorce even if solely because of fear to lose her children. Although in some cases, the eventual divorce is inevitable, it could be delayed. There may be greater chances of divorce not occurring while the children are still subject to custody decision making. Indeed, clarity will engender certainty. Making suggestions for changes in statutory law of marriage here may appear to suggest an acceptance of customary law rules on divorce and custody. This is not the case. Attention is here focused on the ambiguity in legal procedure which leads to narrow interpretation of the nature of statutory marriages, which, in consequence, are the targets for "conversion" into customary ones.

2). We also recommend that the present combined marriage certificate should be replaced by two distinct ones. A separate certificate should be drawn up to be issued solely to parties who celebrate a statutory marriage at the civil status registry. In turn, a new certificate should be drawn up to be issued solely to parties who celebrate customary marriages and register them later in conformity with section 81 of the civil Status registration of customary marriages.

Separate marriage certificates for both types of marriages would help those in possession to know even in the absence of a definition, the de facto nature of their marriage. Possessing a statutory marriage certificate would indicate that one's marriage is statutory. Similarly, a party who has a customary marriage certificate who may have thought for some reason that the marriage contracted was statutory, will be self-informed about the nature of the marriage from the certificate. Even if these reforms are made, it is unlikely that the current complexities would be completely eradicated, unless statutory law on divorce and custody itself is made certain.

Towards a Certain and Complete Body of Statutory Divorce and Custody Law:

Cameroonian custody law and practice is faced with the problem of absence of a complete and coherent legal system. The Civil Status Registration Ordinance does not make provision for divorce and adjudication of the custody of children after marriage, as discussed earlier. Hence, English law is the law applicable. It is by no means certain which English

statutes and cases decided on them are applicable in the courts. Even legal practitioners are not comfortable when advising a client on the legal position in this area, as in other areas where national law is incomplete. The reason being that even they are not sure about the exact English laws that are generally applicable in certain areas. Whether a particular English statute or case law is applicable or not seems to depend on the instincts of individual judges. Judicial practice has not indicated a pattern from which a definite inference can be made as regards the precise English laws that are applicable. Policy-makers appear to be satisfied with the haphazard application of English law, which depends on intuitive picking and choosing by judges, as a solution to the legal ambiguity created by the colonial clauses which enabled the reception of English law. What does this mean for children of divorce? - Decisions about upbringing of children of divorce are made on the basis of paternal preference in statutory courts as the welfare of the child is interpreted in terms of customary law father's custody right in exercise of judicial discretion. This may or may not be in the best interests of the child. Changes are, therefore, deemed necessary.

Proposals for reform:

We, therefore, make the following two suggestions:

1). That it is time our law and policy-makers consider the development of a comprehensive body of Cameroonian family law. The body of law developed as Cameroonian family law, needs to take account of the dual legal heritage of the country. It also has to consider the fact that Western type law, which will be the basis of statutory family law, is to form a body of law to regulate family lives of people who have different values, beliefs and perceptions about the family and marriage.(3)

Cameroonian statutory family law should, thus, reflect harmonisation of selected English and French legal principles on the one hand, and certain aspects of customary law which are fairly peculiar in the majority of the tribes, on the other.

2). We also suggest that in developing Cameroonian statutory family law, the contribution

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(3). See, PHILLIPS, A., "An Introductory Essay," in PHILLIPS, A., and MORRIS, H. F.,Marriage Laws in Africa, Oxford University Press, London, New York, Toronto, 1971, p. 1 at 6-9. Cf. DWIGHT, M. L., "Cameroonian Women at the Crossroads: Their Changing Role and Status,"(1986-87) II Journal of African Studies 126 at 128.

of the courts should not lag behind. Whereas, parliament and other law-makers[4]lay down broad legal principles, the substantive law that develops from statutory enactments basically arises from judicial interpretation of legal provisions. This is necessary in order to clarify the legal position in a particular area. Through the operation of the doctrine of precedent, which principle of law is already part of the legal system,[5]such decisions will be binding on lower courts.[6]Undoubtedly, it would be a substantial contribution to the development of Cameroonian family law. For example, a ruling of the Court of Appeal or the Supreme Court on the criteria for the determination of the nature of a marriage, could have to a certain extent, settled the problem of uncertainty discussed above in the absence of a statutory definition. However, the contribution of the courts may not be fully realised if the administration does not devote resources geared towards the proper filing of judgements. For example, ensuring that the judgements are consistently typed and to make sure that, a system of consistent law reporting is developed.[7]

B. CUSTODY DECISIONS DO NOT IN PRACTICE AIM AT PRESERVING THE WELFARE OF CHILDREN OF DIVORCE:

Our discussion of child custody law and practice after divorce in Cameroon indicated the significance attached to paternity in child custody adjudication. This is customary law, which informs judicial practice in statutory courts. Applied in statutory courts, paternity as the test for custody adjudication is importation of customary law into statutory courts. Not only does this practice question the professional ethics of statutory court decision-makers, it acquiesces in customary law subordination of status of motherhood and children.

The mother is recognised culturally and socially as the child carer. This is stated in

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(4). See, ANYANGWE, C., The Cameroonian Judicial System, Publishing and Production Centre for Teaching and Research (CEPER), Yaounde, 1987, Ch. 13.

(5). See, ANYANGWE, ibid., Ch. 15.

(6). S. 23(3) of Law No. 75/16 of December 8 1975 (procedure and functions of the Supreme Court) enacts :"Judgements delivered by the Supreme Court sitting with at least five of its members shall be binding on lower courts on matters concerning points of law brought before it." For the authority of decisions of the Provincial Courts of Appeal, see, ANYANGWE, ibid., p. 255. Cf. Ibid., p. 257, para. 3.

(7). Lack of funds and sufficient administrative backing accounts for the absence of a law reporting system. This explains why the cases consulted are basically unreported. The majority in the case files are left in handwritten scripts. See, ANYANGWE, op,cit. note 4: p. 257.

judicial pronouncements in statutory courts and custody awards based on the tender year presumption discussed earlier. However, this role is not reflected in the customary law of divorce and in statutory court practice. The focus on making custody decisions, even in statutory courts, is not the interests of the child, but decisions are made in a manner which upholds customary law father's rights. The need to maintain cultural values and tradition over-rides welfare considerations which could warrant a re-assessment of the significant role of mothers in the upbringing of their children. The interests of culture are given priority over the welfare of the child.

This does not reflect the Cameroonian government policy of establishing a welfare state for children,[8]in discharge of the responsibility vested on it as a member state of the United Nations Organisation.[9]Individual state responsibility for the protection of the world's children was recently re-emphasised in the United Nations Convention on the Rights of the child 1990[10]to which Cameroon is a signatory member. The convention now makes it clear to the member states that the identified children's rights to be recognised and protected by the governments, are rights that children possess in their capacity as children.[11]

The obligation of the Cameroonian government to be concerned about the welfare of its children does not exclude children of divorce. It is incumbent on the policy-makers to ensure the existence of and compliance with policies intended to secure the interests and developmental needs of children during and after marriage. These include, children brought up by single parents as well. Such a framework appears not to exist. Three factors which were mentioned earlier in support of assertion will be discussed seriatim. First, the response of policy and decision-makers to the non-payment of maintenance by fathers. Second, reliance on welfare reports despite the chances of absence of objectivity surrounding such reports. Thirdly, the fact that the wishes of children are considered irrelevant.

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(8). See, FONYAM, S., The Protection of Children Under Cameroonian Law, Ph.D Thesis, University of Yaounde, 1986. (Unpublished).

(9). See, United Nations Declaration of the Rights of the Child 1959. See also United Nation's Resolution No. 31/119 of 1976 which declared 1979 the International Year of the Child.

(10). See, UNICEF : Facts and Figures, 1990.

(11). For a critical view of the United Nation Convention on the Rights of the Child, see, BUTLER-SLOSS LJ., "Children in Society,"(1989) Current Legal Problems 71.

Decision-Makers' Response to Failure of Fathers to Comply With Maintenance Orders:

The possibility of non-compliance with maintenance orders by fathers, as seen in an earlier discussion, is the main reason which has been advanced by decision-makers as the rationale for resorting to paternal preference as a general rule in custody adjudication. Rules of thumb, including the customary law rule that children belong to the father had existed in Western societies. This is obvious, for example, from the references on the English Victorian family made earlier in this work. However, English common law father's custody right, at least, in law, gave way to the primacy of welfare of the child, early this century, when welfare principle emerged as the standard for custody decision-making. Today's English judges recognise the diversity of family forms in the English society. They acknowledge the fact that awarding custody to the father as a rule of thumb, is not necessarily in the welfare of the children. The welfare principle as the standard for custody decision-making, as treated earlier, enables the courts to make decisions that take account of the circumstances and facts of individual cases. Unlike English courts, Cameroonian statutory courts still base custody decisions on the right of the father over his children, by interpreting the welfare of the child in a manner that upholds the traditional father's right over his legitimate children.

The Victorian social structure is analogous to the Cameroonian traditional hierarchical society, the values of which are deeply rooted in the various customary laws. As it was in England, customary law father's custody right idealises a particular family form - the patriarchal family, discussed earlier in Chapter Four. By importing customary law father's custody right in statutory divorce, statutory court decision-makers, influenced by customary law eschew the diversity of family forms that exist in Cameroonian society today. They are refusing to acknowledge the practical erosion of the traditional family structure through the efforts of mothers in the strife for economic independence.

Furthermore, the double capabilities of mothers as professional women and mothers in today's capitalistic and competitive society is still undervalued. Rather, courts idealise in the capability of fathers to do what is best for their children. Social and economic circumstances within which children in Cameroonian society are born and raised are to be emphasised. It was discussed in Chapter Six that sexual division of labour is rigid, with a clear distinction still made between the home and the work place. There has been an opening up of the public economic domain to women, hence, a general acceptance of women in the

workplace away from the home. However, flexibility in sexual division of labour in the public domain, as seen in a previous discussion, has not been reflected in domestic work. This issue has been examined in Chapter Six.

The home is still regarded as a woman's sacred place, from where she derives her respect and status regardless of her achievements and success in public, as we discussed in Chapter Six. The most significant and most demanding of a mother's domestic responsibilities is presented as the procreation of and caring for her children. This involves physical, social and financial sacrifices on the part of mothers, in time of ill-health of the child, and in cases of desertion or neglect by their father. The mother is the parent who is likely to be there to attend to the child's developmental needs, even when she is physically exhausted, emotionally and financially drained. A working mother, for example, would not be regarded as having accomplished her daily obligations unless she has discharged her activities of the day towards the children and the household. Few mothers are fortunate to have supportive husbands to share with them in particular, the emotional demands. On divorce, however, this reality of family life is overshadowed by customary law fathers' custody right rule which is so influential in custody adjudication.

Our intention is not to advocate maternal preference in statutory courts custody decision-making or a reversal of customary law paternal custody rule into maternal custody. Apart from the argument against establishing rules of thumb in custody, an issue which had been dealt with earlier, there are mothers who may be less responsible for their children's upbringing than their fathers. Similarly, we have acknowledged the existence of fathers, even in the Cameroonian society, who are capable of and willing to make what ever sacrifices child rearing involve if they have to. These are exceptions to the general practice discussed earlier in Chapter Six. Usually, it is the fathers who have an active involvement in the upbringing of their children during marriage who are likely to bear everyday responsibility for their upbringing if the children are in their custody. The level of physical commitment is not equal to the claims made by various fathers' movements current in the English society.[14]

Our intention is to attract the attention of decision-makers to these facts of child rearing. A pragmatic view of the socio-economic circumstances within which adjudication

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(14). SMART, C., "Power and the Politics of Child Custody," in SMART, C., and SEVENHUIJSEN, S., (eds) Child Custody and the Politics of Gender, Routledge, London and New York, 1989, p. 1 at pp. 10-21.

on the upbringing of children of divorce is made may reveal that decisions based on rules of thumb are not in the interests of children. Pragmatism would also lead to the realisation of the predicaments of children of divorce in customary marriages, who are not even considered interested parties affected by their parents' divorce. Therefore, resorting to paternal preference in statutory courts, as under customary law, in response to non-payment of maintenance by fathers, is not an objective solution. It is, generally, against the welfare of the children involved.

Suggestions for reform:

We, therefore, make the following proposals.

1. That the relatively low financial position of mothers should not be capitalised on in denying them custody of their children as a general rule. Rather, policy-makers should aim at developing an administrative framework to supplement the finances of mothers where the child's interests demand that she be awarded custody. It should be a machinery to ensure that mothers have a fixed monthly financial scale with or without compliance with maintenance orders by fathers. This means that, custodian mothers in low financial positions should be placed on a well calculated income support scheme under the Department of Social Welfare, in the Ministry of Social Affairs. The calculated payments have to be on a monthly basis. In turn, the Department should be vested with a legally backed right of subrogation against the fathers involved, to pursue them to the extent of their monthly indebtedness in the maintenance order, where made.

2. The Department of Social Welfare should be legally empowered to enforce maintenance on failing fathers as they think fit. For example, in cases of employed fathers whose salaries are paid through the banks, the Department should be empowered to make standing orders with the banks concerned. Such orders would be for the bank to pay the sum of the monthly maintenance each month on a fixed date, withdrawn from the account of the father concerned to the Department. The standing order will make provision for the bank to use its own money to pay maintenance due for the month to the custodian mother through the Department, even if the father's salary is not yet in his account when the payment is due. In turn, the father should be made responsible to pay to the bank any handling charges plus interest where the bank pays before the arrival of the father's salary.

Presently, similar arrangements exist between the Department of Social Welfare and

the employers of some of the fathers. Under such arrangements, the employee has to set-off the monthly maintenance charges from the father's salary before it is paid. However, their effect is not far reaching, as, the Department relies solely on the goodwill of the employers in the absence of any legal means of enforcing such arrangements. Besides, there are many fathers concerned who are not on employee pay rolls. They are self-employed businessmen or farmers. Our proposals would cover them as well. Apart from the first suggestion, the second may also secure payment from self-employed fathers. Most businessmen, have accounts in the banks in respect of which the proposed arrangement could be made.(15)

3. As regards small business fathers and farmers, most of whom are unlikely to have bank accounts, we suggest mandatory monthly payments into specified courts. The involvements of the courts would mean that failure to pay without justifiable cause will be tantamount to contravention of the law. For fear of being considered a criminal which to many is the sole reason for the existence of law, they would be obliged to comply, unless there is good reason to do otherwise.

Although compliance may not be total, our proposals could increase substantially the number of fathers who comply, if the administration, backed by the law and the courts are willing. This could induce custody adjudication on the basis of what is in the child's best interests, if, in fact, the financial position of mothers is the reason for paternal preference in statutory courts.

Objectivity of Welfare Reports:

In the absence of sufficient evidence to enable the judge to reach a decision as to which parent to award custody, the practice, as discussed earlier, has been to request a welfare report from the Social Welfare Department. In principle, the aim is to give the judge sufficient facts to enable him to decide on the basis of what is best for the child. Hence, the report is based on investigations by an appointed social worker made on the parents involved, the children and others connected to them. Recommendations as to whom the court should award custody are made at the end of the report, which are usually reflected in the ensuing custody orders. It is doubtful, however, if the report which is produced evinces what is in

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(15). A similar approach for enforcement of maintenance exists in English law, now under the Maintenance Enforcement Act 1991, S.1. We have treated this issue earlier in Ch. 6.

the child's best interests, for two reasons. First, because of the influence of customary law father's custody right and, second, the content of the welfare report itself.

First, it has been discussed previously that welfare reports generally recommend that custody should be awarded to the father. This general rule is premised on the experience of the social workers that most mothers are in low financial positions and fathers do not comply with custody orders. We have in an earlier Chapter, made a case against this purported judicial justification for disguised paternal preference. A number of conclusions were discernible: First, it was illustrated that there are other gender-neutral solutions to the relatively low financial position of mothers and the non-compliance with maintenance orders by fathers. Second, it was also established that mothers' less privileged financial position does not render them incapable of bringing up their children and providing for their developmental needs. Third, it was also discussed that paternal preference is not in the best interests of the children.

The second element in support of our allegation that welfare reports produced in Cameroonian statutory courts may not necessarily reflect what is in the welfare of the children relates to the content of the report. Despite the humble legal objective of welfare reports, their use in Cameroonian courts is questionable as to fairness. Scepticism as to the objectivity of these reports arises because of the social, cultural and economic circumstances under which investigations are made. Occasional favouritism of one of the parties in return for some compensation in kind or fiscal terms have been noticed. Besides, the possibility of the reports being tainted by nepotism cannot be overlooked.[16] In a bid to favour a relative or a friend or one who has negotiated in return for benefit, producing an objective report[17]with recommendations which are based on the welfare of the child, is a remote possibility. Rather, the report is likely to suggest a custody order to the parent who is being favoured.

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(16). Information obtained from my interviews with the personnel of Social Welfare Department in Kumba, Buea and Yaounde cited earlier in Ch. 5, p. 183, note 47.

(17). Cf. MURCH, M., Justice and Welfare in Divorce, Sweet & Maxwell, London, 1980, Chs. 3, p. 60 and 11, p. 173. For general criticisms on the use of welfare reports, see, ibid., Chs. 3, 7 and 8. Cf. MAIDMENT, S., Child Custody and Divorce, Croom Helm, London. Sydney. Dover, New Hampshire, 1984, pp. 75-78. Suggestions for a standard form welfare report containing a checklist have been made. See, GARETH, H.D., "Welfare Reports: An Expanded Checklist," (1992) Family Law 210 at p. 211-213.

Suggestions for reform:

We, therefore, put forward the following suggestions:

1. That the Department of Social Welfare should consider the risks of assigning one individual to investigate a case as it is currently done. The chances of corruption would be reduced if more than one person is investigating a case, unless all the investigators are bribed. To offer a bribe when there are two people would be more difficult than if there is just one.

2. That the Department should be legally bound to ensure that no person is assigned to investigate a case in which one is an interested party, for example, relative, friend, or close colleagues. Although, there is presently such a precaution, adequate steps are not taken by Social Welfare Department to ensure implementation, especially as it is not legally constituted.

Wishes of the Child:

In determining the welfare of the child, statutory law does not require that the wishes of the child of any age be taken into consideration. As discussed earlier, there is no checklist to help the courts in their exercise of balancing the factors in determining the welfare of child under S. 1 of the Guardianship of Minors Act 1971,[18]which is still the law under which custody decisions are made in Cameroon. Until the enactment of the children Act 1989, English statute law did not require the wishes of the child to be considered in custody determination.[19]

However, English courts have been taking the wishes of the child into consideration, in certain circumstances depending on the age of the child. For example, in B v B,[20] the wishes of a boy of sixteen who wanted to have nothing to do with his father were taken into account. Although, the court suspected that his attitude had been influenced by his mother and maternal grandfather's indoctrination and pressure, the court made an order for end of access. Similarly, the wishes of a thirteen and a half years old girl were influential in the decision of Re S[21] and reflected in the custody decision. In English courts, the child's

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(18). Now, S.1 of the Children Act 1989 which contains a checklist in S.1(3).

(19). The checklist in S.1(3) of the Children Act 1989, mentions the wishes of the child as a factor to be given regard to in the balancing exercise.

(20). (1971) 3 All ER 682.

(21). (1967) 1 All ER 202. Cf. Doncheff v. Doncheff (1978) 8 Family Law 205, in which the court was sceptical of the expressed wishes by three children aged between 9 and

wishes were given regard to in evaluating what would be in the child's welfare even before the emergence of the wishes of the child in the checklist in the Children Act 1989.[22]

The earlier English cases usually took the age of the child as the test for deciding whether the child's wishes should count or not. This test was, however, broadened in the House of Lords' judgement in Gillick v. West Norfolk and Wisbech Area Health Authority,[23]in which it was extended to the mental capacity of the child regardless of age. Lord Scarman (with whom Lord Fraser and Lord Bridge agreed) said:

> "... as a matter of law the parental right to determine whether or not their minor child below the age of sixteen will have medical treatment terminates if and when the child achieves a sufficient understanding and intelligence to understand fully what is proposed."[24]

It has been expressed, however, that to comply with the spirit of the decision in the Gillick case, the courts should as a matter of course, ascertain the wishes of older children.[25]

In giving regard to the child's wishes when determining welfare, however, English courts have exercised caution. Such wishes may, as in most cases, be a reflection of one parent's indoctrination as it was remarked in B v. B.[26] Nevertheless, as the child's wishes are relevant as one of the factors to aid the judge in determining the child's welfare, the opinion of a child may be persuasive, although it is obvious that such views are indoctrinations of one parent. This would be the case if it would be against the welfare of the child to hold contrary to his expressed wish.[27]

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15 to return to live with their father.

(22). See generally, CRETNEY, S. M., and MASSON, J. N., Principles of Family Law, 5th ed., Sweet & Maxwell, London, 1990, pp. 529-530. Cf. BROMLEY, P. M., and LOWE, N. V., Bromley's Family Law, 7th ed., Butterworths, London, 1987, p. 329.

(23). (1986) A C 112; (1985) 3 All ER 402.

(24). Excerpt from HOGGETT, B., AND PEARL, D., The Family Law and Society Cases and Materials, Butterworths, London, 1987, p. 391.

(25). See the pronouncement of Butler-Sloss LJ., in Re P (A Minor)(Education)(1992)1 F.L.R 316 at 321, CA. Cf. EEKELAAR, J., "The Eclipse of Parental Rights,"(1986) 102 Law Quarterly Review 4. Cf. EEKELAAR, J., "Gillick in the Divorce Court," (1986) 136 New Law Journal 184.

(26). (1971) 3 All ER 682. Cf. BROMLEY, P. M., and LOWE, N. V., Bromley's Family Law, 8th ed., Butterworths, London, Dublin, Edinburgh, 1992, p. 385. See also WALLERSTEIN, J., and KELLY, B., Surviving the Break Up: How Children and Parents Cope with Divorce, Grant McIntyre, London, 1980, pp. 314-315.

(27). See, B v. B supra.

By contrast with the practice of English courts, Cameroonian statutory courts have not considered judicial interviews to seek the wishes of the child relevant in determining a child's welfare,[28]regardless of the age or level of understanding of the child. This attitude, the judges intimated, is dictated by the possibility of the child not expressing his views but those of one parent who may have indoctrinated the child and presented a negative image of the other.[29] Furthermore, excluding the wishes of the child from welfare determination has also been justified on the ground that it is not in the welfare of the children to place on them the burden of having to choose between the parents. The argument is that, it could jeopardise a child's relationship potentially with the "non-custodial parent."[30]

Similar concerns have been expressed regarding the relevance of children's wishes in English courts.[31] Writers have also put forward similar arguments. Wallerstein and Kelly have noted particularly that nine to twelve years old children always display anger, hostility, willingness to be co-opted, take sides and label parents as "good" or "bad". The writers doubt the capacity of such children to make plans which would be in their best interests. They put forward the view that children below adults are not reliable judges of their own best interests. They intimate increased misgivings on their part about relying on the expressed opinions and preferences of youngsters below adolescence.[32]

It is in the child's best interest to maintain continuing relationship with both parents. Hence, the less opportunity there is for the child to feel guilt, or the child to show conflicting loyalty to parents, the better for the child.[33]

The views of different writers on the disadvantages of giving regard to the wishes of the child put forward above, are not in support of the Cameroonian court practice of not seeking the wishes of the child at all, regardless of age or level of understanding. A child-centred decision making process must allow the child to be heard if the making of such choices become necessary as in contested divorce.[34] This view has been endorsed by expert

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(28). Information obtained from my interview with judges cited earlier on p. Ch 5, p. 174 at note 13.
(29). Cf. MAIDMENT, op.cit., note 17: p. 275. Cf. B v. B, supra, note 26.
(30). Ibid., p. 276.
(31). See the court's pronouncement in Re S, (1967) 1 All ER 202.
(32). WALLERSTEIN, and KELLY, op. cit., note 26.
(33). MAIDMENT, op.cit., note 17: p. 276.
(34). Ibid.

opinion. The Group for Advancement of Psychiatry recommends that a child's opinion in custody disputes has relevance, although it is only one part of the evaluation.[35]

Proposals for reform:

Against this background, we suggest, therefore, that the wishes of the child are a relevant factor which on balancing the others, may aid the judge in awarding custody to a parent on the basis of what is best for the child. The wishes of the child may be known through the welfare report. However, considering the possible lack of objectivity in reports produced in Cameroonian courts, discussed earlier, they are not a proper medium through which the child's wishes may be made known. Besides, the fact that children are usually interviewed by welfare officers during investigation, does not render irrelevant individual judges' interviews with the children to ascertain their opinion. This has to depend on the level of understanding of the child determined in most cases by the age.

It is the responsibility of the interviewing judge to make the child to see such interviews less as a burden of choosing between parents. The interviewer is to explain to the child, who must first be of the age to enable a sufficient understanding of the explanation, that the aim is not to choose one parent. That the court's intention in seeking the child's wishes is to determine the parent with whom the child's welfare would be best served[36] in the circumstances. The child also has to be told that the award of custody to one parent does not mean that the other ceases to be regarded as the child's parent. The child should also be made to know that he or she can spend time with the other parent as often as arranged. This calls for decisions which impart on both parents a feeling that they are both still looked upon as the parents of the children even after divorce, regardless of who gets custody.

We are suggesting a development towards a concept of responsible divorce, whereby parental responsibility does not in law and in fact cease on divorce. The current practice of preferring the father because he is traditionally the "owner" of children of the marriage is certainly not capable of accommodating such a proposal. Therefore, reforms need to start from the level of judicial practice. This means that statutory courts should focus their concern on what is best for the child as a neutral concern, rather than as an element of parental status.

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(35). Cited in MAIDMENT, ibid.
(36). Infra.

Both parents need to know that they are both the parents of their children during marriage. Thereafter, they may be willing to be educated on the fact that they both remain parents after divorce, regardless of the actual residence of the child. Before returning to the concept of responsible divorce as our conclusive note, we intend to make a case for a concept of divorce in customary law.

C. THE NEED FOR THE DEVELOPMENT OF A CONCEPT OF CUSTODY IN INDIGENOUS CUSTOMARY LAW OF DIVORCE:

A lot that has been said in criticism of statutory custody relates to judicial misuse of the good intentions of discretion conferred on judges under statutory custody law. The shortcomings are based on the restrictive interpretation of the English principle of welfare by the courts in an attempt to protect certain traditional values which are beneficial to the fathers, as opposed to the children's interests. Statutory law provides a legal framework that takes account of the vulnerability of children of divorce. Accordingly, the law on that area aims at giving protection to the children whose parents get divorced. This explains why the welfare of the child is the first and paramount consideration under Cameroonian statutory law regulating custody adjudication, although, this is not apparent in practice. Hence, our proposal for change in statutory custody law will be geared towards the encouragement of continuous post-divorce parenthood. This is to avoid the notion of "win" and "loss" that the term custody has been associated with and its consequence on parental post-divorce relationship as seen in an earlier discussion. Children from customary marriages whose parents get divorced face a different situation.

No Concept of Custody for Children in Customary Divorce:-

It had been examined in chapter three that indigenous customary law of divorce has not developed a concept of child custody. It may appear absurd for one to make suggestions for the development of a concept of custody on divorce in this period. Academic bickering on the concept of custody in English law is almost becoming a thing of the past, with the enactment of the Children Act 1989. In English law, therefore, academic research in this area is currently exploring possibilities of making the new concept work, with the intended benefit realised. This is why we suggest that Cameroonian statutory courts move towards a concept of responsible divorce for it is a current safety-net for the child's welfare. By contrast,

customary law has not developed a concept whereby the future of the children would be considered on granting divorce, independently of fathers' rights. Advocating for a concept of custody, therefore, seems to be the proper premise.

Children in customary law are not accorded individual status. As seen in Chapter Two they are identified as a kin-group. In case of legitimate children, they are associated with the father's kin, while illegitimate children are associated with their mother's kin. With the rules made so clear and apparently acceptable, no thoughts have been given to the particular needs of the children's future after divorce. The determinant of the parent who should "have" the children after divorce is paternity, which is in turn dictated by the payment of bride price. In the tribes studied, bride price determines the validity of a customary marriage, hence, paternity of the children. Therefore, entitlement to custody is based on the customary law value of the bride price, as it determines paternity. Custody decisions centred on bride price, are not the result of an independent consideration of the children's future. Welfare considerations in customary custody adjudication, as identified in an earlier discussion, are merely incidental to the exercise of customary law fathers' rights over their legitimate children during and after marriage.

The purpose of this discussion is not to minimise customary law. Customary marriages in Cameroon are under customary law jurisdiction. What we are advocating is a re-examination of certain areas in which current customary law is prejudicial, particularly to the children and their mothers. However, making an appeal for re-consideration of the position of mothers in customary law, is beyond the scope of this work. Our concern is on children of divorce who are left unprotected in the face of harsh customary law rules based on traditional beliefs and cultural values.

Claims of children that divorce is advantageous to them are linked to the narrow interpretation of the concept of the welfare of the child in the Cameroonian society, as seen in a previous discussion. It has also been established that even in these traditional communities, children need more than material and physical welfare, contrary to the popularly held view. The gap left by the absence of the other developmental needs which are not taken into account in customary custody adjudication is not made up by the material advantages which the children intimated that they derive from their parents' separation.

Nevertheless, customary law has no framework for looking at the negative effects of divorce on children. There are no specific indigenous customary law rules to ensure their

future welfare after divorce. Statutory intervention by stating the welfare principle in Customary Court divorce through the Customary Court Rules, as seen in a previous discussion, is of little practical effect. On divorce, therefore, no thought is given to the question of how suitable the father who in customary law has the custody right is, to care for the interests of the child. Similarly, where very young children are involved, temporary custody is awarded to the mother on the basis of their young and demanding ages, without regard to the mother's suitability in the particular circumstances, to care for their needs. As a consequence, many children are likely to suffer from neglect and malnutrition in villages, the education of many is retarded[37]and many more become juvenile offenders.[38] This is partly the result of leaving the child under the charge of an irresponsible parent. This is in turn the consequence of basing decisions regarding post-divorce upbringing of children on customary law father's right rather than on laws which consider the welfare of the child.

Proposal for reform:

The development of a concept of divorce in customary law is pertinent. It may be that such a concept was not necessary when a customary marriage was regarded indissoluble as it was traditionally. The need for having to make decisions in the future on which parent should bring up the child was not feasible. Customary law has not adapted itself to the new social trend of divorce, despite the general acceptance of that occurrence. This would be possible only after customary law has come to terms with the fact that divorce brings about changes in family life, for which the traditional father's right rule is not specifically suitable, if the children are to be protected. Rules have to be formulated to enable the children adapt to the changes in family life with minimum consequences on them. This means, amongst other things, developing a framework which considers the issue of the future upbringing of the children after divorce. It also calls for the establishment of laws which determine the economic conditions of mothers after divorce. For example, giving the mother property rights on divorce. This would elevate the post-divorce poverty condition of mothers, caused by the absence of any form of property sharing in customary law divorce. In turn, many mothers

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(37). Personal observation during my years of growing up in these areas.

(38). Information got from the Social Welfare Report on Activities of the First Seminar held from July 1 1989- December 31 1989, from the Social Welfare Department in Buea in 1990.

would be better placed to shoulder the economic responsibility they now solely bear in cases where children who were left in their father's custody voluntarily escape to their mothers.

Customary law can be amended as socio-cultural values change. The basis for change, therefore, is the cultural ideologies and beliefs of the people. The possibility of change is indicated by the change from the concept of indissolubility of marriage to the acceptance of divorce. The law dealing with marriage also needs to change to suit the changed social circumstances. With unregulated continuous existence of the bride price as the determinant of legal validity of a customary marriage, and test for paternity, there is not much of a chance for change.

Without prejudice to the supporters of the institution of bride price, we conclude that it is a "necessary" evil. Rather than suggest its total abolition in customary law, we suggest a return to the traditional nature and value of the bride price. In other words, bride price in the form of money should be abolished and its payment in kind re-instituted. It should be an exchange of specified commodities, which would be in the form of a token, not as compensation to the bride's family. Rather, the commodities that would be exchanged by the bride and bridegroom's families, should be a symbol for remembrance of the day of marriage. This could mark the beginning of change in customary values and social attitudes now based on the current monetary value of bride price which gives it the appearance of purchase price of wives.

ADDENDUM:

TOWARDS A CONCEPT OF RESPONSIBLE DIVORCE:

"Children of divorce can be protected against damage to their psychological health and development. A society which ... allows divorce on the scale now experienced is irresponsible if it fails to provide a legal system which encourages and helps parents to fulfil their responsibilities to protect their children."[39]

Joint parental responsibility has been identified as the better means of minimising the effects of divorce on the children. Placing the children at the centre of custody adjudication, as provided by statutory law, the introduction of which we have advocated in customary law,

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(39). MAIDMENT, op.cit., 17: p. 283.

is a legal safeguard for the protection of the interests of children of divorce. It is important to bear in mind that it is advantageous for the children to have both parents in their lives even after divorce. Responsible divorce, which means continuous parenthood after divorce, calls for less hostility between the parties on divorce. This would only become a reality if parents would accept to divorce amicably without ascribing fault on the other or, on each other. Less hostility, which is likely to arise from amicable divorce would encourage conciliation, and help the parties to make objective decisions about their children's future. This includes, recognising the fact that they both remain the children's parents even after divorce, and that the children need them both. First, the parental status of both parents vis-a-vis the children during marriage has to be recognised.

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