

"CUSTOMARY LAW AND SOCIAL CHANGE": A
STUDY OF DISSOLUTION OF MARRIAGES AMONG
THE THARAKA, MERU

A DISSERTATION SUBMITTED IN PARTIAL
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By

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DEDICATION

To my wife Priscila

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STATUTES

Law of Succession Act, Cap.160, Laws of Kenya

Marriage Act, Cap.150, Laws of Kenya.

African Christian Marriage Act, Cap.151, Laws of Kenya.

Matrimonial Causes Act, Cap.152, Laws of Kenya.

CUSTOMARY LAW AND SOCIAL CHANGE

A STUDY OF DISSOLUTION OF MARRIAGES AMONG THE THARAKA, MERU DISTRICT.

~~THESE STUDIES ARE THE PROPERTY OF THE UNIVERSITY OF KENYA~~

INTRODUCTION.

The most serious of all the problems of law reforms in Kenya today is probably the unification of the various family laws obtaining in the country. The existence of these various family laws is basically due to differences in cultural heritage; the ~~best~~ modes of reduction and religious persuasions of the Africans and foreigners in Kenya. With the importation of the English rule in Kenya, statutory law of marriage and divorce was introduced (which is basically English law), with the immigration of the Asiatic Communities and Arabs, Islamic and Hindu laws came in. For this reason, we now have four regimes of family law in Kenya. Historically, the tendency has always been to make English law as the only law suitable for ^{all} the peoples of Kenya.

SIGNIFICANCE OF THE STUDY.

Since the era of colonization, there has been great intensification of modern influences among the African people. The Africans have experienced the impact of alien political, religious and economic organizations and various other factors which have shaken the foundations of the community life. Many factors in this process of culture change have already engaged the attention of sociological inquirers, but the problems ~~of~~ the flight of African institutions remain a question of controversy. One area of particular concern is the family institution, which has caused great controversy amongst the lawyers and politicians. Some argue that customary law has a future in Kenya, while others argue the contrary. In light of changed circumstances (economic, social, political and intellectual) an investigation of the flight of customary law becomes essential. A study of this kind, under-

taken by an indigenous person, who, through experience of the mode of life of this people is better able to know the patterns of life through which the society is undergoing, would assist in making an assessment of the degree of change in any one particular direction. Such a move is necessary for any positive rebuilding of the society.

RESEARCH LOCATION.

Due to limited time available for the research and the nature of the paper, a large area of survey could not be covered. The area chosen for the survey is Kathangachini Sub-Location of Tharaka Division in Meru District. However, it's my view that what would be said about this area would be a fairly representative of the Tharaka people. What is happening in Tharaka in general is not anything peculiar to them, other similar societies are undergoing the same process. Thus this area is taken as a case study.

METHODOLOGY.

A combination of different methodological approaches is requisite for obtaining the necessary information. A brief summary of each method adopted is as follows:

(a) INTERVIEWS.

Open questions were put to many persons regarding this topic. The subjects of the interviews ranged from the young to the elderly of both sexes. This was necessary to give a better cross-section of the society. An attempt was also made to ensure that the subjects come from various occupations, a move that assisted in appreciating the relationship between the attitude between divorced and the economic base.

(b) DISCUSSIONS.

Information was also gathered through informal discussions and social conversations. This was used more as a sounding board rather than a definite source of data.

(c) My parents have over years played an extremely important role in educating me on the ~~existing~~ cultural values of my people. What I have learnt from them over years was useful to me when writing this paper.

(d) LITERATURE.

Reading the available literature (not necessarily those on Tharaka, but also those written on customary law in general) was done. There's little literature about the Tharaka on this topic of study. Eugen Contran has done a documentation of a bit of it in his "Restatement of African Law" I. I did not find this to be very useful because Contran writes, expectedly, with the English jurisprudential concepts at the back of his mind. Because of this, he makes a lot of unfair generalization about the Tharaka Customary law.

THEORETICAL FRAMEWORK.

I am in agreement with Marx's version of philosophy which proposed as:

"In the social production which men carry on, they enter into definite relations that are independent and independent of their will, these relations of production correspond to a definite stage of their material powers of production. The sum total of these relations constitute the economic structure of the society - the real foundation on which rise legal and political structure and to which corresponds definite forms of social consciousness. The mode of production in material life determines the general character of the social, political and spiritual process of life" 2

put in short, what Marx is saying is that the society's view or epistemology is largely determined by the mode of production obtaining in the society. That mode of production dictates the greater content of law and other aspect of the whole social set up. The changes taking place reflects the perceptions of life and the needs of the class that controls the mode of production in a state.

SK SCOPE.

The nature of the paper does not allow a detailed analysis which would otherwise be carried out in a paper of greater magnitude. Coupled with the limited time available for the survey, the ^{paper} is not exhaustively authoritative on what is being discussed. I would propose that a future, more detailed research be carried out in this field.

It is proposed to deal with the present disturbing phenomenon on the following lines:

Chapter one deals with a general statement regarding the position of Customary law today. This is done by putting the issue in it's historical context. This answers the question how and what forces were used by the colonial government to dismantle customary law.

Chapter Two is concerned with the specific details of the laws that governed and regulated the dissolution of marriages in traditional Tharaka society. ~~Maxthirds~~

The Third chapter deals with the changes that have taken place today. A more detailed examination of the social economic forces behind these changes is done. Further, the chapter deals with the attitude of the post-Colonial government towards customary law. The conclusion is a summary of the whole paper. It is composed of a review of how the question of the plight of customary law has been answered and a word of recommendation.

CUSTOMARY LAW AND CHANGING CONDITIONS .

GENERAL STATEMENT.

As observed in the introduction, this paper attempts to discuss the right of customary law in Kenya. If the paper deals too much with one facet of customary law, it's because what will be said applies equally to all other facets of Customary law obtaining in Kenya. Toward this end, the present writer intends to make general statements about customary law, narrowing down, in greater details, to the future of the customary law relating to the dissolution of marriages. The Tharaka community is taken as a case study for this purpose.

In the early days of the colonial rule the colonial administration refused to recognize African customary law as law. Whether or not customary law can be termed as law, only incidental here and no much time need be spent on this issue. It suffices to say that the colonial administration used their own jurisdictional concept of what is law and used it as a standard measure. This attitude must not be seen merely as expression of cultural superiority that definitely the colonial administration carried along with it, but as having economic and political implications as the guiding forces.

The present writer is of the view that law properly defined is an integral part of society which is germane to it's welfare and development. It is aimed at enabling every individual within the society to enjoy and realize good life as they see it. It reflects hopes, fears, wishes, and social-cultural, economic and political institutions that obtain in the society. To this extent, I am in agreement with KARL MARX that a people's way of life, shape, and the nature of the superstructure finds expression in it's laws. Mirroring a people's philosophy about life, it expresses the economic base, which base

comprises of the mode of production, the means thereof, distribution of the produce and ownership of the means of production. If this definition is taken as being correct, as I do take it to be, then customary law, having evolved over a long period and binding on the individuals who comprise the society, expresses the cosmology of a people, and reflects their idea of good-life, and therefore no doubts that it commands the respect of law. This good life is to be measured against the mode of production that obtains. To the African Communities, good life can only be realized if every member of the community works, not merely for the betterment of the individual but for the society in its entirety. The major means of production were owned communally in most of African Societies, in a true and unadulterated African traditional Society.

This notwithstanding, it must be borne in mind that African Societies were not in a state of stagnation. They were in the process of developing and this development means a different outlook towards life. There is a change in the social, economic and political superstructure, which change must find expression in the laws that regulate and govern their affairs. It's not a change that can be ignored by law. To ignore such changes would be to make law an abstract set of rules rather than an integral part of society, rooted in its social-economic habits and attitudes of its people. Law must conform in a broad and general way to the patterns of behaviour which are widely approved and accepted in the community.

Among the African Societies in Kenya, this change was more pronounced after the establishment of the colonial administration. The colonial administration assumed overall sweeping powers to bring changes of the African superstructures through the process of legislation and other subtle, but equally effective means.

As observed above, the customary law had to change to conform to the new conditions of life.

It's the effect of the colonial administration on the customary law, that this chapter is set to examine.

DETAILED ACCOUNT.

Kenya, as a nation, did not exist before the coming of the British, when their imperial hegemonistic ambitions were put into practice in relation to the people of Kenya. The technological development of the African societies was characterised by low level of production. The mode of farming was not significant.

Socially, the nation of ~~kin~~ kinship bound together the entire life of the community. The individual was part of the whole and could not exist alone except cooperatively. The participation of every individual in the various aspects of the society was needed for the continuity and harmony of the society. None would be allowed to pursue his or her interests to the prejudice of the society as a whole.

On the contrary, the British were different ~~materially~~ culturally and economically. ~~As~~ Technologically, they were more advanced than the Africans and their mode of production was Capitalism. The African Concept of Kinship and Communal ownership of the means of production did not apply to them. Individualism was what they cherished. Whatever an individual did was not seen as aimed at ensuring continuity of their community, but was seen purely as an attempt for personal advancement. Their laws, as of necessity, were such as would fit their superstructure. It is because of this great difference between the British philosophy of life and the Africans philosophy of life that the British found the African traditional institutions wanting in substance and form. To ensure that there is conducive atmosphere for the prosperity of their institutions

be they economic, social, political or intellectual, they had to apply their laws to the prejudice of customary laws. To them, some aspects of customary laws hindered the process of exploitation of African resources, and such had to go. To the Christian missionaries, who for all purposes and intents, were part of the administration, the African institutions were Satanic and in the name of Christ had to go.

The declaration of a protectorate over ~~Kanaya~~ Kenya on 15th June 1895 marked the beginning of official British rule in Kenya, which rule endured until December 12th 1963. This completed a process which had been begun by a favourite Victorian colonial device - the chartered British East African Company. For effective control of the protectorate, the administrative officials had to assume wide powers over the protectorate. This was first marked by the enactment of the 1897 Ordinance in Council, which was more than a legitimizing legal instrument. The desire to banish the African institutions found expression in this colonial legislation. The ordinance provided for the setting up of native tribunals to hear a native case; I. Through their proxies, the administration nominated people who were to reside over the tribunals. This was the first official step towards demolishing the traditional way of resolving disputes. Among the Tharaka people for instance, disputes were settled by clan elders and no single individual would claim any fee for the proceedings of the dispute. There was, of course, the usual obligation to provide for the elders, in terms of food or wine, But with this new tribunal, those who were residing over them demanded payment of fees, seeing themselves as above the others.

The 1897 ordinance, further provided for the application of English law, not only to the Europeans but to peoples of all kinds. It provided for a High Court, having jurisdiction over all peoples, in both criminal and civil matters. Whoever had any doubts as to the attitude of the colonial administration towards customary law, must have been put to rest by the provision in the ordinance that customary law would be recognized in so far as it was not repugnant to justice and morality. One wonders how customary law would be repugnant to the traditional sense of justice and morality of the community which accepted them. They had evolved over a long period of time and had gained general acceptance amongst the people. How they would suddenly turn to be immoral and unjust, the colonial administration never bothered, nor did they feel obliged to explain. The only explanation for this is that, justice and morality was to be measured not from the African point of view, but from the Colonial administration's philosophy of justice and morality. Given this new and foreign standard measure of justice and morality, the customary laws appeared unjust and immoral.

From the revisions of this ordinance, it's clear that the colonial government recognized customary law, but within limits-subject to the repugnancy clause. This recognition can easily be explained. It had its basis in practical necessity, political theory and judicial philosophy. The limited resources of staff and uncertain policy objectives made the recognition of some aspects of customary law necessary. A less altruistic political explanation of the little prominence which colonial government gave to customary law is that such laws proved increasingly more convenient as administrative authority developed.

The adaptability of rules of customary laws made them useful instruments for the reservation of administrative control and buttressing the existing African authorities, who would be used as government proxies. The colonial administration would be prepared to compromise and reserve those aspects which did not hinder the progress of economic exploitation, while at the same time would legislate out all laws that proved a block to this end. Thus they were involved in conserving some aspects especially those which would enable them to exploit the more, while destroying those which proved otherwise conservation-destructive thesis of the colonial government. It was in fact an aspect of the infamous LUGARD'S indirect rule.

Clearly, this one single ordinance of 1897, heralded unprecedentedly powerful legal change, which gave a big blow to the customary law.

Other illustrations of attempt to legislate away customary law by the colonial administration may be given. In 1902, Crown Ordinance was passed. The most important thing to note about this ordinance is that it extended the powers of the commissioner over the territory. Among other, the the Commissioner could sell lands and leases for ninety-nine years. According to this ordinance, the rights and requirements of Africans to which regard was to be had in dealing with Crown land were seen in terms of actual occupation only; when land was no longer occupied by Africans, it could be sold or leased as if it were waste or unoccupied land. This was an assertion of sovereign ruling powers over the land. If there were any doubts as to the extent of the power the protectorate government was claiming by the 1902 legislation, they were set at rest by the CROWN LANDS ORDINANCE 1915. The ordinance re-defined Crown lands so as to include lands occupied by the Africans and land reserved by the governor for the use and support of members of the native

tribes. But "Such reservation shall not Confer on any tribe or ~~xxxx~~ members of any tribe any right to alienate the land so reserved or any part thereof" 3.

Thus not only did the protectorate government now have complete control of land destroying in whole the African land tenure system, but it was made ~~xxxx~~ clear that Africans had no right to alienate any of the lands, whether they occupied it or it was reserved for their use. The disinheritance of the Africans from their land was complete. This view of the effect of 1915 Ordinance was seen in the case of Wainaina -v- Murito 4 where it was held that the effect the ordinance was to take away all native rights in the land, rest all land in the Crown, and leave Africans as tenants at will of the Crown in the actually ~~xxx~~ occupied.

Other legislations relating to land were land Titles Ordinance 1919 and the subsequent amendments that followed. The 1919 Ordinance had the effect of making land a commodity capable of being held individually to the exclusion of all. This was in tune to capitalist mode of production where the guiding force is the desire to own and control private property. Titles over lands acquired under this Ordinance are still valid today.

Moving from the realm of land ownership to the realm of personal laws, one sees a similar attempt by the Colonial administration. The first Ordinance in this area was the 1902 Marriage Ordinance. This marriage Ordinance ~~xxxx~~ provided for marriage in the English way - the marriage is removed from the purview of the family members and made a state affair. The Essence of this marriage is that the marriage is registered by the Registrar of marriages and a certificate of marriage issued.

Knox

Under this Ordinance, marriage is monogamous in line with the decision of HYDE -v- HYDE 5 where marriage was defined as a voluntary union between a man and a woman for life and to the exclusion of all. The Ordinance made it an offence, punishable by imprisonment, to take a subsequent wife once one enters into marriage under this Ordinance. Such a marriage would only be dissolved by the process of court and not otherwise. Grounds of divorce were also specified. To the colonial administration the African polygamous marriage was not marriage. On African Marriage, Hamilton C J. in the Case of B-v-Ankeyo said:

"In my opinion, the use of the word marriage to describe the relationship entered into by an African native with a woman of his own tribe according to tribal customs is a misnomer, which has led in the past to considerable confusion of ideas. I know of no word that correctly describes it; 'wife purchase' is not altogether satisfactory but it comes much nearer to the idea than of marriage as generally understood among civilized people. The elements of so-called marriage by native custom differ so materially from the ordinary accepted idea of what constitutes civilized form of marriage that it's difficult to compare the two." 6.

Because the colonial administration did not consider the customary marriage as 'Marriage' it was necessary to enact a law providing and regulating marriage. A law that would apply to the English Community and to the Africans who would accept the 'civilized' form of marriage. It is important to note this 1902 Ordinance, the present day matrimonial Causes Act Cap 152 of the Laws of Kenya, was enacted to provide for the grounds and process of dissolving such marriages. The African Christian Marriage Act, Cap 151, a Colonial legislation was enacted to assist those Africans who had married under the Customary law to convert their marriage to Christian marriage Cap 151. Marriages under this Act, just like those under the marriage Act, are monogamous and can only be dissolved as provided for in the Ma

as provided for in the matrimonial Causes Act.

Under the African system, marriage is a union between two families, creating new relationships. It is a complex affair with economic, social and religious aspects which often overlap so firmly that they can not be severed. It is not an individual affair as defined in HYDE-v-HYDE, but it involved the whole lot of people.

~~Mbiti makes this clear when he says:~~
Mbiti makes this clear when he says:

"Marriage is a drama, in which everybody becomes an actor or actress and not just a spectator. Therefore marriage is a duty, a requirement from the corporate society and a rhythm of life in which everyone must participate. ~~in it~~ otherwise, he who does not participate in it is a curse to the community, he is a rebel, a law-breaker, he is not only abnormal but also under-human." 7.

It is the focus of existence and it was never left to the individuals. This is exactly what the English Marriage does. When it comes to dissolving it, the respective families were involved, the process is not judicial but extra judicial.

The present writer wishes to make it clear that, the Africans were not forced to marry under any of these two systems of marriages—Marriage Ordinance and African Christian Marriage Ordinance. But the administration encouraged and assisted those Africans who wanted to marry the English way. This is not to mean that the administration recognized African Marriages as such but it was a case of necessity. The administration knew that personal laws provided the focus of existence for the Africans and any radical change would likely result in a revolt. At any rate the Marriage institution did not hinder much the establishment of Capitalist mode of production. They would accommodate some aspects of it.

In matters pertaining to criminal laws the Indian Penal Code was received in Kenya 8. The criminal procedure ordinance was enacted in 1914 providing for the manner of conducting

criminal cases and the High Court had the jurisdiction to hear criminal cases from all over the protectorate, as granted by the 1897 Order in Council. The Customary way of settling disputes was being undermined by legislation. As of today, the customary criminal law has expressly been legislated from existence by the constitution provides:

"No person shall be convicted of a criminal offence unless that offence is defined, and the penalty therefore is prescribed in a written law."

African Criminal law, by virtue of being unwritten is excluded by this provision. In this area, there was a complete overhaul of the African system of the administration of justice.

There are numerous other examples of legislations which can be given, but the present writer is of the view that it's not really necessary to give all the Colonial Legislations which were aimed at striking a permanent blow on the customary law.

The Colonial administration was wise enough to know that, legislation was not enough to kill the African institutions. Other branches of its whole, in particular the christian church, had to be used. It is in the area of personal laws that the christians church threw its entire institution, which was satanic change.

The christian faith was not simply carrying gospel. It was not a complex phenomenon made up of western culture, politics, science, technology and schools. The gospel in its very nature is revolutionary. It is revolutionary in that it seeks a radical change of circumstances in a scientific and social systems. In fact when christian talk of salvation, they talk of a radical break from the past in fact a 'violent' change. The Africans were being urged to denounce their ways of worship, marrying, divorcing, ceremonies and all cultural activities and embrace

the western christian values.

As a first step in spreading their faith the christian missionaries had to weed out the detestable aspects of polygamy in the name of christ civilization. This aspect of polygamy was most pronounced in the marriage institution. Polygamy was satanic and had to be abolished. The Christian church preached against polygamy blindly, without any attempt to understand the underlying forces behind the practice. They were in fact dealing with the effects and not the cause, and no wonder they were not much blessed in this area. Polygamy is still a widespread practice among the Africans. The social-economic organization of the African Societies was such that it favoured polygamy. In some cases it was a case of luxury and others a matter of pure necessity. Having many wives meant more hands in the shamba and more assurance that children would not go hungry. This was extremely important as all the work in the shamba had to be done by hands-there were no tractors. In a polygamous family, there was always somebody around to help in time of need, and having many children raises the social standing of the family and consequently that of the entire clan. A man with many wives commands more respect from the society. Further, polygamy, to some extent reduces unfaithfulness (adultery) on the part of husband. When one wife is pregnant or has given birth recently, the others would give sex satisfaction to the husband and there would be no need to go looking for a woman elsewhere. Polygamy was a necessity in cases where the first wife failed to give the husband any children due to barrenness, or where she gave birth to daughters only. In such cases the man would be forced to take a subsequent wife or wives instead of divorcing the first wife.

Here, the present writer is not saying that polygamy is good or bad. There are problems that are connected with polygamy and it would be utterly wrong to pretend that everything

runs smoothly with polygamy. What the writer is saying is that the custom fits very well into the social structure of the traditional life and into the thinking of the people. What the writer is doing here is condemning the Christian church's approach to the whole issue of marriage institution. It was outrageous and unscientific.

The African, faced with the promise of eternal life and the more sophisticated English technology and the advantages gained by those who accepted christianity, it's not difficult to see why some embraced the new faith. Acceptance of the new faith meant the acceptance of all that goes with it. This includes the fallacious Biblical concept of indissolubility of marriage.

~~What God has put together, let no man put assunder~~ 9.

Marriage is a God - Made Sacrament and should not be dissolved by any man except God - through death. The present writer calls this fallacious because marriage is most instable in the western countries than any other part of the world. It is fallacious because while they reached this, they at the same time provided for grounds of divorce in matrimonial Causes Ordinance. The Catholic Church for instance, made it mandatory for all its followers to undergo a christian marriage in church or face the denial of taking the Holy Communion (Body of Christ). The propaganda carried by the captains of the Gospel was wide spread and effective to the new convertes. All wives had to go except the ring wife. Most of the Africans who agreed to marry in church did so with a lot of ignorance, without knowing of the legal implications that goes with that type of marriage. 10. They were mesmerised by wearing of white marriage gown, the ring, the cutting of the wedding cake and such like nicities that go with the system.

The missionaries also established schools II. They were to be used as nurseries for bringing up Africans who would be used to Anglicise others. They were conducted in christian lines and religion was the major subject. Economic benefits were quickly realised by those who joined them. They were appointed as clerks, teachers and chiefs in their own local areas. Through re-created re-agenda, and given the fact that many young minds are very vulnerable to new, "rebellious" kind of ideas, the pupils were made to believe that the only way to lead a modern Standard life is by accepting christian values. They, on going back home refused to take part in some of the traditional ceremonies which were branded as satanic by their masters. They became the emissaries of the western culture and some air of individualism surrounded them. Slowly, the society started acquiring a new shape.

The colonial economy also assisted in the policy of anglicisation. Africans were compulsorily recruited to work in the settler farms. Others who wanted to escape from the labour fled their respective areas to seek jobs in town. The introduction of Hut Tax Regulation in 1901, further necessitated the movement from the rural areas to the urban centres. It also necessitated the change from subsistence mode of production to monetary. This way, the monetary mode of production was introduced to the African societies. As a matter of necessity this led to a change of superstructure and people's philosophy about life had to change to meet new changed circumstances.

The acceptance of new life styles and values had of necessity to be followed by the acceptance of laws and practices that are germane to them. The change of superstructure, must therefore be seen as a response to changed conditions of economy. As the economy develops, and more diversified and people earn living by different occupations, with different rewards and securities,

so do their -attorns of life, The -resent writer is in agreement with Radcliffe when he says of African marriage;

"It should not be considered as a condition or an event, but as a developing process" 12.

Justice Sach, speaking of laws in general observed:

"In.....In the exercise of any such the law is to be considered as a living thing, ~~next~~ moving with the time and not a creature of dead or moribund ways of thought". 13.

What these two men of great learning are saying is that changes in the su-structure can not be ignored by law for long, for these changes must find ex-ression in the laws & that obtain.

Before closing this chapter, a brief statement may be made about divorce, in relation to what has been observed above. Among the Af ricans, divorce is an act that leaves a great scar in the community . It brings about a re-arrangement of a social set up, as it was a concern of the whole community , just as marriage was. With changed circumstances, the Africans started considering themselves not as part of the entire corporate existence but as individuals. Mar r i g e started being treated as individual affairs between man and woman even at the exclusion of the family members.

What the -resent ^{Chapter} writer has sought ^{to} ~~out to~~ bring out in ~~this cha-ter~~ is the dialectical relationship between law and the social, economic, -olitical and intellectual institutions that obtain in any one give n community. The changed conditions led to the dismantling of the customary institutions. Nonetheless this -r ocess of anglicisation was not equally blessed in all areas. There was great resistance in -ersonal laws, and here the British Colonial administration would compromise so long as it did not im-air the development of capitalism. The idea was to -ut t h e -protect corporate irrevocably on a Ca-italist road. Whether or not, the -ost-inde-ndence government has

CHAPTER TWO

DISSOLUTION OF MARRIAGES AMONG THE TRADITIONAL
THARAKA SOCIETY

GENERAL STATEMENT

Matrimony among the Tharaka people on the whole was looked upon as a lasting union, except in cases where the continuance would have done more harm than good. This was because of the very nature and character of marriage institution. Marriage creates many friends and new family alliances and contents. Old feuds and vendettas, if they existed, are healed and a new era of friendship is ushered in. This is reflected by the expression "Kaari Igatuma Ndugu". This literally translated in English it means that "a girl creates friendships". This friendship is created by the fact of marriage.

It is for these reasons, among others that one would not be allowed to get out of the marriage easily. Dissolution of marriage was viewed and regarded as an exceptional measure requiring special justifications. It's a delicate accident in marital relationship, which left a great scar to the community. It resulted in a re-arrangements of

social-order. Families once friendly, tied together by the bond of marriage are seperated and this may have far reaching effects - sometimes to downright enmity between the families. To prevent the happening of this disturbing phenomenon, various attempts were made. Efforts to reconcile the parties were seriously undertaken, or the husband would be advised to marry a subsequent wife, especially if the wife had children or was very hard-working. Divorce was a very rare occurrence among the Tharaka.

MARRIAGE ADJUDICATION

As already observed, marriage was a concern of many. Its dissolution also was, as a consequence, a concern of the members of the various members of the families. It's adjudication was not a concern of the court, but was brought about by the decision of the elders of the two families. Where need arose, either party to the marriage would take the initiatives. What normally happens is that when it's clear that divorce will come about for reasons which will be given later in this paper, whether it's the initiative of the wife or husband, the woman goes back to her parents and discloses the matter to them. After giving a tentative and serious thought to her report, the mother takes her back to her husband, where she makes an inquiry about the matter, especially when the woman alleges that it's the husband who wants divorce. The purpose of this kind of action by the woman's parents is two-fold. One, they do not want to be seen to be encouraging the break of the marriage -

they have all to lose after all. Two, if it's found that there's a serious issue or problem between the woman and the man to be adjudicated, a meeting would be arranged when the elders from the respective families would meet and settle the dispute. Such a meeting is a matter of public concern and there is nothing secret about it. The judges are elders from the two families [family is used in the African sense to mean extended family].

A discussion takes place and the reasons why either the man or the woman wanted divorce would be weighed against those of the other spouse. In executing this duty, the elders were not concerned with the strict application of precise rules. Each case was treated on its own merits. This form of adjudication in the Tharaka setting was aimed at reconciliation and restoration of harmony. The adversary system of English law is concerned with the establishment of a matrimonial offence before dissolution would be allowed. Not so in the African setting. Reconciliation is paramount. In this form of setting, reconciliation was necessary and, except where the circumstances were grave, easily achieved. The judges in dispute were not strangers, but members of the disputants. They knew, not only the facts of the dispute before it came to them, but also aware of the history of the relationship out of which the case arose. Each party was given a fair chance to present their side of the case and judgment be given according to the facts as heard, of course the elders using their extraneous knowledge about the origins of the case. The party found to be on the wrong is

advised to the effect that his or her behaviour fell short of the expectations, and should change his/or behaviour. Why were the elders so much interested in reconciliation?

The reasons for this are easy. In a small community any unsettled dispute or grievance is like a running sore that weakens the integrity of the group. Its survival depends on co-operation, and the latter on the general will of the group. If the dispute is not solved amicably, this basic pillar is weakened and undermined, with far reaching consequences.

If the elders find that the reasons for wanting the marriage dissolved are grave and there is no possibility of reconciliation they recommend divorce, without any party meeting any costs for the dispute, as is done under the English setting. Unlike the present English setting there was no fees or any form of payment whatsoever paid to the elders. When it comes to the worst and divorce is granted, the husband is then told to look for a man, usually of his age-group, popularly referred to as "mutharka", to whom he hands over the woman for conveying her to her parents. This has a special significance. It shows that the man is no longer the husband to the woman and has no duties or obligations whatsoever towards her. She ceases being under his care henceforth. Once the Mutharaka [witness] takes her to her father's home, the process of divorce is complete, whether the bride-gifts¹ have been paid back or not. The practice requires that this mutharaka be a person who is not related to the man who is divorcing his wife. The reason for this is once again the kinship existence of the society. If the mutharaka is a close relative of the man

who is divorcing, his act would be treated by the society as the act of the man seeking divorce and therefore not constituting a competent witness for the purposes of divorce. The woman is then free to re-marry. Immediate return of the marriage-gifts is not necessary for the divorce to be valid. Of course the man would claim immediate return of the gifts - usually in the form of livestock, if he can identify those animals which he gave out. If none of them is surviving, he will have to wait until the woman re-marries.

GROUND FOR DISSOLUTION OF MARRIAGES

The present writer has headed this section as "grounds for dissolution of marriages" because there are various ways in which marriage can be dissolved. The process of divorce is one and the commonest way of dissolving marriages. A declaration of nullity would also dissolve a marriage. This as will be seen was extremely a rare occurrence because of the very nature of the institution of marriage itself. The third way in which a marriage would be brought to an end, is by death of the husband and not of the wife. This also was very rare because of the levirate union that was practiced by the Tharaka.

It is not strictly correct to talk of grounds of divorce among the Tharaka, as we would under the statutory setting. The word "ground" in my view is an English jurisprudential concept, when used in this sense. As observed above, the Tharaka institutional setting of marriage adjudication was not concerned with the establishment of any particular act so as to grant divorce.

Its paramount duty was to reconcile and restore harmony, even when it's clear to the elders that one or more of what, for purposes of this paper I will call grounds, is established. This is in sharp contrast with the judicial process where once the petitioner establishes one of the grounds provided for in section 8 of Matrimonial Causes Act, Cap.152, Laws of Kenya, divorce is granted.

Nonetheless, investigations reviewed that there were acts which quite commonly featured as causes of divorce. The writer intends to treat each one of these separately. The writer wishes to emphasise here that the acts discussed here are not exhaustive, there were other numerous reasons which need not be looked at. For example, I learnt of a case where a man divorced his wife arguing that she was smelling badly when in bed. The elders would not have sanctioned such a divorce, but when one adamantly contends that he would not stay with the wife, the elders have no choice, in absence of any direct sanctions against such a man.

REFUSAL TO SEXUAL INTERCOURSE

Just like under any system of marriage, right to sex is created by marriage. Any refusal by either party goes to strike the very foundation of the union. Among the Tharaka, sex has religious as well as social uses, it's necessary for procreation and for pleasure. It has a religious significance in that, when there's a special ceremony, for example, circumcision ceremony,

at the end of the day, the parents [mother and father] of the circumcised boy or girl must engage in a serious sexual intercourse. Failure to do this would have adverse effects on the health of their child or his or her social successes in life. The same was expected to happen when the woman menstruates for the first time after giving birth. Sex before she menstruates after giving birth was a taboo. Thus both the husband and the wife enjoyed sexual rights. Any wilful refusal, was treated as a rserious abrogation of marital obligations. There were times when the spouses were not supposed to have sexual intercourse and nobody would be heard to complain. If infact any complaints would expose him or her to the risk of getting disciplined the traditional way -organised beating by family members.

Mainly, this is a ground which was available to women. It was very easy, especially, for men who are polygamous to prefer one wife and have nothing to do, as far as sex is concerned, with therother wife. The expression used by women who have been denied sex rights by their husbands is "gutegwa". This literally means "thrown away". The message this term carries is that the wife has been refused sex by her husband for a long time, as to infringe pain on her and lose her pride as a wife. I said this is a ground mainly available to women because a man would not wish to complain about this in public. He had the traditional right to chastise the woman - beat her to submission. The question of sex is a very fragile area of family life and refusal jeopardises the union.

BARRENNESS OR STERILITY

Procreation is of great moment, to an African. Inability to bear children block the stream of life. This view is echoed by Mbiti, who puts it in the following words:

"To die without getting married and without children is to be cut off from the human society, to become disconnected, to become an outcast and lose all links with mankind."²

What Mbiti is saying here is that children, are necessary as a means of capturing the lost immortality. Among the Tharaka, when one dies childless, he's not called by his name. To mention such a person by his name was strictly prohibited. People used to refer to him as "Muuri ^{wa} Gwawire" - that person who got lost or perished. He perished because he or she has no links with the society. But when one dies and leaves his issues, of his own flesh, people joyfully remember him and call him by name. He is in a state of personal immortality, as Mbiti calls it, which state is externalised in the physical continuation of the individual through procreation, so that the children bear the traits of their parents or progenitors. So, to ensure that one does not vanish like a flame when extinguished, one had to get children.

If the wife fails to give the husband and his entire clan any children, her position as a wife is very weak, and divorce may result. In this case any party would take initiative to break the marriage. Normally, there are counter-accusations,

especially if the marriage is the first one. If the man has other wives who get children by him, his position is stronger. However, failure to get children did not automatically lead to divorce. African marriage being potentially polygamous the situation would be saved by the husband marrying a subsequent wife. This usually happened where the woman was so obedient and faithful to her husband and very hard working too - the system of farming, it must be remembered was hoe system.

Impotence on the part of the man rarely resulted into any divorce. This is because, traditionally, there's a trial period when the girl goes to the intended husbands home and stay there for a maximum period of seven days, during which period, sex is supposed to take place. If she discovers the man is impotent she will refuse and that will be the end of the matter. But if she discovers his impotence and yet consent to marry him, she is taken to have waived the right to use this ground to seek divorce. In such cases arrangements are made so that a brother or cousin of the man sleeps with the wife to give children - giving the man the much longed for immortality. If the husband becomes impotent after marriage, the wife may or may not seek divorce.

CRUELTY

Cruelty, was the commonest cause of divorce. It's a ground available to women but can also be available to men. Traditionally a husband has a right to chestise his wife, from time to time.

It is taken as a corrective measure, aimed at ensuring that she plays her role as a wife for the continuity of harmony in the family. Being the head of the family, disciplinary measures, which takes the form of beatings were necessary if all had to go well in the family. Failure to do this was seen as a weakness on the part of the man and a licence to the wife to fail in her duties. It was quite usual to overhear a woman telling others, with a lot of pride, how her husband is a no nonsense man, tough and serious in whatever he said. However, this was so when this right is reasonably exercised and only for the purposes of correcting a mistake somewhere. When it reaches such a proportion as to injure or endanger the life of the woman it may make the woman seek divorce. If she is subjected to excessive beatings, she would have a justified cause for seeking divorce, for her life is at stake.

Cruelty can also take the form of insult and inhuman treatment for example women are very sensitive to anything their husbands say about their [wife's] parents. If a husband repeatedly speaks ill about his wife's parents without good cause, the woman interpretes that as being directed to her and can lead to divorce.

A man can seek divorce on grounds of cruelty on part of woman if she beats him up. Husband-beating was taken very seriously and usually the relatives of the man would advise him to divorce her, for such an act was a disgrace to them all. It can also occur if the woman becomes too cruel, not to the husband but to his parents, sisters and brothers. Insulting one's husband's parents or refusing them food was taken very seriously and if it

reaches a high proportion, it may result to divorce.

ADULTERY

This, unlike under the English system, is a ground available to the man and not to the woman, unless it reaches such a proportion as to lead to denial of sex by the husband, in which case, she would use the ground of denial of sex. The wife has no remedy for the adultery committed by her husband. To men, commission of adultery by woman was a serious affair. Use of sex is sacred and must therefore be safeguarded. It was tainted with religious believes. For example, it was generally believed that if wife committs adultery when she is baby-feeding, the health of the child may be affected and may result into death; There were many other superstitions that made women shun committing adultery. It was also a common believe that if a woman got a child through adulterous union, that child would die if, after birth, she has any sexual intercourse with her husband before she does it with the man with whom she committed adultery. Because of these fears, the fedility of women in this respect was very high. This is not to mean that there were no cases of adultery. But one or two incidences of adultery would not result to divorce. In such isolated cases, some disciplinary measures were taken against the woman and the man with whom she committed adultery. If the man was a relative of the wife's husband and he was married, he was subjected to organised beating by members of the family and father fined a bull to be

eaten by the family members. If the man was not married, he was only beaten up and not fined for such people normally had no property of their own. In stances where the offender had no relation with the wife's husband, all that could be done is pay compensation for the offence. The standard amount of compensation was fourteen goats plus an extra he-goat to be used for taking oath. The man had to take an oath swearing that he would have nothing to do with the woman in future. The woman also took the oath to the same effect.

PERSISTENT LAZINESS

Due to what ~~the~~ ^{was} ~~newest~~ ~~method~~ earlier referred to as the hoe system, women were supposed and expected to do a lot of work in the farms and at home itself. She had to prepare food for the husband and children, parents-in-law if they are elderly, fetch water and all domestic work there is. A hard working woman was a cause of pride to the husband and the entire clan, for it meant that the family would not go hungry. There was much expected in her input. It's partly on this understanding that the marriage gifts were given - an exchange of a small token for something of greater value.

These expectations are frustrated by persistent laziness on the part of the woman. She has failed as a wife and deserves a divorce.

At the same time persistent laziness on the part of the husband would lead to divorce. It was the duty of the husband to look and provide for the wife and childre. A man who could not take up a panga and and axe and clear bushes, in preparation of a shamba, was a disgrace to the wife, her parents, who would be depressed to see their daughter lead a life of squador, and also to his own clansmen.

So laziness was a ground that was available to both men and women.

DEATH

Death of the husband may or may not bring about dissolution of a marriage. Death of the wife would not have brought about any dissolution of marriage where the woman dies and leaves children the husband/still under an obligation to treat her /was parents as in-laws and pay any balance of the marriage gifts if any was unpaid. The relationship continued. But where she died childless, he would not be under any obligation to pay the balance of marriage gifts if any, nor could he claim any return of the marriage-gifts which had been given out.

Death of husband would have led to dissolution of marriage especially where the widow had no children or she was very young. In most of the cases, the brother, usually the older brother, takes over the responsibility of the deceased's family. He ensures that she gets children, whose children are treated

as the children of the deceased. This arrangement is commonly referred to as leviaratic - quite a common practice in African Societies. It's a form of social insurance. Providing for the deceased's family - children and the widow, was the responsibility of the entire extended family.

NULLITY

Cases of nullity were isolated and not much can be said about it. In traditional Tharaka society, for any marriage to be valid, the consent of the parents of both parties - intended wife and intended husband, was necessary. The consent of the man's parents was necessary because they were the ones to give out the necessary marriage-gifts, the man at this stage having no property of his own. All the arrangements, apart from choosing the girl to the marriage, were to be done by his parents. Without their consent, nothing could take off-ground. The girl's parents on the other side had to accept the marriage-gifts and give their blessings to the girl before she joins her husband. If they refuse the gifts then the girl would not join her intended husband. If she did against their will, it was not treated as marriage, it was null and void *abi initio*. As observed earlier, such cases were extremely rare, because it was generally believed that such a girl who marries in defiance of her parents' blessing [there was usually a ceremony where she was blessed before joining her husband] was a bad woman and something ill would befall her.

There are other instances where marriage would be annulled even when the parents have consented to the union. This was where the marriage-gifts were not given, but had reached an agreement - the standard amount of property that exchanged hands for this purpose was forty eight goats, four heifers, and one bull. If payments is not made within a reasonable time, whether in whole or in part, the girl's parents would treat the marriage as a nullity. But would rarely happen where the girl has given birth to a child.

EFFECTS OF DIVORCE

The effect of divorce on the entire society, as an act that left a great scar in the community has been looked at. What the writer intends to look at here is what followed, the consequences of dissolution of a marriage. In particular the writer will pay attention to what happens to marriage gifts already paid, the custody of the children of the union and finally what happens to the matrimonial property.

PROPERTY

In traditional society, a woman owns no property. She can not own any land or livestock. The husband and his kinsmen are entitled to the fruits of her labour. The husband has the ultimate power over all the property. She can not dispose of any property, in whatever form, without the husband's consent. When the marriage is dissolved, she is not entitled to a share of the property they have acquired with her husband. However, she is entitled to any

property she might have acquired before marriage e.g. it was usual for her to get four goats as a gift from her parents. She was entitled to such property. I wish to emphasise here that as regards property, the law was strict. In case of livestock [the four or so goats mentioned] she could only be allowed to take the goats that she was given but not their offsprings. Clearly, if the marriage breaks after ten years or so, she would get nothing.

CUSTODY OF CHILDREN

Children to any marriage union are identified with the husband's clan. They are named after the husband's father, uncle and other relatives and only in isolated cases would one name his child after his wife's relatives. Where this happened, it was during their old age when there was almost no chance for divorce.

The woman therefore can not claim any custody of the children. In cases where the woman was breast-feeding and it was felt by the elders that separating the child from the mother would be prejudicial to its health, the woman, upon the payment of ten goats or one heifer by the husband to the woman's parents would be allowed the custody until such time as the child stops breast-feeding. This property paid by the man when the woman temporary keeps the child is generally referred to as "moori ya kurugamira mwana" - literally means a heifer to stand for the child. It was given as a compensation for maintenance of the child, it was a consideration for the up keep of the child.

There were, however, cases where the woman would take the custody of a child. This happened where for instance for some reason, the father of the child downright refuses the custody of the child. This would happen for instance, where the man was pretty sure that the child was born out of adulterous union. This is not to say that the woman would have any right to the custody of such a child, it's only when the father refused the child. Such a child was generally referred to as "Kiriiko" and it was the duty of the woman's family to look after such a child or if the woman re-marries she would go with the child, upon the man who is marrying her agreeing. There was no problem where the child was a girl. In the first place the woman would not be given the custody of a girl even if the child is a product of adulterous union - a girl brings wealth when she marries. All what has been said above happens not with standing the fact that all the marriage-gifts had been returned.

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MARRIAGE-GIFTS

The property that exchanges hands for the purposes of marriage is referred to as "Rurajio". The standard form, as observed above was forty eight goats, four heifers and one bull. Nobody would demand more than that, except in some special cases where the girl's parents would demand an extra heifer on the ground that the suiter was very ugly.

Upon divorce, the former husband is entitled to the return of all the property which had been paid. He would also take back offsprings if he could identify them - this was very difficult unless they lived as very very close neighbours. The grounds or reasons for the divorce were irrelevant in determining the return of rurajio. Whether it is the man or woman who was at fault was not of any moment. Where the man could not identify any of the goats or cows, e.g. if they all died or were sold, the woman's parents were not under any obligation to get any livestock from their flock or herd and pay back. He had to wait until the woman marries again so that he can have his property returned. This was one of the reasons why, after reaching a certain age of marriage union, and the chances of getting married by somebody else reduced considerably, divorce was very hard, for the man knew pretty well that he might not get anything back.

This chapter has dealt with the law regulating dissolution of marriages among the Tharaka traditional society. However, the story does not end there, otherwise this paper would not have been undertaken. The position analysed above does not reveal the position today. It only depicts customs thriving in the right social, economic and political conditions attained to its values. Today things have changed to a large extent, due to the colonial policies, the post independent government and the economic superstructure. The writer now wishes to turn to examine the position as it is today.

CHAPTER THREE

DISSOLUTION OF MARRIAGES IN THARAKA TODAY

GENERAL STATEMENT

Any norms are subject to change. As the society changes and becomes more complex, the creative role of the old norms diminishes. Law must mode itself in the framework of the entrenched norms and expectations, which expectations change also. Any progressive society is characterised by the movement from family dependency to individual obligation as the unit which civil law takes account. Given chance, human nature is such as would like to attain a higher status, as viewed by the society. To the Kenyan African society, the higher status is the English status, because the colonial administration ensured that they set Kenya on the path of capitalism.

Due to direct and indirect means ^{or} by abolishing customary laws by the colonial administration, coupled with the attitude of the past-colonial government, much of the customary law in various fields has disappeared. The independent government has taken bold measures to the same effect. The only difference there is is that some communities in Kenya were more exposed to the European influence than the others. The influence depends on what those areas had to offer to the Europeans. Areas which were fertile and had much to offer to the Europeans, for example central

province, the upper parts of Meru and other such, were more affected. Other areas for example, Tharaka, had little to offer to the colonial government and the areas were ignored. Tharaka remained an area with poor infrastructure, few schools, and farming largely undeveloped. This remained so even after independence. Population shifts to the rural areas was on the whole insignificant. The first secondary school to be set up in the division was Tharaka Secondary School in 1971, on Harambee basis. Health facilities still remain very poor and patients are required to walk long distances to nearest dispensary.

Socially, the idea of extended family, appeals to the bulk of the population and the desire for corporate existence has not disappeared.

Economically, there has been some re-arrangement. Majority of the people still keep livestock, but the number that an individual can keep has greatly been reduced. Great re-arrangement can be seen in the field of farming. In particular, Makothina and Nkondi Settlement Scheme and Thungai are important farming areas. Cash crops such as cotton, and sunflower are extensively grown in these areas. Maize and beans are also largely grown. Since 1970, the growth of cash-crops has increased and mechanization can be seen in some areas [ploughing the land]. On the whole, since 1970, there has been a change in the social, cultural and economic organization of the society.

DETAILED ACCOUNT

The Tharaka people do not live in an island where they are not subjected to foreign culture. As a result of these influences, the customary norms are not static but flexible. Since the colonization of Kenya, these norms have been mutated to reflect the changes in the political and social life. With the changed circumstances customary law started evolving rapidly to accommodate these changes. It is not necessary here to go to the details of the extent to which the customary norms have been affected. This has already been done in the first chapter.

By independence, public affairs, political as well as economic matters were ordered along capitalist lines. This was so notwithstanding the fact that majority of the Kenyan people had not yet fully taken after capitalism. However, those to whom power was transferred and in whose hands the destiny of the country was, had vested interests in the preservation of capitalism. They continued playing a neo-colonial role which, as a colony, she was called to fulfil. The top leaders had acquired wealth and deviating from the mode of production would be detrimental to their interests. Theirs was to see that the inviolability of private property is firmly entrenched. For this reason, the independent government look upon customary law with less sympathy than did the colonial authority, not merely associating it with indirect rule but regarding it as element of African tradition which has been corrupted by western influences and which, furthermore presents in its local basis a divisive factor that resists the centralizing tendencies of the new state. The government rejects the significance of customary law which gives the African nation its

distinctive elements of African traditional culture and re-defining the features of the African personality. As a result, customary law is in the era of decline, and in most areas it has been completely eclipsed by legislation which is modelled towards British Law.

A few illustrations may be given. The constitution of Kenya declares that any law inconsistent with it is void to the extent of its inconsistency.¹ It further provides for the recognition of the various legal regimes relating to divorce, marriage, inheritance and custody of children.² By the provision of the constitution, customary criminal law has been completely eclipsed by section 77(8) which provides that no person should be punished for an offence unless the offence is written and the punishment is prescribed by law thereof. The Magistrate Courts Act Cap.10, Laws of Kenya provides for the recognition of the various marriage, divorce and inheritance laws.³ In summary, the above legislation refuses to impose any values upon a people, leaving them to conduct their personal matter in accordance with their concept of good-life.

These legislations notwithstanding there has been attempts since 1972 by the post-colonial government to get further and further control of the lives of the people. The objective being similar to that of the colonial administration - accumulation of the state's economic potential into the hands of a clearly defined class. This is being done under the pretext of unity. The Marriage Bill of 1976, had that objective. It provides for the registration of all marriages in Kenya. This would follow that dissolution would

be possible through the process of court.⁴ The effect of this would be far reaching. The objective is to impose the English value to a people who largely conduct their affairs the customary way. It also aims at destroying the traditional institutional setting of marriage adjudication.

The other legislation that marks the government's determination to wipe customary law out of existence is the Law of Succession Act, Cap. 160, Laws of Kenya. This law was passed in 1972, but was shelved until 1st July 1981. The Act destroys all the customary, Hindu and Islamic Laws of Succession and replaces them with the English law of Succession. The reaction of the Kenyan population towards it when it became effective is illustrative of the inadequacy of the law.

All the people I interviewed, with the exception of a few were not in favour of such a law. One woman called the government's act of legislating such a law "madness". Her sentiments were found^{ed} on the fact that the law provides for a drastic break with the past.

The emphasis being put on the need for unification marks an epitome of the degree to which the state is interested in putting all powers in its hands.

If the marriage Bill is re-introduced and is passed as law, we shall not talk of customary law any longer. The reasons for this trend are quite clear. At independence, there was no significant change. All that was a transfer of power (mere translation). It's not surprising then that the independent government is capable of doing

government is capable of doing what the colonial government did and with a greater goal. It is an attempt to bring Kenyans into line with the law of metropolitan British Capitalism, and through it link the national bourgeoisie to the international bourgeoisie. In short, what the above analysis shows is that the plight of customary law in this country during the colonial era and after independence is traceable directly to this overall policy decision on the part of the colonial government to put the country irrevocably on a capitalist road, and that of its successors not to deflect the country one inch from a path with which it had been familiar. If this government pressure continues to pile, and there is no discernible change of policy in the offing, there would be no future for customary law.

CAUSES AND AGENCIES RESPONSIBLE FOR CHANGES IN THE TRADITIONAL
PERSONAL LAWS IN THARAKA

Today, in the 1980s, there are changes involving a large existence of the Tharaka people, which changes make their impacts upon religious, economic, political as well as social life. This is not peculiar to the Tharaka people. It appears that there is a new rhythm of beat from the drums of science, technology, schools, towns and mass media, the world over. It is a world drama that Africa, in general, can do nothing to alter.

Among the Tharaka, the new developments are attributable to a number of factors which can be broadly comprehended.

(a) IMITATIVE PROCLIVITIES

There is no doubt that the imitative proclivities of the people have played a certain part in hastening this process of social change.

A most salient result of this is seen in the field of marriage. Many young people these days prefer marrying in church. Those who marry the customary way are looked upon as being old fashioned and are generally referred to as "antu muindu" - literally means, "people of darkness". People of darkness because they are not in tune with what is generally accepted by the young people as fashionable. The astonishing part of it is that both the young men and women who marry in church are quite ignorant of the legal implications that go with such marriage. Very many of such couples have divorced the customary way, ignorant, of the fact that such a divorce is invalid in law. I asked a friend who had married in church, under the Christian African Marriage Act, whether he knew it was not possible to validly divorce his wife customarily, without having the matter adjudicated in court. His answer was that he was not and he would not bother seeking any court's declaration that their marriage is dissolved.

There are various other practices that young people today do imitate ignorant of their significance.

(b) ECONOMIC FORCES

The major factors that have usually operated indirectly, but with powerful and decisive effects, are economic. There has been quite much of economic re-organisation of the traditional society. The trend is towards cash economy.

Traditionally, man has always been the bread-winner. This is not the case today. Education for women has greatly increased. Those women who get formal employments get their independent means of earning income from those of their husbands. Husbands no longer have the monopoly of being the sole cash-earner in the family. Some women have also ventured into the realm of commerce and can be seen operating shops, buying and selling of farm produce etc.

Agriculture, in some parts, has also become mechanised to some extent. Tractors and oxygen ploughs are used for ploughing the land. In the farms, there is not that much division of labour as has been the case traditionally. This has broken the the traditional hoe system. Cash crops, such as cotton and sunflower are in the increase in the area.

All these had the consequential effect of raising the standards of living of the people, and the ability to pay for the education of the children who later become agents of western values. Looked at this way, it becomes easy to trace connection between the economic developments such as these and the current changes in family law. Once the old rythem of life in a small closely knit

society is disturbed, once individuals place themselves outside the effective range of traditional controls, it would not be expected that marriage institution would remain unaffected.

(c) CHRISTIANITY

The effects of the new numerous christian denominations can not be ignored. The christian church since the early days of its introduction in Africa generally, has continued with what it considers a duty pre-requisite to the spreading of the christian faith - to wipe paganism in all its manifestations. Paganism being manifested in all African institutions and values. Christianity being a tool used by the ruling class to subjugate the African values which may interfere with the smooth running of capitalism, has done alot of damage on the African institutions. Partly, this explains why the young people today prefer marrying before a minister of church. The churches take disciplinary measures against those of the flock who marry outside the church. For the Catholic church the disciplinary measure takes the form of refusal to take the Holy Communion or to have the children of the marriage baptised before they become of age.

It is the same christian church that preaches that marrying polygamously is sinful and against the teachings of the Holy scripture. The Pentecostal Church of East Africa, would remove any member of its congregation who marries polygamously, from any position of responsibility. The effects of christianity are felt in other spheres as well.

(d) SOCIAL INTERACTION

The mobility of the people from one part of the country to the other has improved of late. The infrastructure has improved over the last few years. This improvement has facilitated social intercourse with people from other parts of Meru district. There are now inter-marriages with people from Imenti and Tigania. This has led to the emergence of a new social set-up. With this, the traditional cultural practices are greatly loosened. Marriage is increasingly becoming an individual affair and a concern of two persons - man and woman. The fact that people travel from Tharaka to other parts of Kenya is not without effects. They mix and work with people of different cultures, and they definitely get influenced and they start looking at their traditional culture with disfavour.

(e) EDUCATION

The role played by the western education system can not be ignored. For a long time, people in the area generally ignored education for girls, and for quite some time women were left behind in the academic arena. This attitude has now changed though not wholly. The few who make it in this arena are playing an important role in educating the others about their rights in the family, and in particular their rights once a marriage is dissolved. The current adult literacy programme, whose majority of the students are women, are effectively being used as platforms

for such campaigns to enlighten women on their rights. The western education system goes hand in hand with the preaching of the western culture, which culture undermines the credibility of the African culture. Equipped with the new knowledge the educated young people no longer consider themselves bound by the traditional values. They take themselves out of the reach of the traditional institutions.

All these agencies have had quite noticeable effects on the family institution. The changes are quite significant and can not be ignored by law. There is a change of setup, as the economy develops and diversifies and people earn living by different occupations with different rewards and security. In the same way, so do their patterns of life, which is reflected by the way people regulate and conduct their affairs.

SALIENT FEATURES OF THESE CHANGES

Society's view or epistemology is largely determined by the mode of production obtaining in a society and that mode of production dictates the greater content of law and other aspects of superstructure. The social relations that people enter into correspond to a definite stage of their material powers of production. The mode of production in material life determines the general character of the social, political and spiritual process of life.⁵ In response to these changes man has changed tendencies and behaviour, which may lead to transformation of the whole superstructure.

A look at these salient features, a result of these changes
may be useful.

MARRIAGE

Though the present study is focused on divorce, it is difficult to analyse dissolution of marriages without a brief statement on marriage.

Marriage is an institution upon which divorce is based and an understanding of how marriages are contracted will help us appreciate the changes which have taken place in the way marriages are dissolved.

It has already been said that more and more people contract marriages the christian way. This is not to mean that the marriages contracted under the African christian marriage act, are more than those contracted the customary way. Quite the contrary. On the whole, the majority of the people contract marriage in accordance with the customary law. I wish also to emphasise that even those who marry in church, apart from the ceremony, all other arrangements are done in accordance with the customary law. But the trend is more towards the christian marriages, especially when the girls and their parents insist on having a wedding. There was a case in my area where arrangements of marriage broke down because the young man could not afford the expenses of a wedding. The girl's parents refused on the ground that their daughter could only leave the home to join the husband only if there was a wedding.

Marriages under the Marriage Act are extremely rare and isolated. In my area of survey there is not a single marriage that was

contracted under the Marriage Act. Though both men and women do not favour this form of marriage, the greatest resistance to this system of marriage is from the males. As reviewed by the survey, there seems to be little doubt about the attitude of men toward that type of marriage. The attitude is one of resistance to any attempt to impose this form of marriage upon them as an obligatory requirement.

What are the reasons underlying this opposition?

At the risk of over simplification, I came up with the following. Conclusions, derived from the explanations got from those interviewed.

(a) There is the unwillingness to accept the full implications of that form of marriage. In particular the provision under the Act - such a marriage is strictly monogamous.⁶ This is not to say that majority of the people are polygamously married. Even those who feel that economic problems do not favour polygamy, they would still like their marriages to be potentially polygamous - afraid that the marriage may become unworkable.

(b) It's an alien institution, involving consequences inimical to the spirit and traditions of the society. This argument may be used as a mere cloak for the first one, but it's an argument of substance. The mere fact of going before the District Commissioner, is terrifying to the majority and it is too legalistic. It removes the marriage from the social parameters, and places it in the hands of the state, defeating the concepts of marriage as known by the people as an alliance between the families of the girl and the man.

(c) The bulk of the people do not really know what the marriage act contains, as observed above non in my area of research has ever contracted such a marriage. They are only told of it as an Act that enhances the status of women and their rights, would disallow them to claim the custody of children in event of divorce, the application of non-traditional principles of the devolution of property and obstacles on the way of divorce - one having to go to a court of law.

All these fears expressed above do exist in marriages contracted under the African Christian Marriage Act. But they do not exist in the mind of the people. This is because it is common for people to marry under the African Christian Marriage Act, and still divorce the customary way, without having the necessity of going to court. There are very few cases which have reached the courts of law.

It is evident that the public opinion has not yet had time to adjust itself, in whole, to the pace and direction of modern changes, though it is a fact that the influence of the educated and sophisticated minority is taking grasp.

As observed in chapter two of this paper, no marriage would be valid without the consent of parents. This is no longer a requirement. Many young ladies are marrying against their parents consents. The hold the parents have had on their children is being loosened. The ability of some young men to pay the marriage-gifts by themselves has reduced their total reliance on

their parents and kinsmen. All this is to say, that it is no longer true, to a large extent, to say that, marriage is a concern of many. It is becoming a union between a man and a woman to the exclusion of all, very much in line with Hyde v. Hyde.⁷ Though parents make the arrangements, their consent or lack of it, is no longer essential.

ADJUDICATION

Majority of marriage adjudication is still done by the elders and many people are unwilling to go to court. To the bulk of the people, courts of law still remain alien. There is also the expenses of resulting to judicial proceedings which ought to be taken into account. One young married lady I asked whether she would think that all divorce proceedings must be taken to courts of law, she said, "No." Why?, I asked her. "What would a woman get from a court of law anyway?" was her response to the question. Many other women I interviewed, though of the view that the customary way of divorce was unfair to them, were not in favour of going to court to dissolve their marriages. However, there are those who felt going to a court of law afforded them better security, and better treatment. Not surprisingly, majority of these were those who had independent source of income from their husbands or at least have had some education to certain extent. Men had different views. They felt that it was unnecessary and unwise to go to court for divorce. This is mainly based on the fear that the court may order maintenance allowance, give the wife the custody of children or divide the property between him

and the wife. This is exactly what men are afraid of, seeking refuse in the fact that customarily women own no property and all the children go to the father. Women want exactly this. As a result of this there has been of late an increase of cases reaching court relating to divorce.

The present writer checked with the Meru Law Courts Civil Registry, and found out that from the period between 1976 - 1979 alone, there were seven cases which reached the law courts from North Tharaka Location. Out of these seven, only one dealt with divorce and all the other six concerned custody of children and the return of marriage-gifts. Surprisingly none of them concerned the matrimonial property. From 1980 - 1981, there were thirteen cases dealing with various aspects of marriage. This marks an increase in number of cases that reach courts. Of these six of them concerned custody of children.

There is evidence that more and more cases are being taken to court today than before.

Not much can be said about any changes on the grounds of divorce. It may be mentioned that as regards sterility and barrenness, people are becoming more and more tolerant. We have a number of cases where spouses have now stayed for over five years without children and the union seems to be going on well. This lack of any significant change may be explained by the fact that most of the grounds for divorce are also recognised by the English system of law.

A significant change is seen in matters relating to matrimonial property and custody of children. Women are raising voices questioning the fairness of having to get nothing from the property they have worked for or having to leave all the children of the marriage with the husband. One woman who is a primary school teacher, I interviewed told me that she would consider it repugnant to justice if after marriage breaks down she would be told that she is entitled to nothing from the property they have acquired together. This, she explained, is because she earns a higher salary than her husband and she has contributed more to the property they have. Another woman, a house wife [her husband works in Nairobi] told me that through her hard-working in the farm, she has been able to put up a house from the sale of farm produce, and she could not envisage being denied title to that house.

This turn of events may be explained by the fact of change of the conceptual framework concerning social process and female participation in economic production. As more women have their own independent form of employment the more they feel entitled to a share of what they have acquired with their husbands, and more so able to look after their children if given custody. Many women today are not totally dependent on men for cash earning.

The return of the marriage-gifts after dissolution of marriage remains intant. What may be added here is that money has entered this field. Besides the usual standard payment of forty-eight goats, four heifers and a bull, it is now required to pay cash money on top of that. This amount ranges from one thousand to ten thousand. The amount of cash payable depends on the standard of education that the lady has acquired. The illiterate ones get between one thousand and two thousand and the educated ones fetch higher for their parents. The introduction of money into marriage has now turned marriage into a commercial transaction and the traditional significance of marriage-gifts is lost sight of.

To wind up this chapter, it can be concluded that, today it is no longer correct to talk of customary law of divorce in its undiluted form. Economic changes have made it necessary for people's tendencies and behaviour, towards what is considered the practice of the past, change as individualism becomes more rampat. The society is slowly dissolving itself.

CONCLUSIONS

To bring out a real picture of what family law structure is likely to be in the future, a comparative study is necessary. This, has not been done. This precludes me from making definite conclusions as to what the structure will be. However, if history is anything to go by, some conclusion may be made on the future of customary law in general.

When the British declared a protectorate over Kenya, they systematically set out to eradicate the customary law, to pave way for the capitalist mode of production. Customary law, based on a traditional social superstructure was not germane with the capitalist mode of production. Through the process of legislation they imposed their own laws over the Africans to the prejudice of the African laws, which they refused to accord any status of law. Through the process of christian gospel and education, the Africans were made to feel inferior and to look upon the British values as being superior. The independent black government was called to continue the task that had been begun by their colonial masters. They were to steer the country along the road of capitalism, looking upon the former colonial masters as their masters and for inspiration. There was no attempt to change the colonial legislation but were allowed to continue as they were. The tendency today, as shown by recent legislations and Bills, for instance the Law of Succession, Cap.160 and the Marriage Bill 1976, is to bring the family structure under the government control. As already

observed, if the Marriage Bill is re-introduced and becomes law, that will make the end of customary law. By controlling the lives of the people, the leaders are revivifying the policies of the colonial era, the objectives being similar to those of the colonial government. Given this government apathy, there is no possibility of swinging the clock back to the colonial or pre-colonial days. History is against such a possibility. As political, economic and cultural pressures continue to pile, and there is no change of the policy in the offing, it becomes a foregone conclusion that customary law is on the way out of this country. Even those who stick to conducting their affairs the customary way, this will not last for long, given the government's apathy.

Secondly, the passion for economic development is high and the desire to maximise the existing assets boundless. This desired economic growth depends on the accumulation of capital and stimulation of trade investment. These are the typical characteristics of capitalism, which go with individual arrogance and desire for self aggrandisement and preservation. This is a complete break with the past. The legal implications of this economic growth is easy to see.

Firstly, any major change in economic or social arrangements which a government wishes to introduce has to be procured by law - change of law is thus an instrument or consequence of economic growth.¹ Secondly, law can also be seen not as a mechanical

consequence of change, but also as a stimulant to change, where it is felt that the existing law inhibits change. For example, the customary land tenure system was seen as hindering development, and this necessitated legislation providing for individual ownership of land.²

As the economy develops, new institutions develop, which reflect the level of development. Thus, there is a dialectic relationship between the means of production and the social institutions found in community. The relationships which develop are crucial to the understanding of the society, because as Karl Marx said, neither legal relations, nor political forms could be comprehended by themselves or on the basis of the so called general development of the human mind. The understanding originates from the material conditions of life. The mode of production is the one that conditions the general process of social, political and intellectual life. In response to the kind of social pattern created out of the means of production man will behave in a certain way(s).

As this paper has attempted to show, the types of economic base in Tharaka traditional society has helped to mould the type of institutions that were found in it. With the change of the mode of production from communal to individualism, family relations have also changed. To hold that customary law will continue in the face of these great changes, in my view, is to lose sight of the said dialectic relationship that exists between the mode of production and the institutions that obtain. It would be to make law an abstract set of rules. This is not merely wrong, but fundamentally so.

The only comment which may be made here is that, the government is making the Kenyan African societies run faster than their legs can take them. What the government is doing in trying to have a uniform law is applausable, only that the time is not yet ripe for such a law. The writer contends that it is plausible because of the fact that the Kenyan view of the good life, is being dictated by the capitalist mode of production and the English superstructure which are very strong in Kenya. What the legislature should seek to do is to endeavour to ascertain the extent to which the mode of production obtained in Kenya has forced us out of respective original communities and made members of a national communities with same ideas about life.³ Uniform legislation, that would not make any community feel assaulted and being subjected to paternalism, must be based on this empiricism. When this is done, the government can tell when the time is opportune for such a law, which, given the present forces that dictate will not be long, otherwise anglicisation of Kenyan laws will constitute a mockery of Kenya's independence in that it will be a continuation of paternalism, which characterised the colonial administration.

FOOT NOTES

CHAPTER ONE

- 1 Native Court and Regulations, Sections 51 and 52.
- 2 No.2 of 1902, Sections 30 and 31.
- 3 No.12, 1915, sections 51, 54 and 56.
- 4 [1973] 9(2) K.L.R. 102.
- 5 *Hyde v. Hyde* (1866) L.R. 1 P & D 130
- 6 R. v. Ankeye (1917) 7 EAIR 14 at 16.
- 7 "African Religions and Philosophy", Heineman Educational Books Ltd., (1969).
- 8 1860.
- 9 St. Mathews 9:6.
- 10 Majority of the people I interviewed who had married in church told me that they were not aware of any legal implication, unknown to the traditional system of marriage, which go with that type of marriage.
- 11 The earliest in Tharaka Division was Materi Catholic School, started in 1949.
- 12 "African System of Kinship and Marriage"., London, Oxford (1950) at 49.
- 13 Porter v. Porter (1969) 1WLR 115 at 1159.
- 14 Olo Nyago and Others v. A.S. (1974) 5 EML 270

CHAPTER TWO

- 1 Marriage-gift is used throughout this paper to de-emphasise the idea of purchase conveyed by other phrases like bride-price, marriage-consideration, marriage payments, dowry etc.
- 2 Supra 6.

CHAPTER THREE

- 1 Act 5, (1969) section 3.
- 2 Section 82(4)b.
3. Section 2.
- 4 Marriage Bill, section 83.
- 5 Karl Marx: Except from contributions to the critique of political economy in Marx and Engels. "Basic writings in Politics and Philosophy"; Lewis Fontana (1969), 84.
- 6 Marriage Act, Cap 150, section 37.
- 7 Hyde v. Hyde.
- 8 Marriage Bill (1976).
- 9 Dr. A.N. Allot: "Legal Development and Economic Growth in Africa". In a book "Changing Law and developing countries". by J.N.D. Anderson at 196.

CONCLUSION

- 1 Supra 9.
- 2 Land adjudication Act, Cap.284.
Land Consolidation Act, Cap.283.
Registered Lands Act, Cap.300.
3. Gibson Kamau Kuria: "Religion, The Constitution and Family Law and Succession in Kenya." A paper presented in Faculty of Law Seminar on October 28th (1977).

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