FAMILY LAW

FAMILY AND SOCIAL CHANGE: THE RIGHT TO BE MARRIED

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ABBREVIATIONS

A. C.	-	Appeal Cases
ALL.E.R.	-	All England Law Reports
Cap	-	Chapter
Ch. D.	-	Chancery Division
D. L. R.	-	Dominion Law Reports
E.A.L.R.	-	East Africa Protectorate Law Reports
G. L. R.	-	Ghana Law Reports
Govt.Printer	-	Goverment Printer
H. C.	-	High Court
H.C.C.C.	-	High Court Civil Cases
I.C.L.Q.	-	International Comparative Law Quarterly
J.A.L.	-	Journal of African Law
K. B.	-	King's Bench
K.H.D.	-	Kenya High Court Digest
K.L.R.	-	Kenya Law Reports
Legico Debates	-	Legislative Council Debates
L. R.	-	Law Reports
L. T.	-	Law Times
M. L. R.	-	Modern Law Review
N.L.R.	-	Nigeria Law Reports
N. Z. L. R.	-	New Zealand Law Reports
O.U.P.	-	Oxford University Press
Q.B.	-	Queen's Bench
S & M	-	Sweet and Maxwell
W.L.R.	-	Weekly Law Reports

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INTRODUCTION

The study will be focusing on the institution of marriage. Its a comparative study of three aspects of the marriage institution, Customary Marriage; Statutory marriage and cohabitation without marriage ("Concubinage"). Marriage has been described as being the best state for man:-

> " Marriage is the best state for a man in general and every man is a worse man, in proportion as he is unfit for the marriage state"[1].

But the same institution has been described by Michel de Montaigne as a " cage; one sees the bird outside desperate to get in, and those inside desperate to get out"[2]. The latter two quotations show the apparent contradiction of the marriage institution. These blantant contradictions will be the subject of our study. I undertook the study of this particular arena of the law after careful perusal of an illustrious article by none other than one of the Kenya's family law heavy weights today, Kamau G.K.[3] Its no wonder that the title to this study is derived from this particular humble contribution. The latter article dealt with the oft-talked about "Marriage for convenience" or "Concubinange" or Cohabitation without marriage or elopment.

Due to the acute scarcity of material sources the writer will at time rely on deductions from leading works on family law, interviews and given opinion views and observations from experience, though not claiming to be authoritative. However, it is extremely difficult and rather over-ambitous to undertake an exhaustive study of the aforementioned subject, hence this work is by no means exhaustive. This study is not merely academic as it will be seeking for hopeful solutions for the proper guidance of our scholars, the judiciary and our legislators & law reformers. There is no reason why the law should treat those living as husband and wife differently from those living in the same way having first married.

.../ .

The concern should be with the substance and not the form of the matter. The human foundations of the two unions are the same.

Although this study is primarily on the institution of marriage, it is considered necessary to reveal the epistemology or theory of knowledge upon which the writer has relied for the statment of the law as contained herein. The defination of the law that the writer views as a sound basis for this study is that of Aquinas who defines law as-

> " A measure of human conduct that is possible and desired, is a body of rules that backed by the coercive and other forces of state enable men and women to live a good life during the period they are alive".[4]

As Kamau argues[5] that "good life" refers to the philosophy of life of a society. This philosophy indicates what a society sees to be the nature of man and his purpose on earth. The laws relating to creation or contracting of marriages are intended to enable men and women to live happily within the institution of marriage. The law under study is the basis upon which such marriages are founded, and seek to enable the people to live their kind of good life as they see it. The "good life" means different things to different groups of people, and the concept of good life given by the law will differ from state to state.

Law therefore especially personal (marriage) laws must be a product of the people's common will and express their various philosophies of what a good life is. The philosophy is also varied by certain historical and socio - economic factors. But essentially the laws must reflect the values of the pepple now living.[6]

This theory of knowledge recognises though that the individuals perceptions, laws, family unit, educational system etc are largely determined by the mode of production which constitutes the base of which the others are the super - structure. Karl Marx has expressed it thus:-

" In the social production which men carry on, they enter into definite relations that are indispensable 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 of production constitute the economic structure of the society - the real foundation on which rise legal and political structures and to which correspond definite norms of social conscionsness. The mode of production in material life determihes the general character of the social-political spiritual processes of life" [7].

The mode of production largely determines what are the "right things" to do. The remaining part, as Kamau [8] rightly points out, is determined by universal traits in Homo Sapiens. The ruling ideas will themselves be those of the ruling class, those who control the means of production and consequently the coercive powers of the state which the courts authorise and legitimise in other cases. It is important to note that this theory does not say that laws are shaped by the mode of production as both Marx and Engles in the aforementioned works would like us to believe. Man's view of his nature and the relationship, with the supernatural would be reflected in the laws independent of that mode production. Moreover man is capable of changing his mode of production to meet his own ends. This in part explains the existence of four systems of family law in Kenya since the colonial era, also basing on historical reasons and constitutional and legal backing.

Kenya's political economy is that of an expoited neo-colonial state in which the economically dominant as well as the privileged group, realise their "good life" at the expense of the majority of the people. The ruling class ideas have replaced the whiteman's idea of a good life during the colonial rule. The colonialists imposed foreign laws on our people because of their arrogance and ignorance. But those who took over from them at independence have not improved the situation, having been recruited from a class of Western educated and trained elite who are now of the same economic class.

.../ .

It is not surprising therefore that much of the laws we have today are those that existed during the colonial period[9].

The main thrust of legal development during the colonial times was to displace the African laws and replace them with Engilish ones, under the pretext of civilising the African, the English man, sought to realise his philosophy of life. After sometime, the African was demanding for recognition of his philosophy of life, and hence the struggle for independence which was also a demand by the African for a just society from the recialism and paternalism the colonialists had inflicted on him. As stated earlier, even after independence the laws that reflect the Africans philosophy of life are still being looked as needing civilisation and the thrust of development since 1960 has been towards the same direction as during the colonial times[10]. It is also unfortunate that it is in the area of marriage laws that there has been an attempt to introduce a less dilute version of the English law and that attempts to create a more African Legal system for Kenya, blending together English and African Legal ideas have been regarded by the govt. as still born. The goverment has taken the stand that modern legal system can only be built on the imported English base.

A similar attitude is found in the Judiciary and in case of conflict between the customary laws and statute laws, the latter are always held to prevail. The retention of the Repugnant clause in Kenyan law gives reason for courts to regard customary laws as inferior to English law.

The aim of this study is to highlight on the three forms of "marriage", Statutory; Customary and "Concubinage." By so doing the writer will be seeking to show that concubinage or "Cohabitation without marriage" or "Marriage for convenience" is not an extension of earlier forms of marriage or even as a new life style that can be analysed as a phenomenon into itself.

.../..

Rather cohabitation must be viewed as part of a transformation of marriage. Not only cohabitation but divorce and remarriage are part of this transformation which itself is part of a larger complex of recent changes affecting the family and relations between the sexes.

Marriage is losing its identity as a distinct social status with a unique set of emotional economic and reproductive functions. That the law should give effect to such changing trends in social life. There is no reason why the law should treat those living as husband and wife differently from those living in the same way having first married. The concern should be as earlier submitted with the substance and not the form of the matter. The human fondations of the two unions are the same.

The people actually involved in cohabitation may be relatively increasing in number and are having significant impact on the law. In the past few years there has been a striking increase in litigation involving cohabitation. Faced with necessity to make decisions about the practise, legal authorities from various countries have revealed tolerance for alternative forms of marriage and an unwillingness to punish those who deviate from traditional standards of sexual molarity.[12] Since there has been such a close identity of legal with moral norms, the changing legal standards help to make cohabitation more respectable as well as more visible. In grappling with these questions the courts have been faced with an uphill task and indeed have taken time to accept this institution. It has raised a number of problems which range from disputes regarding the status and rights of children to inheritance; issues of criminal law and civil law; wife's right to maintenance; Rights of the Children of the Union to maintenance; parties rights to the property acquired during cohabitation; custody of the children in the event of the break up of the relationship etc.

.../ .

The study is divided into five chapters. The first chapter discusses the historical and constitutional reasons for the existence of the four systems of the marriage law in Kenya. Although this does not directly discuss the subject of our study, it is considered necessary by way of introduction to outline the sources of Kenya family law. Family law in Kenya, as with any other law must be read and analysed within its socio-economic and historical context. This study of necessity begins with a survey of the constitutional and historical origins of the laws that obtain and apply. Such a survey would help us know generally the society in which the laws operate from the background and enviroment in which they developed.

The second chapter is a study of the objects of marriage. Most men and women at a certain stage in life get into permanent relationships for the purposes that include companionship, procreation, sexual satisfaction, identity, security and to save face, among others. The object of marriage will be what one views to be one's concept of a goodlife. These objects are discussed under three parts:-

(Oi). Objects of marriage under English - type of marriages.
(ii). Objects of marriage under customary law.
(iii). Concubinage or cohabitation without marriage.

At this particular point the writer will have identified a phenomenen of the marriage institution that is becoming more and more prevalent - "cohabitation without marriage". Is it an institution sui generis the marriage institution?

In the third chapter we shall focus our survey or study on the formalities of a valid marriage both under customary and statute law. This in effect will serve as a basis towards the understanding of the writers discussion in the fourth chapter. It helps to differentiate customary law marriages, and statutory marriages from concubinage and the legal implications that ensue from each.

.../ .

Chapter four will dwell on the major thesis of this study. Since today a significant proportion of men and women are living as husband and wife having not either undergone the ceremony prescribed by the law or satified the conditions that must be satisfied (customarily or otherwise) before a marriage comes into existence, the question arises as to whether the law should give recognition to them. This is a question that the writer seeks to answer.

Recommendations and conclusions will be the subject matter of chapter five.

FOOTNOTES

INTRODUCTION

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CHAPTER ONE

THE HISTORICAL BACKGROUND AND SOURCES OF FAMILY LAWS IN KENYA

Law just like any other social science displine should not be divorced from society i.e. should not be analysed or studied as an abstract displine with no roots. Essentially the laws must reflect the values of the people now living. Law is not the harbinger of social relations. It is merely a reflection of these relations not their reflector. It is because of this reason that this writer is of the view that family law in Kenya as with any other law must be read and analysed within its socio - economic and historical context. Such an approach will enable the readers to know generally the society in which the law operates from the background and enviroment in which they developed. "To be able to explain the present we must refer to the past for as Du Bois has said... "the past is the present; that without what was, nothing is. That, of the infinite dead, the living are but unimportant bits."[1]

Hence this study will of neccessity begin with a survey of the constitutional and historical origins of the laws that obtain and apply.

A discussion of the constitutional and historical explaination for the existence of the four systems of family law is intended with a view to show the folly or fallacy of unifying the four systems into one and applying English law to all the people of Kenya and the consequent anglicisation of the laws of the other three communities.

Kenya, since the advent of colonialism has always retained four systems of law; customary law, Islamic law, Hindu and Statutory Law. The latter were all intended to govern the different lives of the peoples of Kenya and to enable them to lead the good life" of their choice, influenced solely, by the religio-philosophical ideas. The existence of these four systems was based on the realisation that Kenya is a sovereign state with various e thnic and racial groups living in it. There was thus a need for a clear cut political theory that these diverse groups to retain their human dignity and make their lives meaningful.

Kamau G. K. in one numerous contributions to family law[2] rightly argues that this political theory must be based on the equality of all men and the view that human dignity and equality can be realised where political, economic, social and legal institution are themselves based on this principle of equality. Each Kenyan is therefore entitled to ~~represent~~ respect and concern wherever social and political arrangements are being made. Chapter five of the Kenya Constitution embodies this moral philosophy notwithstanding the great protection of property rights and the dilution of the foundamental rights by a vague concept of public security and morality. Owing to the diverse faiths in the Kenyan Society for instance, Christian, Hindu, Muslem and traditional African religious faiths the lowest common factor among them is their belief in human dignity and equality. The constitution thus caters for the diverse communities since it embodies the foundamental rights that are essential if man is to retain human dignity and realise human equality.

Of particular mention are sections 78 & 82 of the constitution of Kenya. Section 82 prohibits discrimination generally. What is the underlying reason for the retention and entrenchment of such a section? The answer inter alia is simply the realisation that the Kenya Society has a population of different cultures and philosophies of life.[3] Discrimination of any manner would cause alot of bitterness and culminate into an endless struggle that could indeed be very emotional given the attachments to one's personal laws. Section 82 (4) therefore permits the enforcement of different laws of adoption, marriage, divorce, custody, burial, devolution of property and death and other matters of personal law. The section is intended to enable the individual to lead the kind of life he wants by permitting him to choose the law that will indicate conduct that is permitted and which choice the law will protect. It can therefore be seen that this is the constitutional basis for the application of the four systems of law to the different Kenya peoples emphasising the individuals right to live his own kind of good life.

A further scrutiny of section 78 of the same constitution confirms the individuals inherent right to worship or not to worship which is unfettered.

It is based on the realisation that there is universal need for man to establish some relationship with the supernatural being. From this particular section one can deduce and hence submit that religion forms the basis and provides the content of marriage laws under the four systems. This link between religion and family law is further given credence by our statutory[4], definitions of marriage taken from that of lord Penzance in Hyde v Hyde[5] which defined marriage as understood in "Christendom". Other illustrations of this link may be seen in the African Christian Marriage and Divorce Act which applies where one of the parties is a christian or professes the christian faith;[6] Hindu Law[7] and Islamic law[8]. Africans govern their affairs in accordance with customary law which is based on African religion and philosophy.[9]

When one views the various marriage laws of the different communities in the writers perspective it is seen clearly that the four systems of marriage laws are not in existence by accident as the Commission on Marriage and Divorce[10] would like us to believe. The right to one's personal law is a foundamental one which the constitution protects. It should therefore be illegal and unconstitutional for one to be denied this foundamental right to give effect to his own philosophy of life through the various laws on the family that the constitution permits to operate with respect to the four different communities of Kenya. All marriage laws must be in line with the constitution which embodies the moral philosophy of present day Kenya, that puts all the marriage laws at par. Its reflection of what Kenyan call the nationa philosophy of life which lays down the minimum entitlement of every Kenyan irrespective of colour, role or creed.

The constitution has at times been used as a vehicle for Westernising Kenyan's marriage laws by arguing that the ideas of discrimination and equality have universal meaning which has been taken to be English and American ones.[11] It has thus been used to treat as equal people, who are not equal, leading to injustice. The cases of Wadhwa v City Council of Nairobi[12] and Fernandes v Kericho Liquor Licensing Board[13] are illustious of the machinations by the courts to use foreign concepts of equality and the endeavour to put at par people with different social and economic priviledges This was a clear case of the perpetuation and sanctioning of the unfairmess and injustice of the colonial order.

e these failures and weakness by the judiciary and legislature interpret the spirit of the constitution, the same still provides the strongest basis for the application of the four systems of family law to the various Kenyan People.

Thus the constitution of Kenya embodies man's autonomy as regards his life in addition to making his right to personal laws a constitutional one. One can therefore exercise that autonomy which one needs to give meaning to one's life and change one's religion and/or philosophy and personal laws.[14] Since the constitution is the supreme law of the land and any law which contradicts or goes contrary to it is null and void to the extent of that inconsistency then it follows that any enactment that does not abide with this sacred document will be totally rejected both by the courts and the people. Such fate should be pronounced on the Marriage Bill[15] and the law of Succession Act[16]

For the purpose of this study it is contended that Kenya was born in 1886 when East Afric was partitioned between the British, the Germans and the Sultan of Zanzibar by the Anglo-German Agreement of that year.[17] It is not the aim of a discussion of this magnitude to discuss the mechanisms involved in the partitioning and control by latter powers. The same are exhaustively discussed by historians elsewhere.[18]

From the advent of colonialism the four different marriage laws were intended to apply in Kenya. Kenya like most aAfrican Countires fell prey to imperialist designs in the 19th century when, prompted by capitalists greed for more markets and sources of raw materials. The imperialists curved aut for themselves "sphreres of influence" which became their protectorates and colonies.[19] From 1886 to 1895 the British goverment ruled by surrogates; the imperial British East Africn Company ruled the "British Sphere of Influence" on behalf of Britian. In 1895 the latter company handed over direct administration of Kenya to the British goverment which proclaimed protectorate status over Kenya- The British East Africa Protectorate.[20] In 1920 the British Sphere under the 1886 Anglo German agreement was annexed and became the Kenya Colony.[21] The Sultan's former dominions remained as a protectorate. From 1920, Kenya was known as the Kenyan Colony and Protectorate.

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The significance of the foregoing account is that right fro. the birth of Kenya it was the British imperialism that guided most of the activities of Kenya with the sole aim of making Ken, meet her economic and other imperial needs.[22] According to G. K. Kamau, British imperialism has three important characteristice.[23] Firsty as earlier mentioned, it ruled through surrogates-the imperial British East Africa Company-in the initial period of the 19th Century. During the colonial rule it ruled directly through a colonial administration and indirect rule through some forms of African institutions[24]. Even after decolonisation in Africa, it has sought to rule through other surrogates. Secondly the colonialist submerged into the belief that the non-white people are primitive or sub - human, that their institutions too are an expression of that "primitivity" and consequently the universal movement of man is from his philosophy of life whatsoever it is to the English philosophy of life.

The third characteristic is the imperialists ability and desire to make compromises with any opposing side when such compromises do not hinder what are conceived to be the true objectives of imperialism. They believed in being practical for short term goals. The Kenya Marriage laws that emerged must therefore be viewd againist the background of:

(a). The interests of the British ruling class whose interests Kenya served and whose consiousness was determined by the capitalists mode of production obtaining in Britian whose superstructure was English legal system and legal theory.

(b). The racism that gave some colonialists the moral justification for ruling others.

(c). The compromise idea which led to non - interference with the non - white institutions where such were dictated by her immediate needs.

None of the numerous branches of the law in kenya has witnessed as much racism as family law.[26] This apartheid nature of family law proceeded on the assumption that the Africans and native laws were subhuman and savage and needed reformation. Such transformation was seen by replacing customary law and all the other aspects of the African legal theory with the English type. Such approach was based on a paternalistic belief that English type norms were superior and were the measuring standards to which all the laws had to develop.

Consequently the African had to be trimed into a whiteman because that was the best way of life. A careful but brief scruti. of the colonial legal system makes this abundantly clear. It suffices only to illustrate the latter with some historical examples.

The present English imported legal system dates back when the East Africa order in council established it and indicated the laws that were to be applied.[27] It made it clear that the legal theory that was to be used was the English one. It established a tripartite division of courts or subordinate class; native; muslim and those staffed by colonial administrative officers and magistrates and a dual system of superior courts, one for the colonialists and the other for "Natives" (which was broadly defined to include Muslims) called the " Chief Native Court"[28]

The 1897 courts regulations made under the same order in council made it clear that the native courts to be established to d settle disputes were of two kinds, one of muslims and others for the real natives (indigenous Natives). The final courts of appeal were separate, a judicial one for the non-African and semi-administrative one for the Africans. This served to indicate the racial exclusiveness and the different conceptions of the role of the court.

On the enactment of the East African Marriage Ordinance 1902[29] and the 1904 Native Christian Marriage and Divorce ordinance cases of Native Christians also came up before the ordinary courts. This is a clear indication and a good illustration of the assertion that in the colonialists view the African who had brought himself/ herself within the ambit of the latter acts had caught up with civilisation and could now be treated like the whiteman. The rest who had not succumbed to such acts continued to be governed by the law of their tribes;

" So far as it can be ascertained and so far as it is not , in the opinion of the court, repugnant to justice and natural morality".[31]

But this was not enough since most of the Africans who had decided to turn English and marry in accordance with English customs as seen in the above named Acts were not as civilised as the colonialists had thought. It was in realisation of this basic element that the Native Christian Marriage and Divorce was enacted in 1904[32] to provide the local christian with a simplified procedure for contracting a christian marriage and allowing for conversion of customary marriages into christian ones..

in the colonialists attempts to indoctrinate. This was enhanced by the provisions of the 1902 ordinance which removes from the operation of any other law a person who marries under the ordinance as the person losses capacity to marry another.[33] Did such a provision accord with reality?[34]

A further illustration of the intention of the colonialists to turn the African into a " Whiteman" because it was thought to be the best way is clearly discernable from an observation of the laws that were enacted. They were either the current laws of England or local laws derived from English Laws in force at a particular time. Why such abrupt changes in the law in an African setting? This was to enable the Eurppeans to live a life close to that of their folk back in their motherland. It was believed that the application of common law to an Englishman anywhere was a birthright[35]. It was under the 1897 East Africa Order in Council that the various Ordinances which interalia include the 1902 E.A. Marriage Ordinance, 1904 Divorce Ordinance[36] which was given its flesh and blood by the Indian Divorce Act 1869 were enacted. There is no doubt that when one scrutinises the nature of the amendments, it clearly reveals that this was a calculated move to keep in line with changes in England. Other few examples will illustrate this patent manoeuvre by the colonialists. The Matrimonial Causes Act 1939 which replaced the 1904 Divorce Ordinance was really intended to enable the colonial elite to benefit from changes in family law in England. The Act was derived from the 1925 supreme Court of the Judicature (Consolidation) Act and the Matrimonial causes Act 1937 both of England which made divorce easier to get by increasing the grounds thereof. The same type of amendments to bring the law at par or uniformity with the law in England are also manifest in the neo-colonial Kenya - from the 1972 repeal of the Indian Succession Act and its replacement with the law of Succession Act.[37] which governs the law of succession of Eurpeans; a codification of English Law of succession in the 1860's. The few examples cited in totality show that the laws that were allowed to exist gave effect to the imperialists concept of good life as seen by them.

.../

Despite this imperial arrogance it is quite evident from our discussion that due to historical reasons the Kenya Society was broadly divided into four categories to which different laws applied depending on their various philosophies and concepts of justice. This four systems reflect the compromise and racial aspects of British Imperialism. The imperialists realised that any interference with the local lives of the people, unless when absolutely necessary was bound to cause chaos and hence they prefered gradual changes to avoid rebellion that would pose a threat to the very system that they were out to strengthen.

On the other hand Kenya was all the time intended to be a whiteman's country and Africans and Asians would be instruments to enable the whiteman to lead his kind of good life. It is upon this background that we should study and appreciate the four systems of family law that apply to the different communities. We must resist the temptation to treat Kenya as one homogenous whole. Kenya is made up of the four communities who have different and complete laws and systems of law governing them being of equal wort in law and each with the right to live according to its philosophy of life.

The Judicature Act, 1967 it is submitted has been used as the basis of the application of English law in Kenya. A brief survey of the extent to which this Act has actually been manupulated to apply English Family law to the peoples of Kenya is prefered at this juncture.

This act has been in existence since the institution of the legal system in the Kenyan protectorate but in various masks. It dates from 1 1897 Order in Council which empowered the commissioner to alter or modify the operation of any native law or custom in so far as may be necessary "in the interests of justice and morality" A provision to a similar effect was incorporated in the 1902 Order in Council. It stated that the commissioner shall in making ordinances under it.

> " ,... respect existing native laws and customs as far as the same may not be opposed to justice or morality or inconsistent with any order-in-council"[38]

.../

The provision found expression in various constitutional instruments namely the 1911 order-in-council and the 1921 annexation order in council. It was finally incorporated in Judicature Act 1967 as section 3 (1).

The Judiciary has continued to construe this particular provision of the Judicature Act erroneously and treats it so broadly in ignorance of Kenya's colonial history. Hence it applies English law to and interpret the same to apply to all the people of Kenya.[39] The judical personnel has refused and/or ignored to recognise the fact that English law was never intended to apply to all people but at most to enable the colonial elite to lead same lives as their folks back home. The judicature Act is derived from the colonial laws, which were an expression of the colonialists concept of good life.
The colonialists could only allow customary and Islamic law to exist in so far as they do not threaten the colonial order and as long as they don't destabilise the order nor go contary to the colonialists standard of " Justice" and Morality".

If the reception clause were constructed strictly one would clearly see that the clause applies only where the constitution and written laws do not apply. The constitution as the supreme law of the land provides for the application of customary and Islamic law[40] and for freedom of worship that provides the basis of the laws of marriage of the various Kenya peoples. The constitution puts all marriages at par, and section 78 gives all of us the right to live that kind of life we prefer. This coupled with Section 82 (4) (c) gives the right of those of us who wish to regulate their affairs by customary law to do. To the extent that the judicature Act may intend to curtail the application of such custom then it is submitted that it is inconsistent with the constitution and definitely null and void.

..../..

The purpose of the Judicature Act was to supplement existing laws by filling gaps if any, in the legal system. No progress has been made towards putting customary law in its proper place. If anything the courts have preferred English law to customary law on the argument that customary law is subject to written law.[41] What this colonial minded judges and infact Englishmen have forgotten or ignore is the clear and unequivocal fact that its actually customary law which is more written in the hearts of our people and ought to be given effect. Such decisions as Rex V. Amkeyo[42] where that notorious judge, Hamilton J. refused to recognise the marriage of Africans and called it "wife purchase" lack foresight and rationality. The decision in Kimani v Gikanga[43] that customary law must be proved as a fact is both erroneous and unconstitutional when one takes note of the constitution which puts all marriages at par be they customary or English. The courts must feel free to depart from it following the ruling in Dodhia v National Grindlays Bank Ltd[44]

Moreover according to Nyali v A.G. the section applied only the substance of common law and statutes of general application only as far as the local conditions allow. This would clearly and logically mean that where there are laws governing the local people then those laws will apply, viz, customary law for African, Islamic Law for Moslems and Hindu Law for Hindus.

From the above discussion it is submitted that section (3)1 of the Judicature Act should apply English Law to the Europeans in our society and those Africans who have taken after them and to other peoples of Kenya only to the extent to which the local law does not apply.

This application of English law on the basis of this section which it is submitted was erroneous and must now be rejected and replaced with our own philosophy of goodlife, may be understood from these factors;-

1. Most of the lawyers had a British legal training and cultural background and therefore supported the colonial ruling ideas.[46]
2. The judges were only Britian's " Second best"[47]
   This explains their inablity to use law to bring about the desired changes in the society but rather supporting the establishment, and their failure to understand the country to which the laws applied and failure to appreciate the difference between the British and non-British Jurisprudence.

3. The colonial legislature and Judiciary were victims of the natural temptation to apply the knowledge he has rather than the law he ought to apply. The judges shares the racial prejudices of their mother country that denied the humanity of non-white people. And the idea of the "travelling judge" and offices of the colonial legal services so they never reall had a chance of knowing the law and society well.[48]
4. During the colonial times and just after independence because of the operation of the same mode of production producing the same consciousness in the judges the courts have applied. English law as the law embodying universal justice for all the peoples of Kenya.[49]

THE FOUR SYSTEMS OF FAMILY LAW - A BRIEF ANALYSIS:

CUSTOMARY LAW

The authority for the application of customary family law as earlier noted (supra) is to be found in the supreme law of the land, the constitution [50]. This is supported by History - that it is customary law that has applied and was intended to apply to Kenyans of African origin who regulate their way of life according to the African philosophy of a good life.[51]

Authority for the application of cutomary law is found in the Marriage Act which by section 37 provides that one cannot marry under the Act once married under customary law. Marriage under customary law is an impediment to a statutory marriage [52] and it is an offence for a person to contract a statutory Marriage and Vice Versa.[53]

Section 3 (1) of the Judicature Act provides that subject to the constitution, written laws, the substance of common law doctrines of equity and statutes of general application Customary law applies. By that section customary law must be preferred to English law to give to the circumstances of Kenya and its inhabitants to which English law is subject. It must prevail against the alien and unacceptable principles of law derived from England.

..../

Section 3 (2) of the Judicature Act provides that the High Court and all subordinate courts shall be guided by African Customary law in all civil cases where one of the parties subjected to or affected by it is an African. Customary Law therefore may still apply to non -Africans[54]

Section 10 (1) of the Magistrates courts Act[55] provides that District Magistrates courts have and exercise juridiction and powers in proceedings of a civil nature where the proceedings concern a claim under customary law. This claim is defined to include marriage, divorce, custody etc. giving legal validity to the application of customary law to Africans.[56]

Finally the authority for the application of customary law is to be found once again in the constitution. The constitution establishes a High Court of unlimited original juridiction[57] which means therefore that the court has jurisdiction to hear cases arising out of customary law.

All this abundant authority notwithstanding customary law has not achieved an equal status to other laws. Indeed even Islamic law is considered superior to customary law[58]

The movement was seen to be from customary law to Islamic law then to English Law. This are indeed the some of the attempts as noted above to curtail the application of or abolish outright customary law in preference to imported foreign law.

Despite this setback customary law remains the source of law for most of the Kenyan people and its application must be perpetuated by all means.

STATUTE LAW

Comprises the Marriage Act, the African Christian Marriage and Dirvoce Act, the matrimonial causes Act, subordinate courts (separation and maintainance) Act and maintenance orders Enforcement Act[59]. A brief analysis of this Acts is necessary at this stage.

.../

The marriage Act was a reproduction of its English counterpart from a model prepared by the colonial office for the colonies. It was orinally enacted in 1902 as the East African Marriage Ordinance. It caters for christians and non-christians i.e people who may not wish to go through a church ceremony of marriage. Marriage under this act is monogamous[60]. The same act regulates such matters as capacity to marry, celebrants of the marriage. It defines marriage as under English Law[61]. Once one marries under it he/she loses capacity to marry under any other law i.e. the person is taken to have removed himself from the operation of any law as he becomes a whiteman by outlook to life. The result has been that some courts have erroneously held that such persons have become "white men". A case in point is the famous Nigerian decision in Cole v Cole[62]. An even better illustration is a case cited in the latter case, Yinusa v Adesubokan where it was held that a will made under the U.K. wills Act will be interpreted as in England notwithstanding the fact that the testator had regulated his affairs by Islamic law. The court decisions and the act ignore the realities of life and instead operates on a fictitous and unrealistic premise.

What should be the correct approach to the interpretation of this Act. The writer can do no better than seek guidance in the Ghaninian case of Coleman v Shang[63]. The position as stated in that case is that once an African marries under the Act he is removed from the operation of customary law only to the extent that the statute provides either expressly or by necessary implication which position would give effect to what was the law makers intention that Africans be governed by this customary law in certain areas e.g. personal law.

The marriage is meant to be for life unless dissolved by one of the formalities of marriages under it. The Act makes provisions for the formalities of marrying under it, the prohibited degree and the registration of such marriages.[64]

The African Christian Marriage and Divorce Act was orginally enacted as the 1904 Divorce Ordinance and later amended by a 1931 Ordinance. The Ordinance or Act applied to the natives where one or both parties professed christianity. Yet this did not mean that one could not marry under the Marriage Act; which still governs aspects of capacity and consequences of marriage

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The Act applies to those who profess Christianity but does not define who is a christian for the purposes of the Act. In the writers humble opinion a christian is one who has a close association with the christian religion. One need not be saved or baptised to qualify as a christian. It is enough that he/she is a regular face at congregations of the Christian Army.

The act was passed to serve three purposes peculiar to Africans. Firstly to provide a simplified procedure for the celebration of marriages of African christians. This gave the false impression that the African lacked capacity to comply with complicated procedures of the marriage Act.[66] What the Act requires is for an African christian intending to marry to follow formalities usual to his religion as long as the notice is adequate and there is no caveat entered against the marriage[67]. Secondly the act enables Africans married under customary law to convert the marriage into a christian one when they join the christian fraternity.[68] Once more we discern an erroneous and misguided assumption that customary marriages were inferior to the English/Christian counterparts. Further if one reads section 9 (3) between the lines it does suggest that customary marriage which African christians contract do not bind them in law. The arguments goes that once Africans who had married under customary law become christians they realise that their marriage is no marriage at all and therefore will definitely go through the statutory ceremony of marriage. The writers opinion is that both views are false and unsustainable both by authority and reason.[69] A customary marriage, it is submitted is as good as any other.

Last the Act[70] serves to "free" the windows of African christians from obligations to cohabit with or be inherited by the relatives of the deceased under the African institutions of levirate unions and window inheritance.[71] This had a double effect on the institution of customary marriage. Firstly it gives the widow a special ("Majority") status by rejecting the customry institution which gave protection to windows. Secondly it had the effect of making the window who had no custody of children under customary law, a guardian thereof. It leaves no doubt in the writers mind that the imperialist aim was to do away the possibility of a 'pagan' father who might have a bad influence on the young ones.[72]

This is a clear manifestation of the racist view that the African was less human and his marriage laws of no binding effect.

It is submitted that contrary to what Cotran proposes[73] a window under customary law could not refuse either to be inherited or enter into levirate unions. But today section 13 of this Act and the consitution would make illegal an attempt to curtail the freedom of the individual to marry whom she pleases.

The Matrimonial Causes Act contains most of the statutory law relating to Divorce and matrimonial causes. Originally it was enacted as the Divorce Ordinance 1904 but renacted in its present form to incorporate the changes that had taken place in England in 1925 and 1937[74]. It provides that juridication lies with the High Court based on the domicile of the petitioner or residence in certain cases.[75] Divorce and nullity are obtainable on the same grounds as in England. It provides for judicial separation,[77] restitution of conjugal rights,[78] presumption of death[79] and ancilliary relief etc. It is applied through the matrimonial causes rules made under section 59 of the Act largely follows the one of England.

The subordinate courts (separation and maintenance) Act was passed as a quick way of granting relief to separating people, and provides for custody of children. It is worthy of note this Act too was largely derived from two English Acts; Summary Jurisdiction (separation and maintenance) Act 1935 and Summary Jurisdiction (Married Women) Act 1895. The grounds for granting aseparation under this Act differ from those under the matrimonial Causes Act.[80]

The maintenance orders Enforcement Act provides for the Enforcement in Kenya of orders made in England, Northern Ireland and other commonwealth countries and vice versa. It is based on the maintenance orders (Facilities for Enforcement) Act 1920 of England.

.../ ..

However there is a cloud of some doubt about its applicability bearing in mind the decision in Hilton v Hilton[81] where the Kenya High court pronounced that it no longer has jurisdiction to pronounce decrees of dissolution of marriage etc. where the parties are British, nor grant divorce.

ISLAMIC LAW

The Moslems legal system has been in existence from the early days of colonialism but for a long time the courts had found it difficult to find the legal basis for the application of Islamic Law.[82] In fact the courts time and again held that they had no jurisdiction to apply it or grant matrimonial relief for causes arising out of muslim marriage.[83] In 1908 when the Mohammedan Marriage, Divorce and Succession Ordinance was passed the courts were given explicit jurisdiction. But it was not clear, even by future Ordinances if it was Islamic law that would apply to moslems in Kenya. Hence the colonial judiciary exploited this loophole to impose its racists and paternalistic tendencies by applying English law to Moslems. The 1902 Ordinance as the Marriage Act, now contemplates a situation whereby a muslim can convert his marriage into a christian one after "seeing light".[84] It is evident from this that the content of Islamic Law has been subjected to "civilisation" or Anglicisation as the other laws discussed above.

The constitution makes special mention of Islamic law and establishes Kadhi's courts to administer Islamic law to Muslims.[85] That position of the law can only be interfered with by an amendment of the constitution. The latter notwithstanding the courts have arrogantly applied English law to them.[86]

Besides the constitution there are other laws that apply Islamic law to muslims. The Mohammedan marriage and

Divorce Registration Act[87] and the Mohammedan Marriage and Divorce Act.[88] The former deals with the registration of muslim marriages. Nothing in the Act shall however render invalid merely by reason of its non-registration any marriage or divorce which would otherwise be valid or render valid by reason of its registration a marriage which would otherwise be invalid. Chapter 156 provides that the Act applies to all moslems and makes islamic marriages valid throughout Kenya. It can be ground for a bigamy charge if one subsequently marries under the statute and vice versa.[89] Other rules are to be found in the Quran and works of leading writers on islamic law. The system of law is administered by the Kadhi's courts set up by the Kadhi's Courts Act.

The legal basis for the application of Islamic law is therefore to be found in the constitution and written law and it is a fundamental right that it be made to apply to those who govern their lives according to the Islamic faith.

HINDU LAW

The Hindus in Kenya are governed by the law embodied in the Hindu Marriages and Divorce Act of 1960, which Act largely follows Hindu Marriage Act of India, 1955. Between 1898 and 1945 the Hindu Community regulated their lives according to their customary law with India providing cultural guidance.[90] Probably the colonial government did not make provision for the application of Hindu law for all this time due to the initial insignificant number of the Hindus. The courts as usual erroneously held that they had no jurisdiction to maintain or determine matrimonial causes arising out of Hindu marriages which were potentially polygamous. This was held in Ganga Deviv v Tulsi Dass[91] and Kakar v Kumar.[92]

The position as from 1946 had to change. In 1946 Hindu (Marriage, Divorce and Succession) Ordinance was passed

which indicated that Hindu Customary Marriages were valid and therefore the courts had jurisdiction. It is submitted that the question of jurisdiction should never have arisen as the High court had original unlimited jurisdiction over all matters, and therefore had jurisdiction. In this particular case what was required was a certain amount of legal skill to go round the problem of jurisdiction. The Tanzanian case of Maleksultan v Jivraj[93] serves as an illustrious example, that were the residual clause existed, applying English law subject to the local conditions meant applying Hindu law to Hindus.

The Hindu Ordinance was no exception, just like the other systems of law discussed earlier, it followed the trend of looking towards English people for cultural guidance. Rules made under Cap 152 applied in matters of restitution of conjugal rights.[94] The Ordinance (Act) also applies cap 153 to Hindus.

It is worthy of note and in fact ironical that even upto 1952 after the enactment of the Ordinance the colonial judiciary refused to consider as valid a marriage contracted under Hindu customary law[95] which anomaly was remedied only by a legislative amendment, to apply the Act to all Hindus.[96]

In 1960 the Ordinance was drastically amended to its present form.[97] England had replaced India as a source of cultural and philosophical guidance hence the Ordinance had to change to accommodate this changes that had taken place in India which followed the same developments in England. The Act applied both chapter 152 and 153 of the Laws of Kenya except where it applies to Hindus and also made the marriage monogamous.

Hindu law applies to those who profess the Hindu faith or live according to Hindu way of life. This is the law that the legislature intended to apply to them and which would enable

them to give effect to their concept of a good life.

CHAPTER ONE

FOOTNOTES

1. Dubois, The World & Africa New York 1968 quoted by I.G. Shivji, East African Law Review 1970 p.144
2. SEE, Gibson Kamau Kuria "Religion, The Constitution and Family, Law and Succession in Kenya, MIMEO 1977; p.7-13
3. For the historical origin see Chanan Singh, "The Republican Constitution of Kenya" 1965 I.C.L.Q. 878 generally.
4. Chapters 150 (MARRIAGE ACT): 151 (AFRICAN CHRISTIAN MARRIAGE AND DIVORCE ACT) 152 (MATRIMONIAL CAUSES ACT) Laws of Kenya.
5. See Section 2 Chapter 152 Laws of Kenya (hereinafter referre referred to as L.O.K.) 1866 L.R. IP&D 130 at p.133
6. Section 2.
7. Section 2 Hindu Marriage and Divorce Act makes it clear that a Hindu is one who professes the Hindu Religion.
8. Section 66 of the Constitution provides that the Islamic Laws of marriage apply where all parties profess islamic faith.
9. See generally Mbiti J.S. African Religions and Philosophy, Heinemann 1969. African is here used strictly to mean the indigenous Kenyan who regulates his affairs by Customary Law.
10. Report of the Kenya Commission on Marriage and Divorce Government Printer, Nrb, 1968. The Commission on Marriage and Divorce was appointed by the Kenya Government in 1967 to consider the existing laws relating to marriage, divorce and matters relating thereto. To make recommendations for a new Law providing a comprehensive and as far as practicable uniform law of marriage and divorce applicable to all persons in Kenya, which will replace the existing law on the subject comprising customary law, islamic law, Hindu law and the relevant Acts of Parliament and to prepare a draft of the new law. To pay particular

attention to the status of Women in relation to marriage and divorce. Its recommendations are contained in the Marriage Bill.

11. See G.K. Kuria "Religion Constitution and Family Law and Succession in Kenya.
12. (1968) E.A. 637
13. (1968) E.A. 680
14. This is not in line with the Common Law, See Dicey and Morris, the conflict of laws, Stephen's London 1967 Chaps. 13, 14, 23, 24. See also A.G. of Ceylon v Reid (1965) 1 ALLER. 812; Rattansey v Rattansy, (1960) E.A.
15. Marriage Bill supra footnote 10
16. Law of Succession Act Chapter 1981.
17. Y.P. Ghai and J.P.W.B. MacAuslan take the view that Kenya system begins in 1822, Public Law and Political change in Kenya, O.U.P. 1970 p.126. For the background to the partition and subsequent development of boundaries of Kenya, see John Flint, wider Background to Partition and Colonial Occupation in History of East Africa, edited by R. Oliver & G. Mathew, Clarendon Press 1963 vol. 1 p.352
18. Ibid, also see details on the partition and subsequent developments by A.C. McEwan - International Boundaries of E.A.; Clarendon Press, 1961 chaps 2, 8-11, 18; G.K. Kuria "Religion Constitution and family law and Succession in Kenya supra p.20
19. See Lugard, The Dual Mandate in British Tropical Africa, Frank and Cass Ltd., 1923, chapter 31, and generally W. Rodney, How Europe Underdeveloped Africa
20. For more information about this period of Kenya's history, see Y.P. Ghai and J.B.W.B. McAuslan, Public Law and Political change in Kenya, supra chapter one.
21. See Kenya (Annexation) Order-in Council, 1920. This annexation follows the thinking in the legal establishment that in Africa where people were considered to be primitive and without a Westminister type of government,

the Crown had the power in the protectorates.

22. See Richard Wolff, Britain and Kenya, 1870-1930. John Flint, The wider Background to Partition and colonial occupation, supra.

23. Trends in Marriage and Succession laws in Kenya, 1886;1977 Handout p.10 Paper presented at the Historical Association of Kenya - Annual Conference 1977.

24. Lugard's idea of indirect rule. For how indirect rule worked in general in East Africa see H.F. Morris and James S. Read, Indirect Rule and the search for Justice, O.U.P. 1972

25. Frantz Fanon, The Wretched of the Earth, Penguin Books 1967

26. This is a view shared by G.K. Kuria - supra, Note.23 It is also the point that he is trying to make in his paper, Religion Constitution and Family law supra.

27. Ghai and McAuslan. Public law and political change in Kenya O.U.P. 1970 Chapter IV generally.

28. See Ghai & McAuslan, supra p.130-138

29. Ordinance No. 30 of 1902

30. Ordinance No. 9 of 1904 forerunner of the present cap 151

31. See Regulation 64 of the Regulations. In Kimani v Gikanga (1965) E.A. 735 the court must have had in mind this provision when holding erroneously that customary law must be proved as a fact.

32. Supra footnote 30. 33 sections 11(1)(d, 37, 49, 50

34. For a response to this question see G.K. Kuria, Laws of Marriage and Property in English speaking Africa" generally, Religion Constition and family law supra

35. See R.D. Seidmann - "Reception of English Law in colonial Africa Revisited" 1969 E.A.L.R. 47

36. No. 12 of 1904. The Commission on the law of marriage and Divorce, See a Report of, Government Printer, 1968, chapter 2, explains that it was based largely on the Indian Divorce Act, 1869. It did not state the fact that

the Divorce Act itself is based wholly on English law.

37. The Act was made operational on July 1 1981 by the then Attorney General, J.K. Kamere.

38. Article 2(3)

39. See Re Maangi (1968) E.A. 637 (Succession); Wambua v Okumu (1970) E.A. 578 (Custody); Obong'o v Municipal Council of Kisumu (1971) E.A. 91; JVI (1971) E.A. 278 R v Kadhi (1973) E.A. 153 (restitution of Conjugal rights); Re Kibiego (Succession)

40. S.66 of the Constitution provides the legal basis for the application of Islamic law.

41. Kimani v Gikanga, supra; see also G.K. Kamau "Religion, Constitution and Family law and Succession in Kenya" p.71

42. Rex v Amkeyo

43. (1965) E.A. k735

44. (1970) E.A. 195 see the judgement of Lord Denning to the effect that English law must be applied with caution depending on the circumstances of the case. Wholesale transplant of English law to Kenya is unwelcome.

45. Nyali Ltd. v Attorney-General (1957) A.C. 530

46. See an article by Sir Charles Newbold "Apprecedent in E.A."

47. Lord Devlin, "Judges & Lawmakers" (1976) M.L.R. 1 at p.8

48. Lord Devlin, ibid; see also G.K. Kuria, "Religion Constitution and Family law and Succession in Kenya" pp.65-67, Ghai & MacAuslan supra p.382

49. See generally G.K. Kuria "The meaning of Justice in Kenya" see pp.8-9. Presented to K.L.S.S. Symposium October 22.

50. See sections 78 and 82(2)c Constitution

51. See generally Mbiti, African Religions and Philosophy supra

52. Section 37(1) (d)

53. Section 49

54. See Case v Ruguru discussed by G.K. Kamau in "Customary Law Between Africans and Europeans" (1971) E.A.L.J. 217

55. Act No.17 of 1967
56. Section 2
57. S.60
58. See G.K. Kuria "Trends in Marriage and Succession Law in Kenya, 1886-1977 p.19
59. Marriage Act chap. 150; The African Christian Marriage and Divorce Act, chap 151; The Matrimonial Causes Act, cap 152; Subordinate courts (Separation and maintenance) Act cap 153 and Maintenance Orders Enforcement Act cap 154.
60. The effect of Section 35
61. See sections 37 1(1)d; 49, 50
62. 1 N.L.R. 15
63. Vol. 4 No.3 (1960) J.A.L. 160
64. See Chapter III-infra for formalities
65. See section 6 cap 151
66. See sections 6-8 cap 151 cf SS 8-13 cap 150 see also Legico Debates 1931 vol. p 535
67. Section 7 of the African Christian Marriage and Divorce Act
68. Section 9 of cap 151
69. See a detailed discussion in "Monthly Bulletin of judgements of H.C. of Uganda" April 1971 pp.86-88 and the Ugandan case Yona v Yosamu Mwerere
70. Section 10
71. A detailed discussion of these institutions appears infra. Chap. III
72. See section 13; See also para 154 Report of the Commission on the law of Marriage and Divorce, supra
73. Cotran & Robin - Readings in African Law ch.10, Cotran's Restatement generally.
74. Supra
75. The jurisdiction of the Kenyan courts in divorce cases is like that of the English courts, based primarily on the domicile of the petitioner in Kenya. This was firmly established in English law in Le Mensurier v Le Mensurier (1895) A.C. 517.; see SS 4 and 5 of the Matrimonial causes Act - statutory extensions of Jurisdiction are to be found in the Proviso to Section 4 and S. 5 of the cap 152.

76. See section 6(1) 3 year rule and its exception and Section 8 on the grounds for divorce which include adultery, cruelty, desertion: unsoundness of mind and that the husband is guilty of rape, Sodomy or bestiality.
77. Section 17 of cap 152
78. Ibid
79. See section 22 of the Matrimonial causes Act cap 152
80. Cf. S.3 cap 153 with cap 152 S.17
81. 1964 E.A. 359 see also S.7(1) of Kenya's Independence Constitution.
82. Anderson, Islamic law in East Africa, Frank and Cass 1970
83. See Fatima Binti Athumani v Ali Baka 7 E.A.P.L.R. 171 and Gulan Mohamed v Gulam Fatima 6E.A.P.L.R. 119 Because the marriages were potentially polygamous.
84. See sections 11, 35; se also S.5 the 1920 Ordinance.
85. See section 66 of the constitution; Kadhi's Court Act
86. Yasmin v Mohamed (1973) E.A. 533 (H.C.)
87. Cap 155 of the laws of Kenya
88. Cap. 156 of the laws of Kenya
89. Supra
90. See G.K. Kuria "Trends in Marriage and Succession laws p. 24-26
91. 9 E.A.L.R. 64
92. 20 K.L.R. 34
93. 1955 E.A.C.A. 142 (T)
94. Section 4(5) of Hindu (Marriage, Divorce, and Succession) Ordinance
95. Bessan Kaur v Rattan Singh 25 K.L.R. 24
96. See S.6 of the Hindu Marriage and Divorce Ordinance No.204 of 1952 and Legico Debates, Government Printer 1952 vol.46 col. 18-1
97. Cap 157 of the laws of Kenya.

CHAPTER TWO

WHAT ARE THE OBJECTS OF MARRIAGE?

Marriage is a complex affair with economic, social and religious aspects which overlap so firmly that they cannot be separated from one another[1]. The marriage institution is universal to mankind and has philosophical bases that commend it to all people. The validity of this assumption is however at times questionable. An examination of attitudes to human life which are closely associated with the marriage institution will demonstrate some peculiar characteristics which are antithetical to the marriage institution. This is particularly so in the western countries. The legal tolerance of homosexuality, lesbianism, artificial insemination, sterilisation and abortion[2], all question the usefulness of the marriage institution[3].

Does this then mean that the marriage institution has no noble objectives to the human race? To this I give an emphatic No! The object of marriage will be what one views to be one's concept of a good life. In most cases if not all this will be greatly influenced by one's religion which generally influences the mode of life and attitude to the same that one adopts. Most men and women at a certain stage in life get permanent relationships for diverse purposes which interalia include companionship, procreation, sexual satisfaction, identity, security, confidant and to save face.

For African peoples marriage is the focus of existence, the principle object of marriage among Africans is procreation. Without procreation marriage is incomplete[4]. This object of marriage is diametrically opposed to the principle object of marriage as seen in the English Society. English courts are not agreed as to what the chief purpose of the marriage are. In DE v AG[5] which was followed by the House of Lords in Baxter v Baxter[6] the court seemed to see normal enjoyment of sex and companionship as the chief purpose of marriage in the English Society. In Cowen v Cowen[7] and Corbett v Corbett[8] and ReD(An Infant)[9] the court indicated clearly that procreation is one of the chief objects of the marriage institution. The two differences are no doubt reflections of the secular and christian attitudes towards the marriage institution in English Society.

The objects are discussed under separate heads; customary law; English-type marriages; concubinage or cohabitation without marriage.

I OBJECTS OF AN AFRICAN CUSTOMARY MARRIAGE

When life on earth comes to an end through death, Africans believe that the individual continues to exist in what is known as the 'Sasa' period, when he is still remembered by name by those who knew him while he lived. During that period he is still a "living-dead", i.e. he is dead physically but lives on because his people still remember him. When after four or five generations when the last who knew him passes away from the scene the dead man becomes completely dead and slips into the "Zamani" period on his way to becoming a spirit[10]. So long therefore, as the living dead is in the memory of those who knew him then he is in a state of personal immortality, externalised through physical continuation of the individual through procreation. Children therefore, bear the traints of their parents.[11]

The concept of personal immortality should help us understand the religious significance in African Societies.

Procreation is the absolute way of ensuring that a person is not cut from personal immortality. That explains why polygamous unions are the result of a situation whereby the woman gives birth to only daughters. Mbiti remarks in African Religions and philosophy:-

> "For African peoples marriage is the focus of existence. It is the point where all members of a given community meet; the departed, the living and those yet to be born.... Marriage is a drama in which everyone 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. Otherwise, he who does not participate in it is a curse to the community, he is a rebel and a law breaker,..."[12]

Therefore, marriage is a duty, a requirement from the corporate community in which all must participate. This means that failure to marry under normal circumstances would mean a rejection of the society by the individual who would in return invoke societal condemnation in terms of ostracisation of the rebel.

From the foregoing it follows that procreation is most central to all African marriages. In the absence of procreation marriage is thus regarded as incomplete. The object of procreation as central to marriage is not only acceptable in the African society but also a religious obligation by means of which the individual contributes the seeds of life towards man's struggle against loss of personal immortality and biologically perpetuating the chain of humanity.[13] To state it further, in some African Societies a person who has no descendants 'quenches the fire of life and becomes forever dead since his line of physical continuation is blocked if he does not get married and bear children'.[14]

So long as there are persons in the family who remember someone who has physically died this person is not really dead, he is still alive in the minds of his relatives and neighbours who know him while he was in human form. His name still means something <u>personal</u>, and he can 'appear' to members of his family who knew him and would recognise him by <u>name</u>[15]. Unfortunate therefore, is the man or woman who has nobody to 'remember' him (her) after physical death. To lack someone close who keeps the departed in their personal immortality is the worst misfortune and punishment that any person could suffer. To die without getting married and without children is to be completely cut off from human society, to become disconnected, to become an outcast and to lose all links with mankind.

Everybody, therefore must get married and bear children: that is the greatest hope and expectation of the individual for himself and of the community for the individual. An understanding of this will enable foreigners to our culture to appreciate the customs and ideas connected with African Societies. A marriage is not considered as such until children are born.

The understanding of the social obligation as seen in procreation in the African society explains the existence of such institutions as levirate and Sororate Unions, widow inheritance and woman to woman marriage. The custom of inheriting the wife of a deceased brother is fairly common.[16] By brother it should be understood to mean not only the son of one's mother but any other close relative. The brother who inherits the wife and children of his deceased relative, performs all the duties of a husband and father. The children born after this inheritance generally belong to the deceased man; though in some societies they are the children of the new father. In some societies, if a son dies before he has been married, the parents arrange for him to get married 'in absentia', so that the dead man is not cut off from the chain of life. It may not matter very much about the biological link; it is the mystical link in the chain of life which is supreme and most important. The deceased sons or brothers are still in the state of the living dead, and they are not altogether absent since they still belong to their human families. Children may therefore be born long after the person has died physically, but these continue the genealogical line, inherit the property which would have belonged to their deceased 'father', and pour out libation to him even if they may not have known him physically.

Fewer societies have Sororate marriages, i.e. when a wife dies, the husband marries one of her sisters. The idea behind this practice is similar to the feeling behind the levirate marriages described above. If the wife does not bear children, it is occasionally arranged that the husband takes her sister to be his wife whether or not the first is dead. In still fewer societies, two sisters are married to the same man. This is the woman to woman marriage.[17] In this institution the woman tries to perform her supreme services to the society while entrenching her position as a member of the society as she raises children for her husband by 'proxy'.

All these institutions are aimed at perpetuating the line of existence of a person.[18] Mbiti is illustrious on this point:-

> "That in both levirate and sororate institutions of marriage we see at work the philosophical awareness of the individual that 'Iam because we are; and since we are, therefore I am'. The existence of the individual is the existence of the corporate, and where the individual may physically die, this does not relinquish his socio-legal existence since 'we' continues to exist for the 'I'. This continuity is of great psychological value; it gives a deep sense of security in an otherwise insecure world in which African peoples live. Viewed in this light, the elaborate kinship system acts like an insurance policy covering both physical and metaphysical dimensions of human life"[19]

Sex in the African societies did play quite a vital role in ensuring that the principle object or purpose of marriage was effected i.e. procreation, and ~~of~~ needless to say that the process afforded pleasure and satifaction to the parties involved. Yet it was not in itself an end in marriage. In fact premarital sex was forbidden and heavily punished if discovered. It was a wrong for which a father could bring action.[20]

The other reasons or objects of a marriage mentioned earlier were not emphasized in the traditional society but in one way or other had influence in such marriages. Procreation, however remains the principle object of an African marriage, despite arguements to the contrary given by modern revisionists.[21] It is erroneous to think that the day's social changes and acquisition of new values has changed our nature.

I OBJECTS OF AN ENGLISH-TYPE MARRIAGE

Is there a philosophical case for the marriage institution as seen in English jurisprudence? The definition of marriage under this type of legal system is that pro-pounded by Lord Penzance in the celebrated case of Hyde v Hyde[22] as "... a

voluntary union of one man and one woman for life to the exclusion of all others". The objects of marriage are partly influenced by the above definition. But as Lord Devlin as ably pointed out in Enforment of morals,[23] the christendom which existed then has gradually disappeared and family law becomes more and more secularised since the 19th century. Yet the English institution of marriage continues to serve these purposes i.e. procreation, sexual satisfaction, identity, security etc.

Satisfaction of sexual desires is one of the objects or factors in marriage. The law as regards consummation of marriages emphasises the centrality of sex.[24] Marriage is an institution to control "sexual power" otherwise society would become so chaotic and anarchical. While there is essentially nothing wrong with couples "in love" enjoying this great gift of God, its enjoyment is legitimated in a marriage union. Sex or the quest for sexual satisfaction is one of the great powers of man, and interference with normal and natural enjoyment of sex will make it impossible for one to lead his own good life while alive, as Plato recognises in The laws, that under this system of law it is one of the principal objects of marriage. The marriage institution provides the umbrella under which these sexual desires can be fulfilled. As Mbiti puts it

> "The sexual urge and the development reaches its fullest meaning and satisfaction in marriage. Therefore serves as the peak of relationship where the sexual energy elevates you from the physical contact of a spiritual union which is impossible outside marriage"[25].

Sex in marriage allows for the relationship to have meaning, permanence and endurance. And viewed from a social context, sex plays a positive role in that it cuts down sexual offences such as rape.[26]

At times one may question whether the satisfaction described above can only be obtained through this institution of the marriage strictly so called. With the emerging practice of

concubinage or cohabitation without formal marriage, where couples live for all intents and purposes as man and wife this would be a debatable proposition. However what is clear and beyond debate is the fact that sex remains a useful tool employed for the exploration, understanding, strengthening, deepening and cementing the relationship love creates; marriage.[27]

The need to have a confidant is a further object of the marriage institution. At times a man or woman may be able to cope with the day to day harrassments and frustrations both at work and in life generally. Hence a confidant who is always ready to listen and sympathise with the plight of the other partner becomes a necessity. Since both spouses leave their families to establish a new home, then each of the spouses would like a confidant, one with whom one shares his/her hopes and drems, fears and aspirations, problems etc. It is this confidence in marriage that makes communication made by parties to it confidential and gives rise to the rules in evidence that do not compel one spouse to testify against the other in criminal cases.[28] In Argyll v Argyll[29] the former husband of the plaintiff was restrained by the court from disclosing the details of their marriage to a newspaper. It is for the same reason that the law is opposed to temporary unions, thus intending it to last for life because of its confidential nature.

The quest for identity is another object of marriage. Providing one with a full identity as a man or woman is its object. The fact that one wears a dress or trouser is not enough. Society expects to see the manly and womanly aspect of a man or woman. Marriage earns the parties extra recognition as responsible men and women from their status as married couples. The deep sense of kinship, with all it implies is reckoned through engagement and marriage.[30] It is kinship which controls social relationships between people in a given community, it governs marital customs and regulations, it determines the behaviour of one individual towards another. On marriage society or the clan takes a man to be a responsible member of the clan. For the woman marriage accords her respect and a new status altogether.

Companionship, assistance and security are also objects of the marriage institution. Social hunger drives social beings together and they provide each other with companionship. Marriage opens this desire which starts from puberty into a life-long affair. Not rarely do we find these days especially in urban areas that many people suffer from loneliness. Such was not the case in our traditional societies where the people used to live a largely corporate life.

As such the companionship that a marriage creates gives security to the partners to it. Marriage does provide one with the extra physical, material and emotional support that is needed to cope with the obligations of married life.

Finally, marriage has procreation as another important object. Men and women have to have a way of perpetuating themselves and this can only be done by bringing up children, otherwise there could be an extinction of men and women. Mbiti opens his discussion on the same thus:-

> "Human society throughout the world recognises the procreation of children as the supreme purpose of marriage"[31]

But the above observation by Mbiti is not in agreement with the present English jurisprudence which is not at a consensus as to what the chief purposes of marriage are. In Baxter Vrs Baxter[32] it was held by the House of Lords that procreation is not one of the principal objects of marriage. This was an application by the husband for a court decree of nullity of the marriage on the ground that the wife had wilfully refused to consumate the marriage by insisting that the husband uses a condom every time sexual intercourse took place.

The holding in Baxter v Baxter was contrary to what the lower courts in the same case following Cowen V Cowen[33] had earlier held. The lower court had held that a marriage is consumated by sexual intercourse that is ordinary and complete

By way of conclusion it can be seen therefore that marriages as an institution serves a whole variety of purposes depending on the group of homosapiens we are dealing with. But essentially each of these homosapiens should be given the freedom to choose and lead the good life as seen by the individual himself. It therefore follows that for whatever reason one marries there ought ~~to~~ not be any statutory or societal bars.

It is agreed that marriage serves a purpose at both individual and societal levels, and its preservation is desirable for the well being of all homosapiens. But on the other hand strict rigidity as regards this institution would be failing to recognise the reality about human beings. Other forms of marriage as cohabitation outside marriage must be accomodated in the legal system and society as a whole.

CHAPTER TWO

1. See John S. Mbiti, African Religions and philosophy, Heineman London, chapter 13 pg 133-148
2. Roe v Wande 410 US 113 (1973)
3. See generally, G.K. Kuria "Internal Conflict of marriage in English speaking African countries" a paper presented at the World Congress of Sociology in Uppsala in August 1978.
4. John S. Mbiti - Supra pg 133
5. (163) E.R. 1039
6. (1948) A.C. 274 (H L)
7. (1945) 2 ALL.E.R 197
8. (1970) 2 W.L.R. 1306
9. Re D (An Infant) No Sterilisation for ward of court Aged 11 1976) 2 W.L.R
10. J.S. Mbiti Supra ch. 3 - the quoted terms are a creation of Mbiti himself as he explains in the book.
11. Mbiti - ibid
12. Mbiti, Supra pg 133
13. Ibid pg 133.
14. Ibid.
15. Mbiti, Supra pg 134.
16. Mbiti Supra pg. 144
17. Mbiti ibid.
18. See also Grace Ogot "The Other Woman" The first story.
19. Mbiti, Supra pg 144-145
20. See Cotran's Restatement of African Customary Law vol. 1, Supra
21. A number of my classmates are of this view.
22. (1866) L.R. Pand. D. 130 at pg 133
23. Lord Devlin "Enforcement of Morals" OUP 1965 ch. 4

24. Corbett v Corbett, supra White v White
Cowen v Cowen supra; DE v AG supra;

25. Mbiti, J.S. - Love and Marriage in Africa
Longman, Nairobi 1973 pg 41

26. Also see Austin Bukenya, Bachelor
; Grace Ogot, The Other Woman, supra

27. G.K. Kuria " Cohabitation outside marriage in some in English speaking African Countries" 1979, see also footnote 2.

28. Kenya Evidence Act Cap 80 of the Laws of Kenya; ss 127-130.

29. (1965) 1 ALLER 611

30. Mbiti, African Religions & philosophy supra pg 104

31. Mbiti, J.S. - Love and Marriage in Africa, supra pg. 42.

32. Supra footnote 6

33. Supra footnote 7

34. Supra footnote 9.

CHAPTER III
REQUIREMENTS OF A VALID MARRIAGE

Introduction

Usually the marriage is preceded by certain preliminary arrangements and ceremonies. Unless otherwise stated by the law governing the contraction of marriages, then all formalities must be adhered to for a marriage to be valid. When discussing these formalities the writer has kept distint those acts having legal significance from those acts having purely social, tribal or religious significance. It is the former with which the advocate and the judge are particularly concerned. The formalities under both customary law and statute family law are examined in this chapter.

A. THE STATUTORY MARRIAGE

Under Section 11 of the Marriage Act[1] parties to an intended marriage must obtain either a certificate to marry from the Registrar of marriages or a licence from the minister. In order to obtain the certificate, the parties must give a written notice of their intention to marry which the Registrar will enter in the Marriage Notice Book[2] and display in his office for inspection by members of the public. Kasumnu and Salacuse observe that the object of this procedure is to allow objections by members of the public, to the intended marriage on the ground that there is an existing impediment.[3] Where the conditions are satisfied the Registrar will grant the certificate to marry not less than twenty-one days and not more than 3 months after the notice has been filed.[4]

Under Section 8 of the Marriage Act parties to the marriage must celebrate the marriage within three months of this notice and if not, then the notice and all proceedings consequent thereupon shall be void. This is the effect of Section 12 of the Marriage Act. This section apparently

invalidates a marriage celebrated more than three months after the notice has been issued. Agumu and Salacuse submit that this interpretation of section 12 is inconsitent with section 35(4) of the same Act.[5] The latter section provides that;

> "No marriage shall after celebration be deemed invalid by reason that any provision of this Act other than the foregoing (section 35(3))[6] has not been complied with"

Sections 11 and 14 of the Marriage Act provide that the authority to celebrate a marriage after filing a notice of intention is either the issue of a certificate from the Registrar of Marriages or the granting of a licence by the minister. What is the difference between the two? A licence to marry differs from a certificate to marry in that a licence allows the parties to the intended marriage to dispense with the giving of notice of intention. Furthermore, a licence can authorise the celebration of a marriage at a place other than a licensed place of worship or Registry.[7] Before a certificate is granted one of the parties to the marriage must have been resident for at least 15 days within the marriage district.[8] A marriage district needs to be differentiated from an administrative district. The marriage district can at times be the same as an administrative district. However the marriage district is constituted under Section 4 of the Marriage Act by an order from the minister in the Gazette.[9] On the other hand no residential qualification is required for the grant of a licence.[10]

CAVEATS

The Registrar must before granting a certificate to marry see to it that no objection to the marriage has been filed by the entry of a caveat in the Marriage Notice Book. Such caveat takes the form of an objection raised against the

issue of the certificate. It is entered by simply inserting the word "FORBIDDEN" opposite the entry of the notice in the notice book. The party objecting must give the name and address together with the grounds upon which he claims to forbid the issue of the certificate.[11] The Registrar cannot issue the certificate until a High Court judge has ordered the removal of the caveat after the determination of the issues involved.[12] A caveat can only be entered for a "just cause" which is one of which would make the marriage void if it were to be celebrated.[13] This restriction is aimed at those busy bodies who are out to object just for the sake of it. Thus a caveat entered by a disappointed fiancee is of no consequence since the breach of promise to marry one does not affect the validity of a duly celebrated marriage to another. However, if a man marries under customary law but later marries under statute law the first lady is entitled to enter a caveat against the subsequent marriage. This is because the man is already married and thus has no capacity. This was the case In a matter of a notice of marriage between Alfred Nderi and Charity Kamweru.[14] In this case Alfred Nderi gave notice to the Registrar under section 8(1) of the Marriage Act, of his intended marriage to Charity Kamweru. Two ladies alleging to be his wives under prior and subsisting customary law marriages entered caveats against issuing the Registrar's certificate. On the Registrar referring the matter to the High Court under section 16 of the Act to determine whether or not a certificate for the intended marriage should issue the marriage of one of the caveators was admitted and the other could not be proved and was not admitted, and the caveator indicated that she had no objection to the intended marriage. It was held

(i) that it is settled law that where there is a subsisting customary law marriage, unless such a marriage has been validly dissolved, none of the parties thereto can undergo a ceremony of marriage under the Marriage Act.

(ii) As a general rule a caveator must show cause why the Registrar should not issue his certificate, but where the earlier marriage is admitted, it is upon the person seeking to re-marry to show that the prior marriage had been validly dissolved and, in that case it is not upon the caveator to establish a negative. In this case the burden of proving the dissolution of the customary marriage lay on Nderi.

(iii) Where there are more than one caveators, the fact that one of them is found or admits, to have been divorced or withdrawn her caveat, does not in any way affect the position of the other caveator whose marriage is proved or admitted to be still subsisting, and the court may order that the marriage notice book be brought to it for removal of the caveat of the caveator who has withdrawn her objection and at the same time order the caveat properly and validly lodged to remain on the book.

(iv) A court may award compensation and costs to a party injured if it appears that a caveat was entered on insufficient grounds; but as costs are always in the discretion of the trial court, if there is no reason why the court should deprive a successful caveator of costs a court will adopt the rule that cost normally follow the event and accordingly order the party intending to remarry to pay the successful caveator her taxes costs of the application and consequential costs thereto.

Sections 11 (1)b and 19 of the Marriage Act provides for consent by the parents. The Registrar must be satisfied that each of the parties to the intended marriage (not being a widow or a widower) is 18 years of age[15] or that if she is under that age (though not less than 16 years of age) the requisite consent has been obtained in writing and is annexed

to the affidavit.[16] The consent required is that of the parents unless in exceptional cases where the parents are dead or of unsound mind or absent from Kenya then the consent of the guardian must be obtained.[17]

An even more interesting position is that of a widow or a widower under 18 years.[18] He or she does not require any consent to a marriage. The rationale for such an exception is that such a person is regarded as emancipated from the parents on marriage, and he or she does not revert back to this parental care after the death of the other spouse. But strange as it may seem, this exception does not apply to a divorcee. Perhaps the reason for such a distinction between a divorcee and a widower is that bad luck may have befallen the latter making her a widow and so the society would like to see her live a normal life as possible. So the earlier she marries the better. On the other hand bad judgement makes a person a divorcee. Hence a little delay by society before remarriage is justifiable.

What effect does the absence of parental consent have on a celebration of marriage? Is it valid? Section 35 (4) of the Marriage Act leans in favour of validity after the celebration of the marriage. It makes no difference whether one or both of the parties to the marriage know that the necessary consent was obtained.[20]

The Kenyan case, Robert v Robert[21] illustrates how the courts have handled this particular aspect of marriage. In the latter case the plantiff a minor, sought the consent of the court to his proposed marriage notwithstanding the fact that his father, the defendant, had refused his consent. The parties to the proposed marriage had had intercourse with each other as a result of which the female, who was also a minor was pregnant. It was doubtful if their own resources were adequate to support themselves and a family, but the girl's parents would have provided some assistance. They

differed from each other as to race and religious denomination.

The defendant refused to consent to the proposed marriage in the circumstances and was of the opinion that the plaintiff had not realised the responsibilities that the marriage would entail.

The court held that (i) the governing principle is the interest of the minor who wishes to marry without his parents or guardians consent. Where a father refuses to consent to a proposed marriage of his minor son the court should not override the father unless satisfied that his refusal was unreasonable in the minor's interest. (i) The burden of proof of unreasonable refusal to give consent is on the person who asks for the consent of the court. The application was dismissed.

From the above case[22] we can draw two conclusions. First, the court is not ready to give consent when the same is denied by the parents unless the decision of the parents is arbitrary and/or unreasonable in the circumstances. Secondly, the court takes note of the fact that a marriage entails great and onerous obligations on the part of both spouses. It also requires a lot of patience and self-restraint. Unsatisfactory current material resources may prove detrimental to the marriage. A minor will in most cases lack the latter requirements.

The Registrar under section 35(1) must also see that there is no impediment of kindred or affinity to the proposed marriage. Affinity is a relationship created by marriage, while kindred is one created by blood or half-blood.[23]

Neither of the parties to the intended marriage should be married by native custom to any person other than the person with whom such marriage is proposed to be contracted.[24] If there is a contravention of this condition then the Registrar

will not give a certificate. A marriage where one of the parties is married under native law or custom to a person other than the person with whom the proposed marriage is to be celebrated is by virtue of section 35(1) of the Marriage Act void irrespective of the knowledge of the parties.

CELEBRATION OF THE MARRIAGE

On satisfying the above conditions, a certificate by the Registrar or a licence by the Minister is issued authorising the celebration of the marriage. The marriage can be celebrated either in a licensed place of worship or in the Registrar's office.[25] For marriages celebrated in the former, the officiating person must be a recognised minister of that church who must perform the marriage ceremony in accordance with the rights or usages of that church.[26] The ceremony must according to the Marriage Act be celebrated with "open doors" i.e. must not be secretive. The ceremony must take place between eight in the forenoon and six in the afternoon. There must be two witnesses besides the officiating minister and the ceremony.[27] The officiating minister before celebrating the marriage must see the Registrar's certificate to marry or the license issued in lieu thereof.[28] Section 7 of the African Marriage and Divorce Act[29] relaxes this procedure.

Immediately after the completion of the religious ceremony, the officiating minister must fill up in duplicate a marriage certificate which must be signed by himself, the newly married couples and by at least two other witnesses to the marriage.[30] The original is given to the parties to the marriage while the duplicate is sent to the Registrar of marriages within seven days of the marriage.[31] This certificate is then entered into a marriage register book. The production of a certificate, or of a certified copy of such a certificate, or the marriage register book is admissible

as evidence of the marriage to which it relates in any court of justice.[32]

Marriage in a Registrar's office like the religious ceremony must be before the Registrar of marriages and also in the presence of at least two witnesses. It must, unlike the religious ceremony, be celebrated between ten in the morning and four in the afternoon.[33]

THE AFRICAN CHRISTIAN MARRIAGE AND DIVORCE ACT[34]

This Act provides a simplified procedure for the celebration of marriage of African Christians. Section 3(1) of the Act states that the Act applies only to marriages of Africans, one or both of whom profess the christian religion and to the dissolution of such marriages. Just like the Marriage Act, it applies to monogamous marriages.

Nothing in this Act prevents any African from marrying under the marriage Act which still governs aspects of capacity and consequences of marriages.[35] S.7 of the Act provides a simplified procedure for the celebration of marriage. What the section requires is that an African christian intending to marry to follow formalities usual to his religion as long as notice is adequate and there is no caveat entered against the marriage. The Act relaxes the procedures contained in the Marriage Act. Where the party has no parents or guardian the church minister can inquire in case of consent. Or if the parents of the party wanting to celebrate the marriage refuse to give consent, the Provincial Commissioner on application can consider the case and if need be consent.[36] Section 9 of the Act enables Africans married under customary law to convert the marriage into a christian one when they join the christian fraternity.

ELEMENTS OF A VALID MARRIAGE UNDER CUSTOMARY LAW.

Customary law like the English law, draws a sharp

distinction between a man and a woman who are merely living together as husband and wife. The existence or non-existence of the marital relationship under customary law has an important legal significance as the existence or non-existence of the marital relationship under the marriage Act or the African christian marriage and Divorce Act. For example, a woman who is a wife under customary law may sue for the wrongful death of her husband, but a woman who was merely living with a man at the time of his death has no such right.[37] Furthermore, a man validly married under customary law may not marry under the Marriage Act, but if no valid customary marriage exists, he may do so.[38]

While the customary law marriage varies from place there are certain fundamental principles and notions common to nearly all customary law systems.[39]

An agreement that will give rise to a valid customary marriage must fulfill certain requirements of procedure and substance. First and foremost the parties must have consent of each other to the marriage confirmed as it were by the consent of both parents of the spouses.[40] They must have capacity to marry each other in respect of age, physical fitness and not being within prohinited degrees.[41] An agreement must be reached on the payment of the briedwealth, all culminating in the taking away of the bride.[42] The latter requirements are discussed in turn:

Capacity

Capacity here means the legal ability to marry on the part of each of the prospective spouses as well as their ability to inter-marry. This will include age, physical condition, the sex of the parties, marital and prohibited degrees.

In African societies there is no fixed age as such on attainment of which persons become legally capable of entering into marriage.[43] According to the Kikuyu customary marriage

the girl must have reached menstruation.[44] For both girls and boys, however, capacity is determined by whether or not they have been circumcised.[45] Generally the girls go through the ceremony at an earlier age than the boys. Circumcision is looked upon as a deciding factor in giving a boy or girl the status of manhood or womanhood. Of late, however, circumcision has started declining in importance especially in relation to girls.[46] This has come due to the teachings of missionaries who consider circumcision of the girls as a barbaric practise.[47] They have no doubt succeeded in convincing their followers of the undesirability of the practise. However, the ceremony remains a very strong factor in determining a man's capacity to marry. It would be unthinkable for an uncircumcised man to enter into marriage. The ceremony has lost much of its significance. It has been reduced to a mere physical operation, much of the education that went with it has been ignored.[48]

The marriage or the intended marriage must not infringe the prohibited degrees of affinity and consanguinity.[49] An objection based on consanguinity means a man may not marry any woman to whom he is related in the direct line of descent. Therefore he may not marry or cohabit with his grandmother, mother, daughter or his parents' sisters or first cousins.[50] Prohibition based on affinity demands that the man should not marry or cohabit with his wife's mother, grandmother or sister. Marriage is also not allowed between children of blood-brothers. It may be noted that prohibited degrees among African communities are particularly wide. This is especially because marriage brings together members of the two different clans where the spouse comes from. Such members are then prohibited from marrying each other.[51]

One does not have capacity to marry under customary law if one is already married under any Act,[52] otherwise he would be committing bigamy punishable at law.[53] Such cases never reach the court even though the practice is wide-

spread.[54] Due however to the potentially polygamous nature of customary marriages a previous customary marriage is no bar to subsequent ones. Can one who has married under the Act, where he has converted his way of life, convert that marriage into a customary one? Section 35 of the marriage Act does not seem to have any prohibition to such reconversion Even if it did have, sections 78 and 82 of the constitution would by its section 3 render it null and void.

Once it has been proved that the parties to the intended marriage have capacity to marry each other the next step is to determine whether there is consent.

Consent

Consent can be seen at two levels; that of the parties to the marriage inter se[56] and that of their respective parents.[57] Marriage in the African society is considered as an alliance between the families. Parties to any alliance it was felt ought to have a right to approve of it.[58] Without such consent no valid marriage comes into effect. In the Ghanian case of Badu v Boakye[59] it was held that even where the parties had been living together for two years and the woman had had a child by the man there still did not come into effect a valid customary marriage because parental consent was lacking. In Onondi v Nyafula[60] the Kenya high court also states the foregoing as the position here. The appellant married one Patricia, daughter of the first respondent, in 1963 by elopment. Cohabitation followed and payment of KShs.300 to the first respondent as bridewealth. The appellant in the lower court sought the return of his child and wife which application was dismissed, the court holding that on the evidence, the father had given only conditional consent that the full bridewealth be paid, which was not fulfilled. As such no marriage came into effect for lack of the consent of the girl's parents.

It is submitted that the holding of the court was wrong, because it is not necessary for the full bridewealth to be paid[61] any payment or promise to make such payments should suffice. In so far as the court based its findings on the fact that the marriage was by elopment, it is very much part fof Luo customary law, and one of the acceptable ways of getting married.[62]

The second aspect of consent is that of the prospective spouses themselves. Without such consent, it has been held in Mwagiru v Mumbi[63] no valid customary marriage is contracted. The plaintiff had sought a declaration that a valid customary marriage subsisted between him and the defendant. The latter alleged that there was no such marriage as she was not even present at the fourth essential stage of the betrothal and that therefore she did not give her consent to the proposed marriage. She added that she was forced to stay with the plaintiff by her father, and that she escaped and went through a civil marriage with another man in Nakuru. It was shown on evidence that the defendant had indicated her objection at the "Njuri" ceremony by refusing to drink the beer and was not present at the "Ruracio" ceremony where a lamb signifying blood unity is slaughtered. The court held therefore that no valid marriage was brought into effect and that the defendant's marriage to the second man was valid, as she was not present at the alleged betrothal ceremony to give, her consent which was crucial to the validity of the marriage.

Arrangements for obtaining parental consent takes the form of a ritual or drama. According to Meru customary law the[64] boy selects his bride and proposes to her. If the answer is favourable, the boy reports the matter to his parents

who now invite the girl's parents to their home to have the beer known as "Neobi ya Kuria Uthoni" i.e. the beer of asking the girl's hand. Several visits follow between the parents of the boy and the girl to get more acquitted. Presents such as beer and gruel, are normally exhbanged at these visits. An appointment is then fixed at the home of the girl's father where the "ruracio" negotiations are held. Since the "ruracio" is standard,[65] the negotiations centre on how it is to be paid, rather than how much is to be given. A first instalment is now normally paid, the other instalments following gradually.

BRIDEWEALTH

The parties are considered legally betrothed on the completion of the "ruracio" negotiations.[66] The most common and important activity during betrothal that is the linking of the two families and clans involved by exchange of gifts and or services. as a way of strengthening the ties. Mbiti calls it "engagement gifts". Other writers have termed it "bridewealth" "dowry" etc. For the purposes of this study the writer adopts "bridewealth" bearing close semblance to'blood wealth' which one clan pays the other when any of its members has been killed by one of the other clan. Bridewealth serves a purpose akin to that in that when the girl leaves her home, the cattle, goods or other material things remain in her home as a symbol of her presence. So in effect she continued to live with her family symbolically through the goods and services from her husband.[68] To refer to this transaction as 'dowry payment' is misleading as it "means property - money brought by a woman to her husband at marriage".[69] Further to refer this as "bride price" gives the false impression to foreigners that wives were bought as was the case in R v Ankoyo[70]

Bridewealth may be defined as a customary gift made by a husband to or in respect of a woman at or before marriage. It is also payable by parents and the whole family of the prospective husband and is received by the family of the girl for her parents and the whole family among whom it is also distributed. Its payment or non-payment is enforceable by law.[71]

The significance of Bridewealth is that it serves to establish and cement family relations. Its payment is seen as a pledge kand mark of seriousness and commitment to the life-long union that is about to be or has been inaugurated. Besides it bestows honour upon the woman whose value it thereby elevated.[72]

Marriage consideration may be paid all at once, but more usually, it is paid by instalments and goes on for a very long time. It is thus with dismay that the writer notes the fundamentally erroneous decision of the High court in Karaknecha v Wanga[73] that payment of dowry" is governed by the limitations of causes Action Act.[74] The judge could not have been more wrong. In Amulan Ojwang v Edward Ojok,[75] the parties agreed on a bridewealth of 8,000/= as the value of twenty head of cattle, 10 goats and eight jembes. The respondent paid 2,000/= as part payment and took his bride. After a while the patience of the appellant ran out and he hired a lorry, gave the driver 2,000/= and he asked him to refund the same to the respondent and return with his daughter who was some months pregnant. As if that was not enough, he instituted proceedings for pregnancy compensation. The court on appeal held that a customary marriage is not valid until the whole bridewealth is paid and thus awarded the appellant 150/=. This is both a ridiculous and unrealistic argument which was made in total ignorance of the social significance of the fact that since time immemorial payment of bridewealth goes on

nearly forever. If such an argument is acceptable to our High court then there is the fear that most marriages (which are customary) will be rendered invalid with unforseable and not admirable consequences.[76]

But all that is required really is an agreement to pay such bridewealth as agreed upon. For a valid customary marriage only past payment followed by cohabitation would suffice to prove a valid union.[77] Where however an unreasonable time elapses before such promise is made, the father may recall the girl to his home until payment is made or sue for recovery of the bridewealth. Past payment also enables the father to sue for the rest but does not affect the validity of the marriage.[78]

Bridewealth serves a definite role in the agreement and its payment is accompanied by much ceremony.[79] Problems have arisen though in the quantum and the very need for its payment.[80] In recent times it has been beset by problems of commercialisation whereby the girl's parents take opportunity to enrich themselves from their daughter.[81] The usual argument is that they are recovering expenses of bringing her up, educating and providing for her, all of which are part of their parental duties. The amounts demanded leave the couple in financial situations which take them long to recover. This abuse of the practice is clearly wrong in principle and is contributing largely to the present misconceptions on the place of bridewealth.

Though it serves a vital sociological role, giving rise to the feeling by community that the practice serves a useful role in the lives and customs of the people it faces the individuals as a personal matter. Because many are unable to meet strict requirements, marriage by elopement is taking over as the most popular form of marriage.

Standardisation of the payment of bridewealth would be a plausible suggestion, but it is difficult to see how workable that will be since people with means will still pay. It will be difficult to enforce such legislation. So far, what is the most logical proposition is basing the quantum on what is reasonable and according to custom of the people concerned.

TAKING AWAY OF THE BRIDE

The ceremony of taking away the bride marks the end of the formalities on the way to marriage. As Obi has put it "the gist of a customary marriage is the handing over the bride by her parents or guardian to the bridegroom or his representatives."[82]

Among the Meru this takes place after agreement has been reached in all aspects. When a sufficient quantity of the "ruracio" has been paid over to the girl's father, a day is fixed for bringing the girl to the boy's home. The girl is fetched by old men and girls who are the relatives of the bridegroom. Food and beer are consumed both at the girl's parents home and at the bridegroom's home on the arrival of the bride. The house where the couple will live must be ready before the bride arrives. The marriage is consummated on that night.

It may be seen from the foregoing that for a valid statutory marriage to come to effect the requirements of the marriage Act and the African christian marriage and Divorce Act must be complied with. As regards customary marriage the requirements as to consent, capacity, payment of bridewealth and the taking of the bride must be agreed upon.

What is the object of this formalities or ceremonies in both statutory and customary marriages? Are they really necessary for the existence of a marriage and its recognition

by a court of law?

As stated earlier, marriage is the central institution round which others revolve. For instance it will determine the legitimacy of the children thereof and their succession rights. It therefore becomes necessary to be able to judge in what circumstances a marriage may be said to have occurred. Hence the marriage must have attained certain essential legal requirements and formalities which must be complied with in order to constitute a valid statutory or customary marriage.

But are such ceremonies necessary? It is submitted that such ceremonies as seen in both the marriage Act, the African Christian Marriage and Divorce Act and under customary law are not necessary for the court to recognise the cohabitation[84] The courts have taken the beginning to live together as husband and wife as the alternative to getting married.[85] The reason is that in functional terms or in substance or essence, there is no difference between such living together and similar living together which is preceded by a marriage ceremony. The only exceptions should be where the parties could never become husband and wife even if they complied with the requisite forms. For instance are within the prohibited degree of marriage. They ought never be treated as married. If it were otherwise, this would offend the deeply felt moral views.

CHAPTER THREE
FOOTNOTES

1. Chapter 150 of the laws of Kenya
2. This is provided for in sections 8-10 of the marriage Act. See also a discussion of the same provisions of the Nigerian marriage Act in Kasumnu, and Selacuse's Nigerian Family law, London, Butterworths, 1966 chap 3 p.48-70
3. Ibid, at p.48
4. Section 12 cap 150
5. Marriage Act
6. S.35(3) of the Marriage Act cap 150
7. See section 31 of the Marriage Act
8. Section 11(a) cap 150
9. Section 4 read together with section 2 of the Marriage Act
10. Purport of section 11 Marriage Act
11. Section 15 of the Marriage Act
12. See sections 15, 16 and 17 of the Marriage Act
13. The purport of section 18
14. High court civil case no. 62 of 1979 at nrb, 1980 Law Society Digest
15. See, the Age of Majority Act, chap 33 of the law of Kenya, 7 of 1975
16. Section 19 of the Marriage Act - consent to marriage of minors
17. See Kasumnu and Selacuse supra p.55; Also see section 21 consent where no parent or guardian is capable of consenting
18. S.11(b) and 19 Marriage Act
19. This is one of the reasons advanced by Kasumnu & Selacuse in their treatise on family law - supra p.56
20. The Kenya courts can take the lead of the Nigerian courts of interpreting section 35(1) as was the case in Agbo v Udo (1947) 18 N.L.R. 152
21. In the matter of the Marriage Ordinance and In the matter of an application by Robert - 20(2) K.L.R.6 (1942-1943)

22. See also the cCanadian case Re Bennet v Re Bennet 45 D.L.R. (1974) p.409
23. Kasumu and Selacuse supra p.59, see also Mette v Mete (1859) 28 L.J. 117
24. S.35 (1) of the Marriage Act
25. S.23 Ibid
26. Ibid
27. Ibid
28. Section 24 Marriage Act
29. Cap 151 of the laws of Kenya; see the Act generally.
30. S.27 Marriage Act
31. S.27 & 28 Marriage Act
32. The purport of section 34 Ibid
33. Section 29 Of the Marriage Act
34. Cap 151 Supra
35. SS 3(2) and 6 cap 151
36. Section 8 of the African Christian supra 151
37. See; The Estate of Boaz Ogolla, High court of Kenya, Misc. c.c. No. 19 of 1976; The Estate of Ruendi High court of Kenya Misc. cc. No. 19 Of 1976 ; Onwoya Mairura v Bosire Angida (1958) 6 C.O.R.L.R. 4 But see also Yawe v Public Trustee, C.A.EA. civil appeal no. 13 of 1976.
38. S.35(1) of the Marriage Act
39. Kasumu & Selacuse , supra - 48-70
40. Onondi v Nyafula & Another (1972) Kenya High Court Digest 91, Mwariru v Mwbi (1967) E.A. 639
41. Cotran E. The law of marriage and Divorce (Sweet and Maxwell, London 1968) generally
42. Ibid,
43. See, Mbiti J.S. African Religions and Philosophy, supra chap 3 - Because of the African concept of time.
44. Kenyatta J. Facing Mount Kenya (Heinemann Schools ed. Nrb 1971) p. 169
45. Ratledge W.S. With a prehistoric people, London, Arnold 1910, p.133

46. The Government of Kenya, through its administrative machinery has banned the cricumcision of women.
47. Wanyoike E.N. An African Pastor (EA. P.B. 1973) p.72
48. Kenyatta J. Facing Mount Kenya supra; General observations by the present writer among the Meru tribe
49. Kasunmu and Selacuse, supra at p.79-80
50. Cotran, Footnote 42 at p.11
51. Cotran's Restatement, supra p.35-36 in relation to the Meru; Kasunmu and Selacuse, supra p.79-80
52. Marriage Act, S.37
53. Ibid. S.45
54. Usually it is the first wife who is married under either cap 150 or 151, the subsequent ones are married under customary law. But in the Ugandan case of Alai v Uganda (1967) EA 597 adultery was upheld where a man slept with one of his wives in polygamous union. See also Estate of Ruenji case and Estate of Boaz Ogolla case supra; Gladys Njeri v Beth Wa Njeri H.c.c.c. Nyeri C. App. No. 13 of 1979.
55. But see Ayoob v Ayoob (1968) E.A. 72 compare with Rattansey v Rattansey (1960) E.A.
56. Mwagiru v Mumbi supra
57. Omondi v Nyafula, supra
58. Mbiti J.S. African Religions and Philosophy chap.13
59. (1975) G.L.R.
60. (1972) Kenya High Court Digest 91
61. Yawe v Public Trustee supra, Footnote 38
62. See Gordon Wilson, Luo Customary law and marriage customs, Government, Printer 1968 Nairobi p.118.
63. (1967) E.A. 639, See also E. Cotran's Restatement generally
64. See Cotran's REstatement supra p.36
65. The amount of marriage consideration in the various divisions of Meru is standard. Among those from South and North Imenti it consists of one ewe, one heifer, two bulls and one tin of honey.
66. Cotran's Restatement supra, on Meru tribe p.36

67. J.S. Mbiti, Love and Marriage in Africa, Longman nrb p.63.
68. Ibid p.63-66
69. The Oxford Dictionary of Current English compiled kby Fowler & Fowler, 4th Edition, Oxford at the Clarendon Press.
70. (1917) 7 E.A.L.R. 14 Such was the attitude of Hamilton C.J. as he then was.
71. See Cotran's Restatement p.39 para. 8. In Omondi v Nyafula (supra) a substantial amount of dowry was not paid hence the marriage could be brought to an end or the father would sue for the payment of the same.
72. Mbiti, supra footnote 67
73. High court of Kenya at Kakamega Civil App. No. 27 of 1979
74. Cap 22 of the laws of Kenya
75. High court of Uganda, Civil Appeal No. 50 of 1969.
76. In Chima Nyafula's case, supra, it was noted that the court held there was no valid customary marriage as the requirement as to the payment of bridewealth was the condition upon which the father gave his consent. It can be seen that courts are applying wrong principles of customary law.
77. Cotran's Restatement, supra p.38
78. Supra footnote No.71
79. J.S. Mbiti, African Religion and Philosophy, chap. 13 Kenyatta, J. Facing Mount Kenya, supra 113.
80. See Footnote 73 to 76. supra
81. The writer's own observations
82. Obi, S.N.C. Modern Family law, Southern Nigeria, S & M African Universities Press, Lagos 1966 p.116-117
83. Cotran, Restatement, p.36
84. See Charles Kimito Macharia v Rosemary Moraa, High Court of Kenya, Nrb. Misc. Civil case No. 364 of 1981, Yawe v Public Trustee C.A.E.A. Civil Appeal No.13 of 1976.
85. Ibid.

CHAPTER IV

NON-MARITAL COHABITATION (COHABITATION OUTSIDE MARRIAGE)

The primary focus of this chapter is on the legal status of non-marital unions or living together outside marriage. A reference to a legal definition of marriage may be helpful. The long accepted definition is to be found in case law i.e. in that famous decision by Lord Penzance in Hyde v Hyde[1] where he said that:

> "It creates mutual rights and obligations as all contracts do, but beyond that it confers a status... I conceive that marriage, as understood in christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others" (Emphasis added)

This definition does not deal with means of entry into the status of marriage nor does it address itself to the intricate problem of cohabitation outside marriage. A study of non-marital cohabitation in Kenya is asmuch a study of the mechanisms of change as it is a study of substantive legal rules affecting informal families.[2]

Today a significant proportion of men and women are living as husband and wife having not either undergone the ceremony of marriage prescribed by the law, or satisfied the conditions that must be satisfied before a marriage comes into existence. The question has arisen as to whether the law should give recognition to them.

On one view this phenomenon threatens the very existence of Society which assumes that marriage is essential for its viability. There seems to be an impending anarchy in the man - woman realionship. Therefore the law ought to discourage such unions by refusing to treat them as marriage for any purpose. Yugoslavia did this after the end of the second world war but it was abandoned when it was found that people continued that way despite the law.[3]

To other people, beginning to live together as husband and wife is the alternative to getting married. They reason that in functional terms or in substance or essence there is no difference between such living together which is preceded by a marriage ceremony and that, with a few exceptions the law ought to treat for all purposes such living together the way it treats married people. The writer shares this view. The exceptions exist where the parties could never become husband and wife even if they complied with the requisite forms. For instance, people who are so closely related to one another that the law prohibits a marriage between them ought never to be treated as married. Such treatment would offend the deeply felt moral views.

This study is concerned with living together that has some permanence as opposed to casual living together for very short durations. It has the following characteristics;

1) It is public in the sense that parties to it do not make secret the fact that they are living together as husband and wife.

2) It takes place in a residence that the parties identify as the common home, each abandoning a former residence or one of them abandoning such a residence.

3) The parties have established an economic and social unit that is operating as one household as opposed to two households sharing common facilities.

4) It has gone on for a considerable length of time.[4]

In giving effect to cohabitation outside marriage the courts have referred to this institution as a "Common law marriage" or at times used the "presumption of marriage principle".[5] An understanding of this principle is important in our analysis.[6] To this we now turn.

COMMON LAW MARRIAGE AND PRESUMPTION OF MARRIAGE

As from 1066 A.D. marriage which was a matter for the church was assigned to cannon law (Roman) through ecclesiatical courts.

The Common law was applied by the Kings Courts. Campel has noted three types of marriages which were recognised in Cannon law;[7] a) By celebration formally in the church.

b) By parties simply uttering words stating a present intention to accept each other as man and wife, without any other ceremony, thereby became husband and wife.

c) If the parties betrothed by uttering words stating a future intention to accept each other as man and wife, and thereafter consumated the marriage, the betrothal became a valid marriage.

The Common law Courts were not satisfied to have marriage totally governed by the church. The common law courts came to be the final authority on the incidents of marriage (e.g. real property, damages against adulterers, etc). But until 1857, ecclesiastical courts continued to decide who had the legal capacity to enter marriage and who was entitled to a divorce. The term "Common law Marriage" referring to a marriage before 1857 should be referred to for the sake of historical accuracy as "Cannon law marriages" - describes a marriage that may be valid despite non-compliance with the Marriage Act.

In 1857, the English Matrimonial Causes Act removed all ecclesiastical court jurisdiction over marriage and gave it to the secular courts - those that administered the Common law. This merger Meant that one could pronounce upon the validity of a marriage and the incidents of marriage. It is possible that lawyers transferred this notion of Common law jurisdiction to the law (i.e. Cannon law) that had been administered by the secular courts. In the field of marriage, therefore, a marriage recognised by the secular courts could have been mistakenly referred to as "Common law Marriage".

Despite the historical inaccuracy and the absence of legal support for the term "Common law marriage is frequently used by courts, citizens, lawyers etc to describe Cohabitation by a man and a woman who do not view themselves as legally married.[8]

What was the English law of marriage prior to 1870?[9] The three types of marriage recognised by canon law up to 1670 included marriage in facie ecclessiae (formally in church), marriage per Verba de praesenti; (present promises) and per Verba de Futuro (intention to marry followed by consumation) These last two would fall outside the marriage Act as we know it today. The only major development in the Cannon law that had lasting effect was an imperial statute of 1548.[10] This statute permitted an Ecclesiatical Court to examine any marriage contracted entered into outside of the church. The "clandestine marriage" could be the subject of a judges order that the parties solemnize the marriage in facie ecclesiae, consumate the marriage and live together as man and wife. However the extreme step of making all clandestine marriages void was not taken.

Clandestine marriages did not abate and Parliament believed that a check on abuses was essential. In 1753, Lord Hardwicke's Marriage Act was passed to deal with this problem. It required that all marriages with certain named exceptions to be celebrated in the church in which one or both of the parties resided in the presence of two witnesses and effected by a clergyman. Any marriage celebrated otherwise was null and void.

Lord Hardwicke's Act was later repealed and superceded by the Marriage Act, 1823 and the Marriage Act 1836. Although these two statutes permitted some irregular marriages to be declared valid, the basic requirement of solemnization remained in the canon law. Therefore, historical common law marriage was abolished in England as of 1753 even though English courts still recognise historical Common law marriages entered elsewhere.[11]

Does the "presumption of marriage" create a valid marriage under Common law?[12]

The validity of an historical common law marrage often arises as an evidence issue. In order to prove the existence of a marriage, as a matter of evidence, a common law marriage may be recognised. Dr. Olive Stone has summarised this "meaning" of common law marriage as follows:-[13]

> There is another meaning of the term in England Scotland and most common law countries including Australia and most of U.S.A. arising from a rule of Evidence. If it is shown that a man and woman have been openly cohabiting as man and wife and were treated as married by those who knew them, in the absence of evidence to the contrary the law will presume by such cohabitation and repute that they were married, rather than presume an illicit cohabitation until a valid marriage between them is proved. This arises from the general presumption that anything done is lawfully done unless the contrarry is shown. It is part of the general presumption of innocence and right conduct."

The most frequently cited statement of the presumption of marriage arising from cohabitation is contained in the a dvice of the Privy Council in Sastry Velaider Aronegary V Sembeculty Vaigalie[14] in the course of which it was said that:

> "Where a man and a woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage and not in a state of concubinage".

A ceremony had taken place in the particular case, and the Privy Council were of the opinion that the trial judge had erred in supposing that it was incumbent on the plaintiff, who contended that she had been validly married according the Tamil customs, to prove either their nature or the fact that the ceremony complied with them. In the case of jurisdictions in which a marriage might be validly constituted by consent of the parties without a formal ceremony, the presumption under consideration has been invoked in favour of the giving of such consent, even

when the parties began to cohabit in circumstances in which it could not be lawfully given. In Re Taplin, Watson V Tate[15] it was proved that a solicitor had lived with a woman as his wife in Rockhampton for 19 years. The birth certificate of their children referred to a marriage in Victoria a district in which the local law required marriages to be registered. No ceremony between the man and woman was registered in Victoria, but it was held that a valid marriage should be assumed because the presumption could only be rebutted by evidence of the most cogent kind In Elliot V Totnes Union[16] a man contested a claim for maintenance of a child on the ground that he had never married its mother (since deceased), but his evidence was disbelieved and a marriage was presumed from cohabitation and repute although no ceremony was shown to have taken place. The legitimacy of a child was also in issue in Reshephard, George V Thyer[17] and the marriage of its parents was presumed although they gave evidence to the effect that the only ceremony celebrated between them took place in France, and according to expert opinion, that ceremony could not have constituted a valid marriage by French law.

It should be noted that the "presumption of marriage" does not create a marriage under the common law. It simply allows a relationship that has all the hall marks of a properly solemnised marriage to be recognised by the courts in a ruling under the law of evidence.

In Yawe V Public Trustee[18] the High Court treated Cotran's Restatament of African Law[19] as though it were an exhaustive treatise on customarry laws relating to marriage. It categorically refused to treat as marriage cohabitation of more than seven years where the deceased's relatives sought to disinherit the woman he had cohabited with until he died. In the East African Court of Appeal which noted that the Restatement was not exhaustive held that the common law presumption the court held, was known to customary law. If the court had known of the customary practice of elopment it might have preferred it to the presumption principle.

An even more illustrious case is Kisito Charles Macharia Vrs Rosemary Moraa[20]. The plaintiff and defendant lived together as man and wife from 1974 to 1979. There was cohabitation in the true sense and also in the technical sense over a period of 5 years which produced three children. The plaintiff due to differences with the defendant (wife) brought an application in court seeking a declaration that the defendant was not his wife; a perpetual injunction restraining the defendant from entering or remaining on the plaintiff's premises. The court took the view, though none of the formal ceremonies which would normally be expected to be performed in a Kisii customary marriage were in fact performed, nevertheless the intention in the relationship between the plaintiff and the defendant was to establish the relationship of man and wife and that both families knew so and and accepted so. The court relied on the judgement of the High Court in Ngari V Getangi[21] and Others, Muli J as he then was, found the following on the facts before him which related to a Kikuyu Customary marriage:-

> "From evidence as a whole and the circumstances surrounding the relationship or association between the deceased and Juliana there was a marriage association which was impeded from reaching maturity by violent disagreements and certain customary formalities including slaughtering of "ngurario". This association remained for a long period for the court to reasonably presume a valid marriage which I hereby presume to have existed."

Muli J. presumed the marriage to have existed despite the fact that there was no doubt that no marriage ceremony had ever been properly performed. What Muli J. looked at was the circumstances surrounding the relationship between the parties and he clearly found that that association was that of husband and wife. The same was so in this particular case (Rosemary Moraa's case). However some difficulty arose because the defendant (Rosemary Moraa) had earlier on in 1973 been party to a marriage with a gentleman from Zambia a Mr. Vermoor. Thus during the period of cohabitation of the plaintiff and and the defendant from which the court was invited to presume

a customary marriage, there was a valid and subsisting marriage between the defendant and Mr. Vermoor. The association between the plaintiff and the defendant was therefore adulterous and that it would be difficult in those circumstances to presume that the plaintiff was entering the association with the defendant with a view to marriage.

The court went through this hurdle by relying on the case of Chesire v Chesire[22]. in which Platt. J. said on the authority of Hill v Hill[23] that a presumption of a valid marriage can still be made even though the association starts in adultery. From the circumstances of this case and on the basis of the evidence given by the defendant, it is quite clear that the basis upon which the plaintiff and the defendant started living together was that they wished to be accepted as man and wife by everybody around inspite of the obvious problem caused by the earlier marriage.

In all those circumstances on the authority of Yawe v Public Trustee,[24] on the basis of the decision of Muli. J. in Ngari v Getangi[25] and on the basis of Hill v Hill[26] as quoted by Platt. J. in Chesire v Chesire[27] the court came to the conclusion that a presumption of marriage exists between the two spouses and that it has not been rebutted.

THE LEGAL CONSEQUENCES OF COHABITATION OUTSIDE MARRIAGE

The definition of cohabitation outside marriage

In this discussion or study "Cohabitation outside marriage" refers to any situation where a man and a woman who are not married to each other live or interact with each other in circumstances that create in them expectations and mental states that are identical to those created in the man and woman who are married and live like married people. This approach is one which courts in Kenya have adopted in those cases where a man charged with murder like a married man kills on discovery of adultery of his wife, has pleaded that he killed under provocation caused by discovering the woman he has been living with committing adultery.[28] It has also been adopted in

the civil cases. It is the one which the English courts have been using when dealing with civil cases of "Common law marriages" or cohabitations of men and women who are not married to each other.[29]

The following discussion traces recent developments in the legal treatment of non-marital cohabitation under criminal and civil law. It notes the degree to which legislative and judicial forces have shaped current doctrine, and speculates upon the likely relative influence of these forces on future developments. It concludes with comments on the present relationship of the criminal laws of marriage and non-marriages and suggestions for doctrinal growth. The question we are considering is not academic as the following discussion will show.

I CRIMINAL LAW

Cohabitation outside marriage may be affected by the criminal law in the following areas: i) bigamy ii) The defence of provocation in murder cases iii) Compellability and competence of a spouse in the law of evidence. Adultery and Enticement though no longer offences in Kenya's criminal law shall be discussed in view of the fact that the Commission on the law of marriage and Divorce recommended in 1968 that the two be made offences[30] and these recommendations were embodied in the marriage Bill.[31]

a) The defence of provocation in Murder cases

Murder is punished by death in Kenya.[32] There is the case where a man or woman is charged with the murder of the other party or a stranger. The killing took place under provocation on the accused finding the other in the act of "unfaithfulness." The law recognises the fact that the marriage creates great passions in the parties to it, and the expectation that each will be faithful and that discovery of "unfaithfulness" will outrage one party. A spouse in his/her defence can plead that he/she killed under provocation and hence the conviction for

manslaughter which does not carry the death penalty is substituted for the murder one which goes with the death penalty. Does the living together of unmarried people create identical passions and expectations? I would answer this in the affirmative.

In Kenya, the case of Kalume Wa Tuku VR[33] established that in murder cases, the defence of provocation is available where the killing has taken place on discovery of a mistress the accused has been cohabiting with committing "adultery". In these circumstances where the law is that the defence of provocation can be claimed where a man and a woman who are not married are cohabiting, the question does arise as to the nature of cohabitation that the law covers. Must the two have been living as husband and wife in one house or it is enough if they do so whenever they happen to be together in one of the residences? Can it be claimed where the two have been engaged for some time and great intimacy has developed? The law is not clear.[34] Kenyan courts it seems have used the "depth of feelings"[35] created by a relationship to determine when the defence of provocation is available.[36] There is nothing special about the fact of "living in one flat" or house. People who meet frequently and act like people who live together or are married and those who are deeply in love do find themselves in feelings of the same depth. But the defence is confined to those relationships that have imposed the obligation of fidelity on the parties. However even in the cases of those cohabitants, the defence is not available where the two are intimate with other people and each is aware of this fact.[37]

b) Competence and compellability of spouses in the law of Evidence

A man or woman may be charged with a crime and the only person who can give evidence that will lead to his/her conviction is the other party he or she has been living with. Will the prosecution treat him or her as a competent witness for the prosecution? The law is that with a few exceptions a spouse is not a competent witness for the prosecution where the other spouse is charged with an offence. He or she is, however, a competent witness for defence of the spouse charged.[38]

There is no agreement as to the rationale for these rules which seek to limit the relevant evidence which will be admitted to prove the points in issue.[39] But in the writers opinion, these rules are based on the view that a marriage creates a highly personal relationship essential for the development of the human personality and that for this relationship to develop the confidential relationship created and the hope that the marriage creates a situation where one is given at least one person who will be on his or her side when the rest of the world is against him/her. The spouse is not allowed to team up with the "enemy". Do these rules protect those who are living as husband and wife?

In all cases of cohabitation outside marriage the question that may arise is as to whether or not they enjoy similar rights to those enjoyed by those who are married as far as the law of evidence is concerned. Such people it is assumed here are living under conditions that give rise to expectations identical to those of the married people. The Kenya Evidence Act does not seem on the face of it to cover cohabitation outside marriage. Marriage is defined by the act as follows:-

> "In this section "marriage" means a marriage, whether or not monogamous, which is by law binding during the lifetime of the parties thereto unless dissolved according to law and includes a marriage under native or tribal custom"[40]

There is no reason whatsoever for treating people "living in a stable relationship" though not married differently from married people who may be separated or living happily.[41] The Constitution being the supreme law of the land should be invoked to remedy this situation. To the extent that the Evidence Act Section 130 (2) is discriminatory within the meaning of Section 82 (4) of the Constitution against those who are living as husband and wife then it is void.

c. Bigamy

Bigamy is committed when a person who is already married goes with another person through a ceremony of marriage which would have resulted in a valid marriage had that person been unmarried.[42] Cohabitation often follows the outlawed ceremony. In many cases cohabitation precedes that ceremony. Among other things the conviction for bigamy seeks to disturb the cohabitation.[43] This offence of Bigamy seeks firstly to protect monogamous marriage by punishing those who establish other unions and secondly to protect the public from the misrepresentation of status that will follow the issue of a marriage certificate after the second ceremony marriage.[44]

By the law making Bigamy an offence it is in effect enforcing "good" sex morality through compulsion of spouses who no longer can live together to do so. This makes sex life intolerable. The person who seeks to lead a better sex life after the first marriage has failed is punished. This utterly wrong in both principle and practice. It is the writer's submission that society is no longer preparedd to protect a monogamous marriage that has failed. Indeed the Matrimonial Causes Act[45] which allows divorce easily shows this. It is submitted that the law which makes going through a second marriage ceremony a crime should be scrapped off our statute books. Such provision reflects an outdated attitude towards marriage that does not accord with the realities of the Kenyan Society. The civil provides adequate remedies in the law of tort or family law in cases where a wrong is done to a party to the second union i.e. where a misrepresentation of status has been made. Such was the case in Shaw v Shaw[46] where the English court of Appeal treated as a widow, a woman the deceased had lived with for 14 years after he had gone through a bigamous ceremony of marriage, having represented that he was a widower. This was in the woman's action for breach of warranty that the deceased had capacity to marry her.

The crime of bigamy is even more perplexing in Kenya, where the majority of people regulate their affairs in accordance with Customary law which allows polygamy. This crime by all means offends the spirit of the majority of the people.

Polygamy is more in accord with human nature. Many Africans who have accepted some aspects of the western way of life and have in fact been presumed to have gone through a monogamous marriage do not hesitate to marry other women under Customary law when need be. The Kenyan Society excluding the Courts[47] has no quarrel with such marriages and recognise them as valid marriages. The Commission of the law of Marriage and Divorce took cognition of this phenomenon and put it on record as below:-

> "We are told that it is not uncommon for Africans who have contracted Marriage under the Marriage Act or the African Christian Marriage and Divorce Act (which permit monogamy only) and while those marriages subsist, to take other wives under Customary law. This is a criminal offence but so far as we are aware, prosecutions are never instituted. This state of affairs is undesirable as it tends to bring the law into disrespect. The position as regards civil rights and obligations under Customary law is obscure.[48]

In so far as the Commission on Marriage and Divorce laws recommends that the offence of bigamy be vigilantly enforced then it fails to accord to the realities of human nature. In any case it is hard to enforce such provisions because the same law makers will fall victims. The Commission in making such a recommendation reveals a lot of ignorance of the basis and surrounding circumstances of the marriage institution. Such recommendation or comment should be ignored in total.

II CIVIL LAW

Cohabitation of unmarried Africans whose personal law is Customary law has features that a cohabitation of unmarried English and Westernised Europeans or Africans has not. The factors that make it a "cohabitation outside marriage" and not a marriage, or the legal requirement the union has not met are determined by the family law that is applicable to those cohabiting. The discussion will focus on Customary and English law.

EUROPEAN TYPE OF FAMILY LAW

The European community and the upcoming African middle class have accepted the European values and their Marriage law is the European type. Property dealings and contractual relations and arrangements which contemplate, facilitate, promote or encourage extra-marital sexual intercourse have become commonplace in our Society. The courts have come to acknowledge that problems arising from a man and a woman setting up house together and having a family without getting married are familiar and recurring. Those cohabiting face problems with this law because unlike Customary law, it does not allow polygamy and secondly the courts have refused to countenance the fact that the law allows the conversion of western type of marriage into a customary one which permits one to marry other wives under customary law.[49] In most cases, the pattern in cohabitations amongst those governed by the English law is that the husband who has married one woman under it either purports to marry other wives under Customary law.[50] This may at times take the form of a relationship of husband and wife with another woman who he does not purport to marry. This is contrary to the statutory provisions which expressly state that one who is married under the European type of law has no capacity to marry anybody else under Customary law.[51] Does this mean that the law should treat those living as husband and wife different from those living in the same way having first married ? The following illustrations as regards maintenance, custody, Inheritance and property rights will show the gravity of the problem.

a. The Law of Maintenance

By virtue of the marriage a wife is entitled to be maintained by her husband. The right to Maintenance has origin in the mode of production. According to economic organisation the wife was not able to maintain herself. The right to maintenance is also connected to the sexual relationship between the husband and wife. The wife has great obligations in bringing up the children and in effect losing her career. The right to maintenance embodies the morality of duty.[52] In a monogamous system of marriage the right may be exercised as under Common law or statute.

At Common law the wife has the right to pledge the husband's credit. This means that if the wife is not given enough housekeeping then she is entitled to pledge her husband's credit for necessaries.[53] This right to pledge her husband's credit has been extended to the area of borrowing - borrowing money for acquiring necessaries.[54] The right exists only if the woman has no adequate means of maintaining herself.[55] Besides the Common law the right to maintenance is conferred by statute.[56]

If a man and woman who have been living together for sometime and have children and then the man deserts the woman and the children and the woman cannot maintain herself and the children. Should he be ordered by a court to maintain her and the children the way a husband is when he does the same to the wife? A man is under no such legal duty with regard to a woman he lives outside marriage. Thus if such a man were to refuse to maintain his partner, the only remedy open to her in a case where she is made to support herself is to bring the relationship to an end. However it is submitted that such a party who has "deserted" should be liable in the same way that a husband is obliged to maintain the wife. The courts have used the Common law presumption of marriage principle to order maintenance for the wife. In Elliot V Totness[58] a man contested a claim for maintenance of a child on the ground that he had never named its mother (since deceased) but his evidence was disbelieved and a marriage was presumed from cohabitation and repute although no ceremony was shown to have taken place. A problem may arise in cases where the cohabitation is the second one for one of the parties, that is one of the parties is still married. But applying the reasoning and ruling in Charles Macharia v Rosemary Moraa's Case[58] the first marriage should not be a barrier to an order for maintenance. In this case it was held that a presumption of a valid marriage can still be made even though the association starts in adultery. All what the parties had intended on starting to live together was that they wished to be accepted as a man and wife by everybody around inspite of the obvious first marriage. This case illustrates that courts can recognise divorce by operation of law or conduct. The presumption will apply easily in such a case.

b. Custody

Suppose it is the woman who deserts the man and establishes another union with another man. Is the first man entitled to the custody of his children?

In every society, the law governing the custody of children reflects the structure of the family. In the Western Societies, the family is made up of the spouses and their children. The spouses are under a legal obligation to bring up the children. Where they fail, the children are made wards of the court and are kept in a home where they grow as healthy members of Society. Since most of the spouses are in a position to bring up the children properly the courts are often asked to decide which of the two spouses is to have the custody. The welfare of the child which embraces both material and non-material aspects of life is considered the most paramount consideration in such cases.[59] But what is the position of children born outside marriage? Currently chapter 144 of the Laws of Kenya (Legitimacy Act) does not cover illegitimate children. It is submitted that the courts should seek the aid of Customary law to solve this problem.[60]

c. PROPERTY RIGHTS

Faced with this common place situation and the familiar problem of how to adjust property rights between the parties when the extra-marital relationship breaks down, the courts have accorded a substantial degree of judicial recognition and even enforcement to the parties property dealings. English courts have used the law of trusts to resolve property disputes between parties whose cohabitation has ceased to be stable.

One technique which has been used to apply as between man and mistress the doctrine of resulting implied or constructive trusts which in Gissing v Gissing[61] the House of Lords had said might be applied to dealings between husband and wife. This was first done in Cooke v Head.[62] There the parties were a married man and his mistress. They hoped that the man's wife would divorce him so that they could marry. They planned to build a bungalow as their home. Land was purchased in the

man's name and the bungalow built. The woman contributed no money towards these purchases but did a lot of work - "much more than most women would do". Both were in employment and contributed to the household expenses including the mortgage payments and furniture. Then the parties separated before the bungalow was completed and the man moved into it alone. The court of Appeal determined that the woman should receive one-third of the net proceeds of sale of the bungalow, applying the principle in Gissing v Gissing to spell out a trust in the woman's favour for the one-third share. Lord Denning said that a mistress should be treated like a wife in this situation. Karminski L.J. said:

> "I desire to express my entire agreement with what Lord Denning M.R. has said about the principles of law in a class of this kind between a man and his mistress when they intend to set up home together and intend also to marry when they are free. It is in no way different from the principles applicable in the cases of husband and wife who have built up a house together"[63].

In Eves v Eves[64] the parties cohabited from April 1968 until November 1972. They had two children of their association. They did not marry, both being married. In 1969 a house was purchased as a home for the parties and their children. The man had the house purchased in his name alone giving the mistress a false excuse for not putting it in joint names. The mistress did not make any financial contribution towards the purchase but did a great deal of work to improve the house and make it habitable. The parties relationship broke down when the man went to live with another woman, having become free to do so, he married. The court of Appeal held that the house should be held by the man in trust as to three quarters for himself and as to one quarter for the mistress. The principle which was applied was stated by Lord Denning M.R. to be contained in the following passage from his judgement in Cooke v Head[65].

> "Whenever two parties by their joint efforts acquire property to be used for their joint benefit, the court

may impose or impute a constructive or resulting trust. The legal owner is bound to hold the property on trust for them both. This trust does not need any writing. It can be enforced by an order for sale, but in a proper case the sale can be postponed indefinitely. It applies to husband and wife, to engaged couples and to man and mistress, and may be the other relationships too".

The Courts have gone further than the implication and enforcement of a resulting implied or constructive trust between man and mistress. In Tanner v Tanner[66] a married man became the father of twins by one of his mistresses. He set up the mistress and the twins in a house which he purchased, she giving up her flat where she was protected by the Rent Acts to move into the house at his instance. Subsequently the man obtained a divorce from his first wife and married another of his mistresses. He then sought to evict the twins and their mother from the house so that he could occupy it with his new wife. The deserted mistress (as Lord Denning described her) sought to secure her occupancy of the house, either under a licence which the man was estopped from terminating or by a trust of the Cooke v Head kind. All the members of the Court of appeal agreed that this case was not like Cooke v Head(supra) or Eves v Eves (supra) and that the mistress had no proprietary interest in the property. But having held that no trust of the Cooke v Head kind could be inferred all the members of the Court of Appeal went on to spell an implied contract between the man and his mistress under which the mistress had a licence to occupy the house for herself and the twins. Because consideration had been given for this licence it could not be revoked at short notice but was a licence to occupy accommodation in the house so long as the twins should be of school age and such accommodation should reasonably be required for the mistress and her children. The consideration was the mistress's act in reliance in giving up her Rent Act Controlled.

The way the English courts have developed the law of trusts in cases involving parties who are cohabiting outside marriage is likely to command itself to courts in Kenya where urban life styles of the up-coming middle class are in many respects similar to those of the middleclass in England.

In Kenya the Judicature Act Section 3(1) applies the English law of trusts in so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.[67] This provision makes applicable to Kenya not only "the doctrines of equity" but also the "Substance of English Common law and statutes of general application in England in 1897". In Kenya, the English Married Women's property Act, 1881, which has been used in England to resolve property disputes of spouses and of men and women cohabiting outside marriage has been held to be a statute of general application in force in England on 12th August 1897.[68] It is not clear whether the Kenyan courts will take or adopt the manner in which English courts have started treating property disputes involving those cohabiting outside marriage, the way they treat spouses.

The problems which arise where cohabitation of the members of the middleclass comes to an end were described by Lord Denning, vividly in Eves v Eves.[69] He said,

> "This problem in this case is a familiar one. It often happens that a man and a woman set up a house together and have children. They cannot marry because one or both are already married. But they intend to marry as soon as they are free to do so. She takes his name. They are known to their neighbours as husband and wife. They get a house, but it is put in his name alone. Then before they get married, the relationship breaks down. In strict law, she has no claim whatever. She is not his wife. He is not bound to provide a roof over her head. He can turn her into the street. She is not entitled to any maintenance from him for herself".

As stated earlier, originally the court did not treat the people cohabiting outside marriages like spouses where they had property disputes. The Courts and the legislature in England as seen from this discussion have now realised that those cohabiting outside marriage face problems which are identical to those faced where cohabitation is taking place

within the framework of the marriage institution. A new constructive trust is seen to be the effective remedy in both cases. It is endeavouring to inject into the man-woman relationship, the equality of sexes which the societies have accepted. This equality is based on the acceptance of the fact that the relationship by its very nature introduces a division of labour based on sex. It demands that the woman's direct and indirect contributions to the property acquired be recognised when the property acquired during cohabitation is being divided. This is the approach that the Kenyan courts should take. The constructive trust and legislation are new tools which could be perfected.

d. INHERITANCE

A woman lives with a man for many years. The two have a number of children. After the man dies the question exists as to whether or not this woman and her children are to rank as heirs of the deceased man the way the wife and children do. Where under the law, the woman is entitled to a pension, is this woman to be treated as a widow? What will happen in case the woman is party to two unions, a functional one and the "dead" one which the former replaced in cases of monogamous marriages. This happens where a man and a woman marry and shortly separate without dissolving the marriage and each establishes another union with a member of the opposite sex. How will this problem of inheritance be solved?

Husbands and wives inherit from one another on intestacy. According to the English position, the surviving spouse, in the presence of issue has a right to the deceased's personal belongings, the first £25,000 as a statutory "legacy" and a life interest in half of the balance of the estate. In the absence of issue, the spouse's rights on intestacy are increased to the personal chattels, a statutory legacy of £55,000 and half of any balance absolutely. Couples living together but unmarried had until recently no legal rights at all to obtain any benefit of the intestate death of the partner. The only possible situation where a cohabitee could obtain an interest on the intestate death of the other person was where the partner died leaving no relatives as defined in

the Administration of Estates Act 1925, and thus the estate passes as bona vacantia to the Crown. The Crown may grant an exgratia payment to dependents, whether kindred or not, of the intestate and for other reasons "for whom the intestate might reasonably have been expected to make provision." A cohabitee would be able to benefit from such a payment but quite clearly it is not a right.

Recently the position has been improved to a limited extent by the Inheritance (Provision for family and Dependents) Act 1975. Under this Act, a court can award reasonable financial provision to any person who "immediately before the death of the deceased was being maintained either wholly or partly by the deceased". The Act defines "maintained" in the sense that the deceased was making a voluntary but substantial contribution in money or money's worth towards the reasonable needs of that person.

It is submitted that one cannot distinguish between a situation of a man who happens to be married but separated from his wife and living with someone else, and that of a man who was not married at all but living in a stable relationship outside marriage.

The Kenyan courts have treated the issue of inheritance as regards cohabitants in a rather unreasonable and unrealistic manner. At times the decisions have questioned the customary institution of polygamy. In the matter of the Estate of Ruenji, deceased[71] and In the matter of the Estate of Ogola,[72] deceased, the Kenya High Court in inheritance cases held that any customary marriage contracted after the first monogamous one is invalid, and that the woman or women and their children are not the heirs of the deceased.The Court has proceeded on an outdated view that the monogamous type of marriage is the highest form of marriage in the African state-Kenya. This is a fallacious view that is based on unsound principles which ought to be done away with. The widow of the cohabitant and the issue of such cohabitation ought to be entitled to all rights of inheritance. But this is not a great problem after the 1981 Amendment of the law of Succession Act.[73]

CUSTOMARY FAMILY LAW

a) Action for fornication and pregnancy compensation

This two actions or remedies of customary family law can only be brought when the cohabitation is the first one for th e parties to it. Sexual intercourse is an important aspect in all cohabitations outside marriage. Among some African Communities, namely the Kikuyu and Taita fornication is a civil wrong.[74] Customary law treats it as a wrong for parties to have sexual relationship without first getting married in this two communities. The wrong is committed not to the parties who were involved in its commission but to the father and the clan of the woman to whom the African Society has entrusted the sound upbringing of a member of th society.[75]

With the growth of the free enterprise economy since the establishment of the colonial rule, New urban areas, administrative centres and plantations, new moral values have emerged. The close network of Communalistic African communities has been destroyed. The strong moral values have changed in both substance and form. Despite the existence of this customary law remedy, no court case has reached the High Court of Kenya.[76]

Sometimes the sexual relationship results in pregnancy especially where there is cohabitation. In such circumstances, pregnancy gives the clan the right to compensation. This is so in some African communities in Kenya.[77] The wrong is also taken kto be one against the family and clan of the woman.

b) Dowry, Enticement, Custody, Maintenance, Divorce, Property disputes and Inheritance

When the cohabitation comes to an end, a party to it or a third party may make a claim based on either the existence or non-existence of a customary marriage. The action may concern any of the following: (i) damages for enticement of an unmarried woman (ii) dowry which is payable to the family of the wife by the family of the man (iii) the return of the wife (by a man claiming to be a husband) (iv) the custody of a child or children which custody varies under customary law with the status of those cohabiting and the community concerned

(v) maintenance for the wife and the children which the husband is under a legal duty to provide (vi) divorce which assumes that theirs is a marriage to be dissolved and (vii) inheritance.[78]

i.) Dowry and Enticement

Customary law imposes on the family of the husband the duty to pay dowry to the family of the wife[79] unless waived. Hence it must be paid for the customary marriage to be valid. In Nyakanga v Mehego[80] the appellant claimed that the unpaid dowry from the respondent who had eloped with his daughter and started cohabiting with her. The court held that the elopement had resulted in a customary marriage under Kuria customary law, and ordered that the dowry be paid. In Boyikafundi v Tamayali Mganidas[81] the respondent claimed damages against the appellant for enticing and eloping with his daughter. After his elopement this daughter became the second wife of the appellant. The court held (i) that an action for damages for enticement did not lie where the woman was over 21 as was the case here (ii) that she was the appellant's wife through elopement and (iii) the respondent was entitled to dowry.

It is my submission that enticement in cases where the woman is over 21 years results in a marriage by elopement and that the father should bring an action for recovery of dowry as the court held in the latter case.

There is very little literature and consequently little case law on the concept of "elopement" which it is submitted can solve most of the problems arising from cohabitation. Elopement begins when a man and a woman start living together as husband and wife without having complied with the formal requirements of a marriage. No doubt there are many reasons why a man and a woman may decide to elope. In particular elopement may occur in the following situations:

(i) Where a man and a woman decide to start living together as married people, without first seeking the consent of their families. The idea behind such a move is that if they sought the consent first, this may delay the commencement of

their cohabitation. This is especially so since the parents of the woman may demand payment of part of the dowry or brideprice as a condition precedent to giving consent. Therefore if the man cannot make the part payment immediately, the woman will not be allowed to go and live with him as his wife. Thus cohabitation will be delayed unless they so resort to elopement.[82]

(ii) Where a man seduces his girlfriend who is a virgin or whose parents are strict christians. Such seduction may lead to pregnancy. Here the girl will no doubt suffer dishonour for losing her virginity before marriage. And where the parents of the girl are strict christians they will consider it a terrible thing for their daughter to get pregnant outside marriage, whether or not she is a virgin. In both cases ~~the~~ he may decide to elope with the girl to save her, or her family from the dishonour that may follow upon the discovery of the pregnancy. The formalities through which a customary marriage has to pass may take quite a long time. Hence in this situation the best way out for the man and his girlfriend is to resort to elopement.

(iii) A third situation is where lovers who wish to marry are denied consent by their parents. Such refusal may be based on some past quarrels between the respective families, or the bad character of either the man or the girl. If lovers feel they ought to get married and their parents are unreasonably withholding consent, they may resort to elopement. When these lovers start living together and cohabiting, their families will realise the futility of withholding consent. In other words elopement here will be aimed at forcing the families hand.

Elopement as alluded to earlier begins when a man and woman start living as husband and wife. They can do so next to the home of one of the parties or far away from the homes of both. The parties or their representatives report the fact of elopement to their respective families. Amongst the Kikuyu,[83] it would appear that the only difference there is between the ordinary customary marriage and the customary marriage by

elopement is that in the case of the latter, the parties give an undertaking to fulfill the legal requirements after cohabitation begins whilst the case of the ordinary customary marriage, most of the requirements are met before cohabitation begins. Those who elope must have capacity to marry.[84] Since all that is needed is an undertaking to meet the requirements it is the easiest form of marriage to contract. It appears that the only cohabitations that will not amount to marriages are those of people with no capacity to marry. Such people include people within prohibited degrees or are married to other people and the marriages are still subsisting. The law can imply the undertaking where it is not made expressly. In Zipporah Wairimu v Paul Muchemi[85] and Peter Hinga v Mary Wanjiku[86] the court ~~held~~ has held to be marriages, without referring to elopement under Kikuyu customary law which the parties had clearly followed, cohabitation of men and women who have (i) cohabited and had three or more children named the way children are named where a customary marriage exists and (ii) the husband has paid a part of the dowry payable and has undertaken to discharge the obligations of a son in law. These are cases of marriages through elopement under Kikuyu customary law. The present writer is of the view that marriage by elopement occurs in every tribe. It has origin in human frailty which is common to mankind. The common law presumption of a valid marriage which is made where people have lived as husband and wife have been so accepted by the community has origin in the same frailty.[87]

ii.) Custody & Maintenance

In any society, the law governing custody of children reflects the structure of the family. In traditional African society or customarily the rules governing the custody of children are different from those in the western societies. The family unit is bigger.[88] The rights to the custody of the child born outside marriage vary from community to community. In some communities it is the woman's family which has the right to the custody of the children. In others, the man has an absolute right to custody whilst yet in others, the right is conditional on his making a specified payment. Under all customary laws, the spouses who establish a family have the right to the custody where there is a marriage. Where a man

and a woman are cohabiting outside the marriage, and their customary law does not give the right to custody to the man, it is the woman's family which has the right to the custody of all the children. In Lerionga Ole Ntutu v Sundoi Ole Sinderia[89] a man who had cohabited with a woman claimed the custody of the children born during the period of cohabitation. Entering judgement for the woman, the Kenyan Colonial Court of Review held that under the Masai customary law that applied to the parties, the child belonged to the woman's family as they were not married and that the appellant was entitled to a refund of the maintenance for the child during the period of cohabitation. An even later decision which is quite recent, further illustrates this point. In Zipporah Wairimu v Paul Muchemi[90] the plaintiff, a woman, prayed to be declared the sole guardian of four children, three of whom she had had with the defendant with whom she had lived from December 1963 to December 1969 when she left him. She contended that no marriage existed between them and that under Kikuyu customary law, the children belonged to her family. The defendant who had paid part of the dowry payable after the commencement of the cohabitation and lived with the plaintiff as a married woman under Kikuyu customary law contended that they were married and that he was entitled to the custody of the children who had been named like children born within wedlock. The defendant may not have expressly stated it but its very clear that he was relying on the custom called elopement. The plaintiff's case rested on non-performance of certain requirements of marriage under Kikuyu customary law. The court held for the defendant that there was a valid customary marriage where part of the dowry is paid and the parties live like married under customary law, although some of the requirements of a marriage remain unperformed. In Mary Wanjiku v Peter Hinga[91] the plaintiff claimed interalia the custody of the five children born while they were living as husband and wife. She contended that she was married to the defendant under Kikuyu customary law. The court interalia held that she was married to the defendant and that she was entitled to the custody. The marriage upheld in these two cases was that by elopement.

Maintenance as regards customary family law was also an issue in Mary Wanjiku v Peter Hinga.[92] She (the plaintiff) alleged that she was the wife of the defendant under customary law and claimed maintenance for herself and the five children of the marriage until each attained the age of 16; an order for non-cohabitation and custody. The defendant contended that the plaintiff was not his wife. The children were named the way children born in wedlock under customary law are named. The court held that she was entitled to maintenance orders.

iii.) Divorce

Divorce by its very nature terminates the parties obligations to cohabit. It is not unheard of to find one party who has cohabited with another who has filed a divorce petition questioning the validity of the marriage tne court has been asked to dissolve. What this party is alleging or contending is the fact that there was no marriage that the court can be called upon to dissolve. A good illustration of this arguement is the Tanzanian case of Barthazar v Mary Benedicto.[93] The petitioner, the man petitioned for divorce. He had cohabited with the respondent for fifteen years and had six children with her. The respondent contended that there was no marriage to be dissolved as the petitioner had not paid dowry to her family. The court held (i) that the payment of dowry was not essential for a valid customary marriage and (ii) that there was other evidence of a marriage here and that the granting of divorce by the lower court was proper.

iv.) Property disputes

When cohabitation outside marriage comes to an end sometimes questions regarding the property which is acquired during cohabitation arise. Such questions demand that the court decides whether it is to treat parties to it the way it treats spouses similar problems. In Karanja v Karanja[94] the defence submitted that the latest English authorities on the subject of property disputes as between spouses were inapplicable to the African way of life where no intention to share land with his wife could be attributed to a husband. The court took the view that customary law had changed radically from the days when land

belonged to the tribe and that unmarried women can now own land. This was in accordance with the statement of Kikuyu customary law in Cotran's laws of marriage and Divorce pg 17 paragraph 7(c) which reads;

> "In the event of a dissolution of the marriage, the wife is entitled to take all her property, whether acquired before, or after the marriage. Property obtained through the joint efforts of the husband and wife is divided between them."

Again at p 21 paragraph 5 he writes:-

> "Modern development. Any of the wife's self-acquired property i.e. property which she acquires during the marriage through her own efforts, remains with her upon divorce."

Whereas the writer supports the spirit of the above decision, the interpretation of the customary law was erroneous. It is as stated by the defence counsel. It is submitted that all parties should be treated equally.

v.) Inheritance

Where the cohabitation weathers all the storms that threaten its existence there is one possibility of its nature being subjected to judicial scrutiny. This will be after the death of one of the parties when the question of inheriting the property left arises under Customary law and under many personal laws in the world.[95] Ones heirs always include one's wife or husband and children. The relations of the deceased who intend to disinherit the one who was cohabiting with the deceased and her/his children contend that that party was not a spouse as there was no marriage. The courts have often protected the party to the cohabitation who survives by extending the English common law presumption of a valid marriage, to customary law. In English law this presumption is made where parties have lived as husband and wife for many years and hence have been accepted by the community as such.[96] In Yawe v Public Trustee[97] the public trustee petitioned the Kenya High Court to determine

interalia whether the appellant was the widow of the deceased. Decision on this issue was necessary in distribution of the deceased estate which he was administering. The deceased, a Ugandan pilot working with the defunct East African Airways died in 1972. He belonged to the Baganda community. From either 1962 or 1963 to the time of death, he had lived with the appellant as husband and four children. The appellant was a Kenyan who belonged to the Kikuyu community. She contended that she was married to the deceased under Kikuyu customary law. The High Court which relied on Cotran's Restatement of Kikuyu customary law held that the appellant was not married to the deceased. She appealed to the East African Court of Appeal. The relatives of the deceased challenged the alleged marriage. They recognised the children as heirs but not the appellant. The court whose leading opinion was delivered by Mustafa J. allowed the appeal holding that the presumption of a valid marriage was known to customary law and that here it had not been rebutted and that the appellant was thus a widow of the deceased. The Court did not view Cotran's Restatement of African law as exhaustive.

It is submitted that the concept of elopement under Customary law was beneficial and easier to apply in setting such a dispute.

CHAPTER IV

1. Hyde v Hyde and woodmansee (1886) L.R. IP & D 130 at 133

2. A number of terms used interchangeably to denote an intimate pairing of a man and a woman in a shared living arrangement; Informal families; defacto Unions. non-marital cohabitation, etc "Defacto spouse" cohabitant and "Patner" are used to refer to one of the unions members.

3.8 See generally Petar Sarcevic "cohabitation without marriage; Yugoslavia experience", American Journal of Comparative law Nol. 29 pg. 315.

4. While authorities on this subject agree that the living together should have permanence no agreement exists as to its duration.

5. See David Cruckshank "living together outside marrage" a suggestion for the Alberta Institute of law Research and Reform, Uninversity of Calgarry, April 1979. Also see Kizito Charles Macharia v Rosemary Moraa High Court of Kenya Nrb. Misc. Civil case No. 364 of 1981; Yawe v Public Trustee Court of Appeal for East Africa Civil Appeal No. 13 of 1976 In this case, the High Court which treated Cotran's Restatement of African law as though it were all exhaustive treatise on customary laws relating to marriage refused to treat as a marriage cohabitation of more than seven years where the deceased's relatives sought to disinherit the woman he had cohabited with until he died. The East African Court of Appeal which noted that the Restatement was not exhaustive held that common law presumtion of a valid marriage which is raised from prolonged cohabitation applied and that the woman was a widow of the deceased. The presumption, the court held was known to customary law.

6. To help distinguish between customary law concept of elopment and presumption of marriage under common law.

7. Samuel Gampel, A commentary on "An analysis of the concepts of the common law marriage and the meretricions union" by Bryan W. Pritchard, 21 R.F.L. 1977 271 at page 279.

8. See Professor Oliver M. Stone, Family law, London, Mac Millan 1977 at p. 30.

9. See Professor David Cruickshank's article, Supra footnote 5

10. 283 Edward III c 23.

11. See Taczanowski V Taczanowski (1957) 2 ACCER 563 Kochanski V

Kochanski (1957) 3 ALL ER 142

Kochanski (1957) 3 ALL ER 142

12. See:- Cross on Evidence, Rupert Cross, butterwoths, London 1974
13. Olive M. Stone, Family law, London; Macmillan, 1977 p 30
14. (1881) 6 App. Cas. 364 at p 371
15. (1937) ALL ER 105
16. (1892) 57 J.P. 151
17. (1904) 1 Ch 456
18. Cort of Appeal for East Africa, Civil Appeal No. 13 of 1976
19. Cotran's Restatement of African Law, "The law of marriage and Divorce" volume I sweet & Maxwell, 1968.
20. High Cort of Kenya at Nairobi, Misc Civil Case No. 364 of 1981.
21. High Court of Kenya Civil Case No. 1460 of 1977
22. Quoted in Charles Kimito Macharia V Rosemary Moraa, ibid - No citation given.
23. (1959) ALL ER 28
24. Supra
25. Supra
26. Supra
27. Supra
28. The authorities on this aspect will come out in our discussion below.
29. Cooke V Head (1972) 1 W.L.R; Eves V Eves (1975) 1 W.L.R. 1338: Tanner V Tanner (1975) 1 W.L.R. 1346; Davis V Johnson (1978) 1 ALL ER 1132; In Moate V Moate (1948) 2 ALL ER. 486, the High Court in England treated a transaction by an engaged couple which subsequently married the way it treated similar transactions.
30. Report of the Commission on the law of marriage and Divorce, Government Printer, Nairobi 1968, Recommendations Nos. 75 and 76.
31. The Marriage Bill, Government Printer, 1976, SS. 150 and 151. The basic assumptions on which the Bill is based went against the basic assumptions and expectations of the married life of the majority of the people. The recommendations pertaining to adultery and enticement offend the sentiments of the majority of Africans who treat them as wrons for which the remedy is compensation

see also a critique of this Bill by G. K. Kuria in the Weekly Review, September, 6, 1976 pp 3-6.

32. Section of the penal code.

33. (1954) 21 EACA 201

34. The Zambia court of Appeal in The people V Banda whenever a man and a woman are living together in a stable relationship the defence is available.

35. Ibid, it stated the law as follows,

"Where a man and a woman are living together in a stable relationship but are not formally married, either under a statute, or under customary law, it seems quite unrealistic to suggest that the depth of feeling they have for one another must be less than if they were married."

36. See GK Kuria cohabitation outside marriage in some English Speaking African countris pg. 17

37. This was shown by the case of State V Segana Seleke 1974 The Republic of Botswana Law Reports 102 steps 105. See rules

38. See the Evidence Act, Cap 80, Sections 127 and 130. See also Sir Rupert Cross, Evidence, Betterworths, London, 1974, Fourth Edition, pp 154-160, pp 258-259 where these rules as they apply to Kenya and England respectively are state

39. See Sir Rupet Cross, Evidence, Supra, pp 161-162 and Wigmore on Evidence, Third Edition, paragraph 601

40. Cap 80 of the laws of Kenya, S. 130(2)

41. This is the view of the present writer

42. The people V Chitambala (1969) Zambia Law Reports. p 142 see also G. K. Kuria, Cohabitation ... Supra pg. 14-16.

43. G. K. Kuria, Supra

44. A discussion of this two reasons is made out by P. Shifmon in the law of Bigamy in a Multi-confessional Society; the Israel Experience on 1978 American comparative Journal of law pp. 79-89.

45. Cap 152 of the Laws of Kenya

46. (1954) 2 Q-B-429.

47. This is because of the constitution of these courts which is largely non-African: See also such cases as The Estate of Ruenji, High Court Kenya Misc. Civil Case 136 of 1975 and the Estate of Boaz Ogolla, High Court of Kenya at Nairobi Misc. Case No. 19 of 1976.

48. Report of the Commission on the law of marriage and Divorce, paragraph 50.

49. Case V Ruguru (1970) EA. 55; In the matter of the Estate of Rueuji, deceased, Supra; In the matter of the Estate of B.H. Ogolla, deceased Supra.
50. See Case V Ruguru Supra
51. Section 37 of the Kenya marriage Act is the typical provision.
52. See Lon Fuller
53. See Nanyuki General Trading Stores V Mrs. Peterson 15 EA.C.A 28 Ranji Dass V Mrs. MacDonald Vol 16(2) K.L.R. 103
54. See Weigerton V Engel (1947) 1 ALL ER. 425
55. Biberfeld V Berens (1952) 2 ALL ER. 237
56. The subordinate Courts (separation and Maintenance) Act (Cap 153) S. 10; Matrimonial causes Act (Cap 152) S. 25; The Guardianship of infants Act (Cap) 5.6.
57. Supra footnote No. 16
58. Supra footnote No. 20
59. R e(B) (S) An (Infant) 1968 ch. 204. This has also been held to be the position in Wambua V Okumu (1970) EA 578; Karanu V Karanu (1975) E.A. 18
60. Infra
61. (1971) A C 886
62. (1972) 1 W.L.R. 518
63. Ibid
64. (1975) 3 All. ER. 768.
65. Supra at pg. 520
66. (1975) 3 ALL ER 776
67. Although the English law applicable is that which was in force in England at the time specified, the courts in the young nation have always acted as though the english court's declaration that they are declaring the law of trusts in making, it were correct. When applying the law of trusts in these countries, the courts (i) cite the recent English decisions on the law of trusts without referring to the date specified by the legislation and (ii) without considering seriously the extent to which the local conditions and inhabitants permit the application of this law. See the decisions cited in IVI (1971) EA 278 Karanja V Karanja High Court of Kenya, Civil Case No. 123 of 1975.
68. I V I (1971) E A 278 followed in Karanja V Karanja (Supra)
69. (1975) 1 W.L.R. 1338 at p. 1341.

70. See Administration of Estates Act 1925; see also David Pearl, the legal implications of alegal relationship outside marriage, combridge law Journal 252 (1978).

71. Supra footnote 47

72. Ibid

73. See Act no. 10 of 1981

74. See E. Cotran, Restatement of African Law, Kenya Marriage and Divorce, Sweet and Maxwell, London 1968 pp 18 and 100 respectively.

75. See G. K. Kuria cohabitation, Supra at pg. 21.

76. But see the Tanzanian case of Seifu V Aiden (1967) High court Digest (Tanzania) 180; Also see Abraham V Owden (1971) H.C.D. 426 Tanzania where the court used a new and foreign view of sex morality and refused to follow Seifu V Aiden (Ibid).

77. E. Cotran, Restatemtn of African law, Supra, Kikuyu P 18, Kamba P. 30, Meru and Tharaka P 42. Lyhya, P 141. Teso P. 15 and Luo p. 178.

78. G. K. Kuria cohabitation, Supra P. 28-43

79. See:- A. B. Kasunmu and J. W. Salause, Nigerian Family Law, Butterworths London 1966, pp 77-79 see also generally E. Cotran, Restatement of African Law Supra,

80. (1971) H.C.D. 270

81. (1970) H.C.D. 11

82. See Gordon Wilson, Luo customary law and marriage laws, Government printer 1968 p 122 see also G.K. Kuria, cohabitation, Supra pg. 29.

83. See G. Kuria ibid pg. 29

84. Marriage by elopment will occur in all cases except those where the parties are within the prohibited degrees of affinity and consanguinity. Where parties to a cohabitation are already married to other people, these as cases show may be dissolved by conduct or operation of the law or be treated as voidable marriage.

85. High court of Kenya at Nairobi Civil Case No. 1280 of 1970 unreported.

86. High Court at Nairobi Civil Appeal No. 94 of 1977 unreporte

87. The authorities on this aspect will come out in our discussion. See also G. K. Kuria, cohabitation, Supra.

88. See the decision of Udo Udoma C.J. in Muwanga V Jiwani (1964) E.A. 171, John S. Mbiti, African Religions and philosophy, Heinemanu, 1969, Chap. 9.

89. (1953) I C.O.R. L.R. 8
90. High Court of Kenya at Nairobi Civil Case No. 2180 of 1970 unreported.
91. Kenya High Cort at Nairobi civil appeal No. 94 of 1977
92. Ibid
93. (1968) H.C.D. 209
94. (1976) K.L.R. 307
95. See, G. K. Kuria cohabitation, Supra pg. 34
96. See, common law presumption of marriage already discussed and Sir Rupert Cross, Evidence pp. 119-124 Court of Appeal for East Africa, civil Appeal No. 13 of 1976, unreported.

CONCLUSION

We have seen that all homosapiens are human beings of equal worth and that men and women, species of homosapiens have differnces that give them different aptitudes that are essential in realising the good life as by a society. That was the subject matter of our introduction.

In Chapter 1, we have seen that different societies and people are entitled to equal respect. We have argued that for a people to realise the good life, each individual has to be guaranteed equal economic, social and political benefits. That the present marraige Laws reflect the European and African people's concept of a good life. The law maker and the judge during the colonial rule and after has taken the view that the indigenous African is inferior and not a mature human being. What is needed is a total rejection of this view and establishment of a society based on Africans' ideas to enable everyone to lead a truely good life.

In the second chapter we saw marriage serves a purpose at both individual and societal levels, and its preservation is desirable for all, but strict regidity while regarding marriage as such would be failing to recognise the reality about human beings. Other forms of marriage as cohabitation outside marriage, and marriage for convenience are emerging. And we must be able to accomodate them all.

Formalities as regards marriage were the subject matter of chapter Three. It was submitted that in functional terms or in substance or essence there is no difference between living together and similar living together which is preceded by a marriage ceremony.

Lastly chapter four dealt with cohabitation outside marriage. When asked to give protection of some kind to cohabitation outside marriage, the courts have often acted on the view that a relief of the kind available

to those cohabiting within the marriage institutions ought to be given if the nature of the cohabitation is such that expectations and mental states identical to those found amongst spouses exist. This has been the case in both civil and criminal cases.

In criminal cases, the defence of provocation has been extended to those cohabiting outside marriage. In civil cases the English common law presumption of a valid marriage which is raised where prolonged cohabitation is found has been extended to the customary and Islamic marriage laws. It has been held that it is known to both where the court knows of the existence of a customary marriage elopment and where it does not, a cohabitation outside marriage has been upheld as a valid customary marriage.

In those cases where a cohabitation is the second one for one of the parties whose family life affects many lives of others, the courts have upheld it by recognising divorce by conduct or by the operation of the law. Divorce by operation of the law is unknown to the marriage laws in force the state.

Although the courts have gone a long way to protecting the cohabitation outside marriage which serves identical purposes to the ones served by the marriage, the courts have neither gone far enough nor done so consistently. The criminal law offence of bigamy should be done away with. The privileges given to spouses by the law of evidence should be extended to those cohabiting outside marriage. Adultery should not be an offence, instead compensation should be granted to those wronged. In civil law such reliefs as rights to maintanance and inheritance which have origin in cohabitations outside marriage should be granted. There should be no strict adherence to rules that are absolete.

The present writer urges that the cohabitation outside marriage be treated in all respects like a marriage unless exceptional circumstances that demand a different result, exist. There should be no uncertainity in the various legal techniques used to solve problems of cohabitation outside marriage. If the courts did the latter then they will only be recognising and doing openly and consistently what hitherto they had been doing secretly and haphazardly.

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