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DEDICATION

To my parents, Alex and Margaret Kang'ethe,
for their love, encouragement and sacrifice.

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A C K N O W L E D G E M E N T

I would like to express my gratitude to Mr. Pheroze Nowrojee who supervised my work and gave me invaluable assistance. Thanks also go to my friends with whom I shared the good and the bad. Finally, to my sister Pauline, for her constant thoughtfulness.

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C O N T E N T S

Page:

INTRODUCTION I

CHAPTER ONE: THE CONCEPT OF LEGITIMACY

1.1 Historical Background 4

1.2 Significance of Illegitimacy , 6 -

1.2.1 Meaning of Legitimacy 6

1.2.2 Meaning of Illegitimacy , 7 -

1.2.3 Significance of Status , 7

1.3 Origins and Development of Legitimacy
in English Law 8

1.4 Law of Legitimacy in Kenya 9

1.4.1 The Legitimacy Ordinance, 9

1.4.2 To whom does the Act Apply? 10

1.5 Remarks 13

CHAPTER TWO:

THE WELFARE OF ILLEGITIMATE CHILDREN

PART I:

2.1 Introduction 16

2.1.1 Definition of "Child" and Its Consequences 17

2.1.2 Law of Succession Act, Cap. 160 18

2.1.3 Pensions Act, Cap. 189 , 21

2.1.4 Workmen's Compensation Act, Cap. 236 22

2.1.5 National Social Security Fund Act, Cap. 258 23

2.1.6 Law on the Employment of Children , 24

2.1.7 Children & Young Persons Act, Cap. 141

And General Remarks 28

PART II:

2.2. Recapitulation 34

2.2.1 Maintenance Under Customary Law 35 -

2.2.2 Matrimonial Causes Act, Cap. 156 38

2.2.3 Subordinate Courts (Separation &
Maintenance) Act, Cap. 153 40

2.2.4 Pregnancy Compensation 42 -

2.2.5 Actions for Breach of Promise to Marry , 45 -

2.2.6 Affiliation Law , 48

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CHAPTER FOUR:		Page:
3.0	COMPARATIVE ANALYSIS AND RECOMENDATIONS	59
	Detailed Recommendations	
3.1	Private Maintenance	62
3.2	Establishment of Paternity,	63
3.3	Acknowledgement	63
3.4	Guardianship, Custody, Access & Consent to Adoption,	64
3.5	American Law Relating to Illegitimate Children	64
3.6	Marriage and the Parent-Child Relationship	67
CHAPTER FOUR:		
4.0	ILLEGITIMACY IN THE SOCIO-ECONOMIC CONTEXT	70
4.1	Social-Legal Significance of Illegitimacy,	71
4.2	Planning Policy and Ideology	73
FOOTNOTES:	80
SELECT BIBLIOGRAPHY FOR FURTHER READING	88

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LIST OF ABBREVIATIONS

BOOKS AND PERIODICALS

- E.A.L.J. - East African Law Journal
E.A.L.R. - East African Law Review
J.A.L. - Journal of African Law
LegCo Debates - Legislative Council Debates

CASES:

- E.A. - East African Law Reports
E.A.C.A. - East African Court of Appeal
Ch. - Chancery
D.M.C. - District Magistrates Court
G.L.R. - Ghana Law Reports
H.C.C.C. - High Court Civil Case
K.B. - King's Bench
K.L.R. - Kenya Law Reports
Q.B. - Queen's Bench
T.L.R. - Tanganyika Law Reports
U.S. - United States Supreme Court

STATUTES

- C.O.K. - Constitution of Kenya

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1. Adoption Act, Cap. 143.
2. Affiliation Act, Cap. 142.
3. Affiliation (Repeal) Act, Cap. No. 11 of 1969.
4. African Christian Marriage & Divorce Act, Cap. 151.
5. Children & Young Persons Act, Cap. 141.
6. Constitution of Kenya, 1969.
7. Contract Act, Cap. 23.
8. Employment Act, Cap. 226.
9. Evidence Act, Cap. 80.
10. Guardianship of Infants Act, Cap. 144.
11. Hindu Marriage & Divorce Act, Cap. 157.
12. Income Tax Act, No. 16 of 1973.
13. Indian Succession Act, of 1865.
14. Judicature Act, Cap. 8.
15. Legitimacy Act, Cap. 145.
16. Magistrates Courts Act, Cap. 10.
17. Marriage Act, Cap. 150,
18. Matrimonial Causes Act, Cap. 152.
19. Mohammedan Marriage, Divorce & Succession Act, Cap. 156.
20. National Social Security Fund Act, Cap. 258.
21. Penal Code, Cap. 63.
22. Pharmaceuticals & Poisons Act, Cap. 244.
23. Public Health Act, Cap. 242.
24. Pensions Act, Cap. 189
25. Registered Land Act, Cap. 300.
26. Subordinate Courts (Separation & Maintenance) Act, Cap. 153.
27. Succession Act, Cap. 160.
28. Traffic Act, Cap. 403.
29. Workmen's Compensation Act, Cap. 236.

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1. A-G. v. S.N. Punja [1961] E.A. 652.
2. B.A. Shah v Commissioner of Income Tax [1961] E.A. 279.
3. Bazmi v Sultana [1960] E.A. 801.
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6. Esiroyo v Esiroyo [1973] E.A. 388.
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8. Gomez v Perez 409 U.S. 535.
9. Irungu Macharia v Ngugi Waithiru DMC Nanyuki.
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10. Karanu v Karanu [1975] E.A. 18.
11. Levy v Louisiana 391 U.S. 68.
12. Mathai v Mathai H.C.C.C. Nairobi, 1977 (unreported).
13. Mehar Singh Bansel v R [1959] E.A. 813.
14. Miriam Charo d/o Matano v D.N. Mwangangi. RMC Nanyuki
Civil Case No. 24 of 1980 (unreported).
15. Muinde v Muinde H.C.C.C. Nairobi No. 64 of 1979.
16. Obiero v Opiyo [1972] E.A. 227.
17. Parmuah v Montet H.C.C.C. Nairobi No. 3785 of 1979
(unreported).
18. Preston-Jones v Preston-Jones [1951] A.C. 391.
19. R.V. Bourne [1939] I K.B. 687.
20. R.V. Fundhi & Another 8 E.A.L.R. 117.
21. R.V. Robert Mutegi RMC Nanyuki Criminal Case No. 313
of 1982 (unreported).
22. Re Lowe [1929] 2 Ch. 210.
23. Rex v Amkey [1917] KLR 14.
24. Singh v Singh 13 E.A.C.A. 18.
25. Stanley Gakiri v Jacob Mwaliko DMC Nanyuki
Civil Case No. 59 of 1977 (unreported).
26. Weber v Aetna Casualty & Surety Co. 406 U.S. 164.

I N T R O D U C T I O N

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The thesis we advance in this paper revolves around the fact that, in our view, the status of illegitimacy is archaic and serves no useful purpose in our society today. All it does is to relegate innocent children to an inferior status. Its historical origins are no-longer rational and it derogates from the basic principle of justice in that it paradoxically punishes the victim rather than the perpetrators of what has long been regarded as an injury to upright society.

The illegitimate child in Kenya is made aware of the fact that he was born out of wedlock in every conceivable way. Through no fault of his own he becomes a social pariah and is psychologically warped by the very laws which should give him the fair start in life he requires being already deprived the security of a stable family life.

At present the condition frustrates rather than facilitates overall national development. This is because the state of material deprivation that characterises most cases of illegitimacy is prolific of crimes whose solution draws heavily on the national budget.

This condition begs the question as to what law ought to do for the men whose conduct it governs, in particular for Kenyans of the current era? This involves a re-examination of the working of the concept of justice, that is, the justice of an individual law or of the legal system as a whole. There is no all embracing answer to this question, and we must accept a relative answer. The relativity of justice is conditioned by the time and place. If justice is the goodness or fairness as opposed to badness or unfairness, the criteria for such an evaluation is internal to the law itself and of necessity partakes of an ethical or political philosophy.

But there are those who believe that there is a standard of justice or morality or justice to which all law must conform to be good law.⁽¹⁾ Their argument is that there is difficulty in the application of this standard of justice to a variety of situations. But as Kelsen has shown absolute justice is an illusion.⁽²⁾

2

It never exists save in the mind of the person evaluating the relative merits or demerits of a rule of law or a course of action. Theoretically therefore, law reform like all legal sciences should be aimed at the art of conducting man to the maximum of happiness and to the minimum of misery, if a mathematical expression may be applied to the good and evil of life. It is agreed that law ought to be the instrument of fulfilling the human purposes, to serve the conditions of social life.

Our thesis is going to be that the most appropriate way of solving the present problem is to strike out the whole concept of illegitimacy, and then to restructure both the laws relating to children and the economic development priorities of the Government. Thus in the first chapter, we shall examine the history of legislation which theoretically ought to be covenants between free men. We shall question whether these have been anything more than instruments of passions of a clique or a result of accumulated and temporal necessity. In most cases legislation has never been the result of an unimpassioned student of human nature who has concentrated on the actions and interrelations of a multitude of men from the point of view that legislation should be aimed at producing the greatest happiness for the greatest number of citizens.

In the second chapter, to test the argument further, we shall examine the key legislations under the following sub-themes:-

- (i) background to the Act and the coverage envisaged therein;
- (ii) how effective or otherwise the statute is and its effect on the problem and what changes should be introduced towards that end;
- (iii) need for proper harmonization of the statute with other laws if the best results are to be achieved.

The underlying reasoning here is that what law ought to accomplish must be measured against what law can accomplish. Law should not be used where it is not the appropriate instrument of social change when other more effective means may be resorted to. It is to be borne in mind that this highly specialised instrument of regulating conduct if misused, may in the future lead to disrespect of the law.

Chapter three offers a comparative analysis of the Kenyan situation with the great progress that has been achieved in other legal systems. The fact that inter-communication in the area of study is indispensable is emphasised throughout but this does not mean duplication. Various recommendations are made, deriving from detailed comparison. Once again it is stressed that there is no easy way out, any solutions must be specifically designed to suit the unique intricacies of a world-wide problem in the Kenyan context.

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In chapter four we shall examine the government development policy as being the regulating influence of all the contributories to the deprivation that usually results from illegitimacy. Since human social conditions and men's actual purposes and aims, their tendencies and desires at a particular time, the dominance of one purpose over others do determine the content and context of justice, it is necessary to keep track of the prevailing social conditions as opposed to the line that economic development has taken. This will be discerned from press reports and research that has been undertaken on the topic. In order to know what is just law and unjust law, we must look at the society and check what it regards as its ideals and use these ideals to evaluate any rule of law proposed or actual.

Most of the law reform that has taken place in Kenya has tended to be based on a trial and error method, which is unscientific. Optimum reform in the present area of study will only be achieved if evaluations are based on facts which although based on ideals are yet identifiable by reference to sociologically collected data. This paper hopes to facilitate further research, presenting a compilation of the existing law affecting children, as very little work has been done towards this effort in the past. It is an appeal to the newly established Law Reform Commission to consider the law relating to illegitimacy as an area that needs urgent consideration.

Finally, this study is our modest contribution to all the innocent young children for whom the plight of illegitimacy is very real.

CHAPTER ONE

THE CONCEPT OF LEGITIMACY

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I: I Historical Background

Independent Kenya is facing the urgent task of reforming and modernising her system of laws. During the colonial era little effort was made to harmonise the various systems of laws which existed side by side with the received English laws. The High Court and Magistrates' Courts were responsible for administering English law while customary law was the exclusive field of the African Courts. The effect of this dual system was to temper the conflict which would inevitably arise, as well as to retard efforts at harmonisation.

After independence, rapid social and economic changes have occurred. The clash between different cultures has produced uncertainty and lack of direction in the people, who cannot reconcile their raison d'etre with the contents of the laws that govern and mould them. It is only when the laws of a society genuinely reflect and serve the values and ideals of that society that there will be stable social development. The Magistrates Courts Act of 1967¹ for instance, which abolished the dual court system was a remarkable response to the need for law reform.

Immediately after independence, the government embarked on a great feat popularly called "the task of nation-building"². The failure to look at the question of unification of the law critically before embarking on the task is the reason why far-reaching repercussions of the initial trend in legal developments proceeded on the same premise as the colonisers whose main aim, it must be conceded, was to make Kenya Colony an appendage of the international capitalist community. Kenya was to be moulded into a reservoir of raw-materials and a cheap labour force and eventually, a ready market for the manufactured goods of the mother-country, Britain. Laws were applied primarily to achieve these goals. The Swynnerton Plan of 1955(3) for instance, was enforced in order to change the system of land tenure which had hitherto been communal, to an individual basis of ownership. This was in keeping with the capitalistic mode of production which thrives best on competition between private owners of the means of production. This could not have been possible in a communal society.

The African now has a title-deed to his land. This enabled him to get loans of money with which to develop the land. He could also sell the land easily to settlers and thus obtain ^{money} to buy manufactured goods such as radios, clothes and bicycles. The inappropriateness of such a trend was reflected in several judicial decisions where it was generally held that a father could disinherit his sons(4), or that a co-wife could evict the other wives and children ^{from} their deceased husband's land(5).

The need to evolve one family law system to cater for a plural society in Kenya, was considered to be of less importance in the task of nationalisation which favoured Africanisation of all sectors of the economy as deserving priority. The four systems of family law, each appertaining to a different sociological community still exist side by side. The expression "sociological community" is used here because it is the sociological test as opposed to an ethnic one which is used in determining who belongs to a particular community for the purposes of personal law(6). These sociological communities with different marriage and inheritance(7) laws which are equally protected by the supreme law(8) are Africans, Moslems, Hindus and Europeans. The English has noticeably been regarded as superior to all others as seen in various courts decisions which we shall consider later. Each system is deeply entrenched in the particular community with rich cultural values. It is in this area of application that a lot of confusion has arisen. The general trend is the increasing adoption of western laws and values in a society which is still in the throes of neo-colonialism. In looking at the merits of a system, one is informed by his own background, and in Africa the European racialists characterization of African institutions as primitive has had great impact on the mind of the African: hence the discarding of customary laws and the accelerated application of foreign laws to the Kenyan infrastructure. The common law which is applied in common law systems has remained strong because it is adapted to new situations as they arise(9). Equally, African customary law is capable of meeting any challenge if given the chance and the necessary infrastructure. So far however, the trend has been to run to common law and English statutes for solutions which are likely to fail as they have failed there

It is against such a background that we shall study the position of the illegitimate child in Kenya, solutions such as the Affiliation Act,(10) which have failed, existing ones such as customary pregnancy compensation, all the Acts governing the welfare of children and the government's economic development policy which reflects the underlying ideology(11).

I:2 The Significance of Illegitimacy

Strictly speaking, illegitimacy is not a status at all: illegitimate children are those to whom the law denies the status of legitimacy. A child is legitimate at common law if his parents were married to one another either at the time of his conception or that of his birth. In view of this, a comparative and analytical study of legitimacy as between the English received law and the one obtaining in customary law is appropriate.

We shall start on the premise that the concept of illegitimacy existing under customary law is not much of a handicap and that the one obtaining in English law is gradually evolving toward the customary law position.

I:2:I Meaning of Legitimacy

Legitimacy(12) is defined as the state of being lawfully begotten, having full filial rights and obligations by birth, or as accordant with established legal requirements. This is the wider meaning. In family law, it is confined to the child born of a married woman during the subsistence of a valid marriage(13). The Legitimacy Act of Kenya(14) does not offer a definition, so we have to look to the common law of England. At common law it was not necessary that a child be conceived and born during wedlock. The question was determined solely by the existence of a valid marriage between his parents, either at the time of conception or of birth. Legitimacy was a question of fact. Thus a child could be legitimate if conceived during the marriage even though the marriage was terminated before his birth. He was also legitimate if his parents were married when he was born even though he must have been conceived before their marriage(15). This undeniably falls short of the standard of morality set by the Christian faith which abhors pre-marital sex.

There was a presumption at common law that a child born within the proper gestation period after the dissolution of marriage by death or otherwise was legitimate(16).

The conditions of presumption were that the parents had had access to each other and that the father did not suffer impotence at the time. Judicial notice was taken of the fact that the normal gestation period is not always the rule in real life situations, thus extending the presumption of legitimacy to more cases(17). That was the common law position.

By virtue of the reception clause in the 1897 East Africa Order-in-Council, the concept of legitimacy was brought to Kenya. Legitimacy in Kenya therefore means the same thing as in common law. Strictly, the rule only governs those who have contracted marriages either under the Marriage Act(18) or the African Christian Marriage and Divorce Act(19). Customary Mohammedan and Hindu family law systems have their own concepts. In Mohammedan law for instance, the child must be conceived during wedlock in order to be deemed legitimate.

I:2:2: Meaning of Illegitimacy:

In England, under common law, an illegitimate child was considered as "filius nullius" (^{child}son of no-one) or as "filius populi" (^{child}son of the people). Consequently none of the legal rights and duties which flowed from the relationship of parent and legitimate child was accorded to him or to his parents.

I:2:3 Significance of Status:

The role of individuals in society depends upon their place in that society. The individual's place is determined by his status therein. As a matter of legal theory, only after determining status can we then assess the extent of his rights and duties, the range of social activities in which he can participate and his opportunities. Status is defined as "the condition of a person or thing in the eyes of the law, position or rank in relation to others or in a hierarchy of prestige"(20). Status may thus arise from a variety of conditions such as sex, minority or marriage. The law of legitimacy deals with the status of children, inter se, as well as in society generally.

Under the various systems of our laws legitimate children are accorded certain legal rights and duties distinct from those of illegitimate children. These are in the field of inheritance, maintenance or claims in tort. It is therefore the privileges of status attached to legitimacy and the disabilities and incapacities that accrue from illegitimacy that give significance to one's status, in this respect.

1:3 Origins and Development of Legitimacy in English law:

Lord Devlin has remarked that morality and religion are inextricably bound and that moral codes can only claim validity by virtue of the religion on which they are based(21). This is in reference to English Laws, values and morals which have been greatly influenced by Christianity which is dominant. It teaches against pre- and extra-marital sex. This is in order to promote and protect family life, the institution of marriage, and to avoid problems arising from broken homes. This objective was given legal recognition with the introduction of rules regarding legitimacy. Illegitimacy was condemned by both Church and State, and this recognition was meant as a deterrent measure.

In its early stages common law had it that a child born out of lawful wedlock was illegitimate and could not be legitimated by the subsequent marriage of his parents. Legitimation was only possible by a special Act of Parliament. These rules were undeniably harsh.

Until the 16th century, the maintenance of an illegitimate child was assumed by the parish in which he was born. An Act was passed in 1576 to shift the burden to the mother and putative father of the child. In default of payment of the maintenance dues, the parties responsible could be imprisoned. The poor Law of 1601 re-enacted, inter alia, the provisions of the 1576 Act. For over 300 years, the law of Legitimacy in England remained unchanged. The 1926 Legitimacy Act brought a remarkable change. It provided for legitimation by the subsequent marriage of an illegitimate child's parents(22). This provision applied only to those children whose fathers were domiciled in England and Wales at the time of the marriage, the reason being that in England the child's status is determined by the law of his father's domicile.

By the mid - 20th century, the support of the illegitimate child was primarily the mother's duty and consequently she was the child's custodian. Rights of intestate inheritance existed between the two. The relationship between the mother and her illegitimate child resembled that between a mother and her legitimate child. The Legal ties between the putative father and the illegitimate child were few. The father had conditional rights of custody and limited responsibility for the child's support. In 1959 the benefits of the 1926 Act were expanded.

The new Act provided for the legitimation of the child by the subsequent marriage of his parents where this had been impossible because one of the parents was already married(23). The general trend in the development of this law has been towards narrowing the gap between legitimate and illegitimate children by a very slow process. The Matrimonial Causes Act, 1965(24) preserves the legitimacy of children of parties to a voidable marriage which is subsequently annulled, despite the rule that once a voidable marriage is annulled, it is deemed in law never to have existed at all. Thus the rigidity of the common law was slackened diminishing the concept of legitimacy towards the legal recognition of ex-nuptial children as in our customary law.

1:4 The Law of Legitimacy in Kenya:

The English law of legitimacy first came to Kenya on 12th August, 1897(25), when a whole body of specified English law was received in Kenya. The legitimacy law received was the harsh and rigid pre- 1926 law. In 1930 an amendment was made to our 1926 Ordinance in order to incorporate the changes brought about in England by their 1930 Act. Thus, the Kenya Legitimacy Ordinance was enacted(26).

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The pressing need to change legitimacy laws in Kenya was noted by the Attorney-General in 1930:

"It has always been a source of amazement to me that it was only in the year 1926 that England, with its great tradition of equity and fairness saw it fit to make legislative provision for illegitimate children"(27).

With minor modifications the 1930 Act is still the law applicable in Kenya today, with its inherited notions of legitimacy and shortcomings due to the need to suppress adultery at the expense of the issue of such illicit unions.

1:4: 1: The Legitimacy Ordinance:

This came into force on 10th June, 1930. It contains merely procedural rules. One must therefore turn to common law in order to establish the substantive rules. The major part deals with matters of legitimation, and the rest with its consequences. S.3 (1) is the nucleus of the Act. It deals with provision for legitimation of a child by the subsequent marriage of his parents. The lack of thoroughness on the part of our legislators is noted in the superficiality of the Act which is a mere reproduction of the earlier English one.

It goes to confirm the A-G's assertion that he was introducing a measure concluded in England and adopted by most colonies(28). The Act was passed virtually undebated for the reason that it emanated from the mother-country towards whose ideals of the philosophy of life the colonies were supposed to aspire. This trend has sadly recurred at other parliamentary debates, with inevitable repercussions on our society. Such was the case of the 1959 Affiliation Act(29) which was applied without any reconsiderations to Kenya but could not endure due to the diversity of situations from those in England for which it was specifically enacted. The Act was consequently repealed(30).

The Legitimacy Act provides for the recognition of a person by extraneous law thus conceding the concept of legitimation in jurisdictions other than those in the common law world(31). S.5(1) outlines the rights of legitimated person which to all intents and purposes correspond to those of a child born legitimate. S.8 provides that a legitimated person shall enjoy the same rights as a legitimate person in respect of maintenance, claims for damages, compensation, allowance, benefit or otherwise. Where the mother of an illegitimate child dies intestate without any legitimate issue surviving her, then the illegitimate child, or if he is dead, his issue, shall be entitled to take the interest in the mother's movable and immovable property(32). By critically analysing the correlatives of rights and duties or jural opposites(33) we can safely conclude that where the Act specifically provides for the legitimate child, the correlated disabilities or incapacities obtain for the illegitimate child. S.8, for instance allows for the succession of the illegitimate or his issue to his mother's estate only if she is not survived by any legitimate issue. Such half-measures are to be seen extensively in the law that deal with legitimacy.

I:4:2 To whom Does the Act Apply?

It can be argued that since Kenyan Family Law recognises four different systems of personal law, it must follow that four types of legitimacy are recognised, legitimacy being an aspect peculiar to a given family law system. This is not conclusive however. There was no specific reference as to whom the Act would apply when the Bill was introduced in 1930. There is all the same, a strong implication that it was meant for the English type marriage only. The A-G categorically stated that the

introduction of the Bill was a measure already concluded in England and would thus put the English type marriage in Kenya at par with the system then obtaining in England.

Hindu Position:

The Hindu Marriage and Divorce Act(34) is silent on the issue of legitimacy. In S.2 of the Act, legitimate and illegitimate persons are mentioned but only for the purpose of determining a Hindu, Bhuddist, Jain or Sikh for the purposes of the Act. From this we can deduce that the status of legitimacy and illegitimacy exists in Hindu law. As soon as a Hindu child is born it acquires certain legal rights and a legal status depending on whether it is legitimate or not. (35) Consequently the application of the Legitimacy Act is generally excluded. This is upheld by the constitutional provision allowing for the existence of discriminatory rules in matters of personal law(36).

Islamic Position:

The Mohammedan Marriage and Divorce Act, (37) provides in S.3(1) that Mohammedan marriage contracted before and after the commencement of the Act are valid and that parties thereto shall be granted relief according to Mohammedan law. To that extent therefore, the application of the Legitimacy Act is excluded. The decision in Bazmi V Sultana (38) renders this position unclear. The Court of Appeal for Eastern Africa considered the question of the guardianship of an infant in a Mohammedan marriage; the Guardianship of Infants Act(39) was applied to this infant in the same way as it would have applied to the child of an English marriage.

It was held consequently, that under S.17, the welfare of the child and not the rights under Mohammedan law of either parent, was the paramount consideration in determining the question of custody. This reflects the tendency of the courts to assume the supremacy of English law over the other three systems.

African Customary Position:

There is no single legislation directly and solely concerned with marriages under this head. African customary marriages have undergone some appreciable degree of jurisprudential battery both during and after colonial administration.

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This negative opinion was expressed aptly by the late Chief Justice Hamilton when he said that he did

".....not think that it can be said that the native custom approximate in any way the legal idea of marriage"(40).

In the same spirit, there even exist express provisions in the other legislations permitting conversion or "up-grading" of these supposedly legal African customary marriages to the status of Islamic or monogamous Christian marriages(41). However, the legality of African customary law marriages is recognised by the Judicature Act, (42) which provides in S.3(2) that the courts in Kenya in determining disputes before them:

"shall be guided by African customary law in civil cases in which one or more of the parties is subject to it..... so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law....."

This conditional recognition of African customary law is of a general nature, and is assumed to cover marriage, divorce, and other personal laws.

The constitution which, in theory at least embodies the highest legal norms and standards in the state to which all laws must conform provides general recognition to customary laws(43). However, within the same section, it allows for the promulgation of discriminatory laws with respect to "adoption, marriage, divorce..... or other matters of personal laws", while differential laws may be proper in certain areas in a plural society such as obtains in Kenya, such a provision may also permit prejudicial categorisation of legal standards as the ones to be found in the provisions of the Judicature Act which we have just considered, which in effect render African customary law which is unwritten, subordinate to all other systems.

The Magistrates Court Act of 1967(44) offers a more specific and relevant recognition of customary law. A claim under customary law is said to include:

- "(a)
- (b) Marriage, divorce, maintenance or dowry;
- (c) Seduction or pregnancy of an unmarried woman or girl;
- (d)
- (e) Matters affecting status, and in particular the status of women, widows and children, including guardianship, custody, adoption and Legitimacy:

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(f) Succession

The Evidence Act of 1963 section 130(2) (45) provides that a marriage is recognisable:

"whether or not monogamous, which is by law binding during the lifetime of both parties unless dissolved according to law, and includes a marriage under native or tribal custom".

Another statute, the Marriage Act (46) also recognises the legality of African customary marriage. This is however made superfluous since S.35(1) and S.11(d) permit conversion of marriages contracted under customary law and Islamic law respectively, to the monogamous Christian cum civil type. We have already seen that a similar provision obtains for the conversion of African customary marriages into the Islamic form.

The African customary law type occupies the lowest rank inspite of the fact that it governs the largest part of the Kenyan population.

Remarks:

This general over-view of the foundations and background of our legal system reveals certain important issues in respect of our thesis, that the child in particular the ex-nuptial child is not accorded as much protection by the law as he ought to have. We saw that the trend in legal development is that emphasis is put on economic aspects and any change in other aspects of life, especially in the colonial era, have been made only in so far as they affected immediate economic development. It is safe to conclude that it is the social segregation of the colonial set-up, that has left us with the legacy of a family law system characterised by procedural complexities revolving around the institution of marriage, and the devolution of property. These two aspects have always been regarded as meriting the greatest judicial and legislative attention, in personal law, as evidenced in the large numbers of the society in order to maintain the feeling of liberty and unity which augurs well for faster economic development.

Whereas the procedural aspects of marriage and devolution of property for each of the sociological communities are adequately covered legally, the fact that such a recognition was geared only at maintaining harmony during the colonial era is shown by the

inadequacy of the recognition accorded to the personal law aspect of the welfare of children. Contradictions and inconsistencies exist in this respect. This is largely attributed to the very fact of the existence of four family law systems where emphasis lies in the equal protection of the different ways of life and the freedom to express it through marriage and succession rights.

Consequently whereas the law regarding marriage and devolution of property is explicit, our system has failed to provide adequately for those who have not been able to stand up for their own rights. The actions of the adult members of society are well regulated but this is not the case as regards their effect on children.

Where the adults choose to express their freedom in the way that is not contemplated by the laws, they may be punished for their wrongs but little regard is had to the consequences that may be attached. Such is the case of children born out of unions which the law shuns but which the parties feel express their ideal in life. It is the issues of such unions rather than the parties themselves that the law penalises.

The problem of illegitimacy could also be attributed to the fact that legal development has not kept up with socio-economic change. Our nation can be said to be at the vulnerable adolescent stage.

Urbanisation, a high population growth rate, and the disintegration of the traditional close-knit family counter-balance diminishing economic resources. The "civilising mission" of our colonisers has left in our laps unprecedented problems which are inevitable in the transition from communalism to capitalism.

Hitherto, legal development has taken the form of adopting laws enacted specifically for the conditions obtaining in England, which is a welfare state. Although the intentions of the legislature are good, there is a lack of precision and consistency in the nature and extent of recognition of problems peculiar to our situation.

The plight of the child born out of wedlock is recognised but the magnitude of the problem, which is evident in everyday life, is not reflected legally. The provisions that exist are scanty. Superficial reforms such as the repeal of the Affiliation Act have left a gaping chasm between the reality and the law. This calls

for a re-examination of our present condition and the need to maintain an equilibrium between industrialiation on one hand and the retention of our traditional institutions on the other, so that the present day scourge of illegitimacy may be accommodated with the best solutions from both systems.

In the following chapter, we shall look at the specific instances where the law attempts to bridge the gap between legitimacy and illegitimacy.

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CHAPTER TWOPART ONETHE WELFARE OF ILLEGITIMATE CHILDREN2:1 Introduction

In this chapter, we shall look at certain specific problems arising out of illegitimacy. There are certain preliminary points we must bear in mind. It is not any child's choice to come into this world nor to belong to a set of particular parents or home. Nevertheless, the social status of his parents will almost certainly determine his destiny, whether he will get the basic necessities of life and a strong moral upbringing, or even the basic education. These things will help him set out in life as an up-right citizen. Some children are disadvantaged right from the start either because their parents' marriage makes them illegitimate, or because their parents were born poor, and died poor.

Modern scientific developments in the field of medicine have greatly reduced the infant mortality rate. Ante-natal clinics and Maternal and Child Health Centres, including mobile clinics are easily available for all. Society therefore forces the child to live irrespective of the quality of life. Society goes further to expect the abandoned, the destitute, the illiterate and the educated, well-nurtured children to conform to the same models of behaviour. For instance, when a child from a middle class family pick-pockets and another one who grew up as a "parking boy" does the same, they are both criminals and may get a similar punishment when taken to court. The respective parents and society go scot free.

The question arises as to why the destitute child whose living conditions have forced him to steal does not take his parents or society to court for subjecting him to such conditions of depravity. The situation is that the law has not made the child's rights explicit, which means that he has scanty protection from the society which he has joined without his prior consent. The fact of his being alive without anybody to take care of him is a controversial issue which we shall look at subsequently. What happens to such a child once he has been born is the responsibility of his parents as well as society, in as much as the latter orders the lives of all its members.

We shall see that society has drawn a distinction in the class of children by a criterion which is ill-founded and therefore causes injustice. The instances where those children who are denied full status as human beings, are accorded legal protection greatly derive from this categorisation, their welfare being almost totally determined by the status of their parents who may also be unfavoured by the social economic system.

2:1:1: The Definition of "Child" and its Consequences

Different definitions of "Child" are given in our statutory law depending on the purposes for which the particular statute is enacted. The Children And Young Persons Act, Cap. 141 is intended for the protection and discipline of children, juveniles and young persons and for matters incidental thereto. It goes on to define a child as any person under the age of 14 years.

The Adoption Act, Cap. 143 which is intended to make provision for the means by which a child can be adopted, defines a child as any person under the age of 21 years. The same definition is contained in the Guardianship of Infants Act, Cap. 144. The Matrimonial Causes Act Cap. 152, intended to provide for the maintenance and care of the child defines him as any person under the age of 16 years in the case of African males, and 13 years for African females. All these Acts are intended for the protection of the child but their different definitions could give rise to hardship. It is difficult to tell who is protected by which law since the legislature has not seen it fit to make a uniform definition.

The Court has power to give orders for the protection and discipline of a person under 14 years but it appears that the measure contemplated by the Children and Young Persons Act cannot be extended to cover any child over that age even though he may need it. Yet, the Matrimonial Causes Act extends its provisions to persons over that age. We should note here that it is the former Act rather than the latter which has move to do with illegitimate children. Again, while a person under 21 years can be adopted he cannot be made the subject of a disipline or protection order.

The practical implications of these varying definitions have surfaced in various court decisions. In the case of B.A. Shah v Commissioner of Income Tax (1) a wider definition was urged: that a "child (2) should be construed as any person for whom the tax payer has moral and financial responsibility rather than limit the term to only those with a particular relationship to the taxpayer.

A narrower definition was adopted in the case of A-G V.S.N. Punja (3) where it was held that the word "children" in a statute prima facie means natural children and that before extending the meaning in immigration laws to include adopted children it would be necessary to consider whether the apparent objects of the legislation would be better served by so doing. The effect of such an attitude would be to create an extra burden on adoptive parents, thus discouraging other good intentioned people. The interpretation of the word "child" in various statutes is therefore very significant as it draws the distinction between who may benefit from a particular Act, and who may not.

2:1:2 The Law of Succession Act, Cap. 160

This is an Act to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of the estates of deceased persons, and purposes incidental thereto. S. 5 states the capacity required for a person to be capable of making a will. The person must not be a minor, he must be of sound mind and this includes females who may be married or unmarried. S. 26 empowers the court on the application of the dependant, to order reasonable provision to be made if it is of the opinion that reasonable provision was not made for him initially. S. 29 defines "dependant" to mean:-

- (a) wife or wives or former wives and children of the deceased whether or not maintained by him immediately prior to his death.
- (b) such of the deceased's parents, step-parents, grandparents, grand children, children whom the deceased had taken into his family as his own....,
- (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

Although this definition is wide enough to encompass the extended African family, it does not expressly provide for illegitimate children. Ambiguity should have been avoided by qualifying the word "children" in (b) above, with the phrase "whether such children were legitimate or illegitimate". The section does not consider the egalitarianism on which customary law is based, which demands that the better off members of the family give aid to the rest.

This is an informal mutual assistance which increases the scope of dependants even though the deceased had not "taken (them) into his family as his own". It is unlikely that the non-African judge will understand this sense of dependency hence the deprivation of family members among whom there may be illegitimate children. As it stands, the section also seems to require that the illegitimate child should prove prior maintenance by the deceased.

S. 20 of the first schedule to the Act provides that "when the term 'child' occurs in a will, it is construed to include an illegitimate child, unless a contrary intention occurs". A similar rule now applies in England by virtue of S. 15 of the Family Law Reform Act. This rule of construction occurs both in the original Bill and in the Act. However, the definition of 'child' in the main body of the original Bill raises problems. Under this, an illegitimate child ranked equally with a legitimate child for the purposes of intestate succession where:-

- (a) the father had taken him into his family as his own;
- (b) the father had expressly recognised the child as his;
- (c) where the court had made an affiliation order against the father;
- (d) where it was otherwise shown that he was the child of the father on a balance of probabilities.

The Affiliation Act, Cap. 142 had been repealed before the Bill was tabled, and Members' criticisms were mainly levelled at the provision allowing a person, who succeeded in proving that he was the deceased's child on a balance of probabilities, to claim the same inheritance as a legitimate child. The Bill was withdrawn for amendment after a series of uproarious sessions. (4)

As it stands today, S. 3 (2) of the Act provides that an illegitimate child does not take on his father's intestacy unless the father had expressly recognised or in fact accepted him as his child in his lifetime, or voluntarily assumed responsibility for him. The position was clear in the original Bill - whereas the legitimate child did not have to prove prior maintenance by the deceased, the illegitimate child had a heavy task. The position is now confused after re-drafting. The word 'child' is defined to mean:-

"any child expressly recognised, or in fact accepted by the father as his own, and any child for whom the father has in

Yet, per S. 29 (b) an illegitimate child must prove prior maintenance. Such ambiguity is undesirable. Reconciliation of these provisions can be attained by the insertion of the words "subject to S. 29" at the beginning of S. 3 (2). (6)

The only sure way of ascertaining paternity was by the procedures laid down in the Affiliation Act. Since its repeal in 1969, no other procedure exists. Due to frailty of human nature, which makes people shun their responsibilities, illegitimate children need protection. This could be achieved to a large extent if the Succession Act provided a procedure for acknowledgement where it states that such a relationship must be proved before the illegitimate child has a cause of action.

It can also be argued that this Act seeks to introduce a new concept of the philosophy of life to the Kenyan people. A society's philosophy of life seeks to enable all people in the community to realise their aspirations in life, while at the same time maintaining law and order. The different sociological communities were unified in this Act as regards inheritance. At the same time the Act has introduced a system of freedom of contract qualified with obligations to others - the testator is denied liberty to disinherit close relatives whom the legislature calls dependants. (7)

Prior to this Kenya had the extreme form of the laissez-faire doctrine originating from 19th century England embodied in our inheritance law most of which was to be found in the Indian Succession Act of 1865. This had been modified during the stage in English development when the curtailment of man's liberty by feudalism, the divine right of the King, and the brand of Christianity then in force led men to clamour for the extreme form of liberty. (8) When it was discovered in the 20th Century that such liberty caused injustices, the legislature and courts started to curb it in order to protect the economically weaker people.

One aspect of our inheritance law that has not been ameliorated by the Succession Act is the one related to equality of property. The assumption is that everyone has property to dispose of, whereas in reality free enterprise has created a situation where certain people have no property at all. The supply and demand rules of our capitalist economy expect such a situation to occur deliberately as a means of providing men with an incentive to

It must be conceded that this is a fallacy when people do not have an equal start in life. It may be likened to the fallacy of providing "free" education to all when in fact nothing is done to improve their conditions of living so that they may make good use of that opportunity. Tension is created at the theoretical level between the need to maintain life which the value for liberty opposes, and the need to give maximum liberty by keeping state intervention at the minimum. Such an ideal takes out of the law of inheritance those who do not own property. Their children too are taken out of its operation by the same condition of the poverty of their parents.

The fact that such people have not been given a chance to own property is discrimination as per Chapter V of the Constitution which provides that every one has a right to life and the means to support it.

There are two possible solutions to this problem. Firstly, society could be ordered in a manner that ensures that everyone can own property. Secondly, welfare legislation could be enacted to enable those who do not inherit to get assistance from the State, which enables them to maintain a decent standard of living.

2:1:3 The Pensions Act, Cap 189

This is an Act of Parliament to provide for the regulation of gratuities and other allowances in respect of civil servants. For our purposes S.17, which provides for pension to dependants when an officer is killed on duty, is relevant. Among other things the section provides that pensions shall be granted to the children of the deceased officer. S.17 (3) defines 'child' to include

"a step-child or illegitimate child born before the date of injury and wholly or mainly dependent upon the deceased officer for support."

The consideration given to illegitimate children is very limited. It clearly excludes children who may have been conceived but not yet born at the time of injury. The issue of dependancy is heavily qualified so that, as we have argued in respect of the Law of Succession Act, the informal mutual assistance prevailing in the African extended family is not

recognised. The provision will be unfair to children who might be staying with other relatives and are therefore not wholly or mainly dependent on the deceased officer.

Self-preservation on the part of the Government is seen where the same section provides that where the deceased officer's dependants have received compensation under any law relating to workmen's compensation, the section shall not apply. Double gain would help the bereaved family retain a measure of stability as they recover from the loss of their breadwinner.

2:1:4 The Workmen's Compensation Act, Cap 236

The purpose of this Act is to provide compensation to workmen for injuries sustained in the course of employment. It has a similar approach as the above Act, in so far as illegitimate children can receive compensation as dependants. "Dependants" are defined to mean:

"those members of the family of a workman who were wholly or in part, dependent upon his earnings at the time of his death, or would, but for the incapacity due to the accident have been so dependent, and where the workman being the parent or grand parent of an illegitimate child leaves such child so dependent on his earnings, or being an illegitimate child, leaves a parent or grand parent so dependent upon his earnings, shall include such an illegitimate child, or parent, or grand parent, respectively".

Provided that a person shall not be deemed to be a partial dependant of another person unless he was dependent partially on contributions from that other person in his class and position."

These provisions have the greatest emphasis on dependency we have come across so far. Dependants have been so widely construed as to be closest to the idea of mutual dependency in African customary law, which we submit is essential in an economic system based on competition and individuality where hardships deriving from it could only be alleviated by social welfare legislation. The only conceivable problem is with regard to the illegitimate child who during the deceased's

lifetime had become a vagrant, a parking boy for instance, not depending on any specific person for support. It would appear that he is not entitled to any compensation due to his defection which is due to hardships he has been exposed to, probably due to that same person's neglect in his lifetime. Once again legislation fails to provide for the already disadvantaged children.

2:1:5 The National Social Security Fund Act, Cap. 258

This Act provides for contributions and the payment of benefits out of the fund. From the interpretation section, we are able to discern whether the illegitimate child is considered. This defines "daughter" to include a step-daughter, an illegitimate daughter and an adopted daughter, adopted in any manner lawfully recognised in Kenya. This must necessarily exclude fostered children. This is because adoptions, as legally construed are still relatively new to Kenyans. It was noted by the Commission on the Law of Adoption that fostering is predominant and also that it does not create the same rights and duties between a parent and child, as people might think.

"Dependant relative" is defined to include any relative of the deceased who survives him and who inter alia, was wholly or substantially dependent on the deceased for the provision of the ordinary necessities of life suitable to a person of his station and was a relative of the deceased, being a parent, grandchild, son, daughter, grandparent, brother, sister or such other relative as may be prescribed.

"Son" includes step-son, illegitimate son and adopted son. The Act therefore recognises the existence of illegitimate children and provides certain benefits for them. These benefits however, are not absolute but are subject to certain qualifications. The Act states that the Minister concerned may order the registration of any employers and employees as compulsory members of the fund, but exempts the application of the Act to casual workers. It is clear then that the illegitimate children who benefit are those of the middle and high class workers. Without losing sight of the economic and practical limitations that might have influenced the drafter of this Act, the argument is that the Act seems to

favour the haves, rather than the have-nots. This is paradoxical in that it is the dependants of the casual workers, who may be laid off employment frequently, who really need the benefits of such a fund.

What is needed perhaps is a special legislation dealing with the practical difficulties of seasonal employment and the need to provide one's dependants constantly with the basic necessities of daily life.

2:1:6 The Law on the Employment of Children

The employment of children has a long history in Kenya. Children have always made a contribution to the total labour force available to their family. Such tasks as were assigned would be crucial in later life, and were tailored to suit their age and physique. It is the establishment of the labour system during the colonial era which triggered off child employment whose sole objective was the exploitation of their labour. Such labour was, and is harmful to children for a number of reasonsⁱⁿ that it:-

- (a) alienates them from the general education they should have;
- (b) makes greater demands on them than they can meet;
- (c) alienates them from their environment and surroundings;
- (d) exposes them to unhealthy, inhygienic living conditions;
- (e) makes them victims of physical and moral violence.

Space will not allow us to look at these reasons in detail but the general outlook of the nature of the problem will be surveyed.

In 1938, a committee was appointed to look into this problem and it found that there was a growing number of children employed in tea and coffee estates, cotton ginneries and light agricultural work.⁽¹⁰⁾ Nothing much was done towards eradicating the problem because that period was characterised by great labour demand to work in the various sectors of the economy. Inevitably, therefore, the committee played down the issue.

Instances of child labour are by no means strange to our daily lives. In 1978, it was reported that children aged between 7 and 10 years were being transported from Kisii to Meru to work in the timber industry where they were overworked and underpaid.⁽¹¹⁾

In the transport industry, the phenomenon is evident in the great incidence of "Matatu" conductors who are young school-age boys. There are also "Manambas" whose job is to solicit commuters by calling out to them to go in a particular matatu, the boys are then given a few shillings by the driver. It is well known that this is an offence under the Traffic Act, Cap. 403⁽¹²⁾ but a blind eye has been turned to the practice by those concerned. Girls end up as domestic servants in urban areas. At their place of work they are ill-treated, over worked and under paid, and may not have the much needed maternal guidance as they are exposed to town life. Most of them end up with illegitimate babies, whom they are not prepared to care for.⁽¹³⁾ They cannot afford to complain to labour officials about the inadequacies of their jobs because if they do, they face dismissal. A recent survey reveals that a house girl wakes up at 5.00 a.m. and sleeps at 11.00 p.m. She acts as an ayah for the children, cook, cleaner, gardener or field labourer whenever the need arises. For all that, she is paid less than the stipulated salary. In very rare cases is she paid in accordance with Legal Notice No.72 of 1980 on the Regulation of Wages and Conditions of Employment for domestic workers. This prescribes a minimum of Shs.456 in Nairobi and Mombasa, and slightly less in other urban centres.⁽¹⁴⁾

"The natural vent for the housemaids frustrations is your defenceless children". Numerous cases have been reported of instances where the employers children are the brunt of the house-girl's anger, and the solution is to treat the maid as part of the family. Another rather touching aspect of child-labour is that they are given tasks which are unsuitable whether due to physique or tender age. Such is the case of the 8 year old maid who was left with a baby to wash while her employer went out to work.

"The girl boiled water, told the child to sit in a basin and poured it on him. The child was scalded from head to foot. He died on the way to hospital".⁽¹⁵⁾

The mother of the child who died, rather than the maid herself, is morally responsible for what took place.

The nature of children is such that they depend on the adult members of society for both material and non-material needs. Child welfare is the most important consideration which any human society should have towards its very young.

These children are lured into employment by difficulties at home, be they financial or emotional. Their tender age and ignorance of legislated wages and conditions of employment, puts them at a disadvantage. But perhaps the most important inducement is sheer despair, especially for those belonging to single-parent families.

In rural areas such children are left in the care of aging grandparents who are unable to properly care for them. If recognised by putative fathers, they may be taken to live with step-mothers who may ill-treat them. For those whose mothers go into large scale prostitution the environment is clearly not conducive to good upbringing. Most of such children will end up as parking boys, juvenile prostitutes and other forms of delinquents. The few who can grab a job will do so and want to retain it at whatever cost.

For purposes of the Employment Act, Cap. 226 a 'child' is defined as any individual male or female under the age of 16 years. A young person is any individual between the age of 16 and 18 years. S. 25 prohibits the employment of a child in any "industrial undertaking" which includes the transport and timber industries among others. S. 28 which prohibits the employment of juveniles in industrial undertakings between the hours of 6.30 a.m. and 6.30 p.m. is flouted daily since many young boys are employed as conductors on "matatus" which are extremely busy particularly just around the hours specified.

Under S. 34, labour officers are empowered to prohibit or even cancel any contract of service entered into with a juvenile. They may also initiate proceedings by virtue of S. 50 of the Act, and take into their custody and return to the parents or guardian any child employed contrary to the provisions of the Act. It is submitted that the only justification for intervention by the State into the employment contracts entered into with infants is to protect them from any exploitation by unscrupulous adults, but not to deny the children their source of livelihood without providing an alternative.

Under S. 29, S. 28 may be waived when the public interest demands it. S. 24 has two provisions which have the effect of narrowing down even further the operation of the law in the field of industrial undertakings. Firstly, the Minister may exclude forms of work carried out in industrial undertakings from the

operation of the section. Secondly, any industrial undertaking of which a part only is an industrial undertaking shall not for that reason alone be deemed an industrial undertaking. These provisions were deliberately included when the Bill was being debated in 1948, to allow for any policies which the government might wish to implement from time to time. (16)

It was the policy of the colonial government to make the economy of Kenya, which was essentially based on agriculture, self-supporting. It was necessary therefore to exclude all agricultural undertakings from legal limitations. Children had to be available to work legally in factories that processed raw agricultural materials like coffee and sisal. (17) This is the light in which the Act must be seen. It appears that the legislators have no scruples at exploiting even children when it suits them. The Act has the further effect of interfering with the legal capacity of infants as citizens who have to work for their livelihood - this is the combined effect of S. 34 and S.50 of the Act.

The law is governed by considerations not solely in the interest of children in employment. This is because the substance of our laws regulating employment is incompatible with a true spirit of protecting infants. There are two conflicting interests - that of the child as an able citizen and those of individual adults in need of cheap labour at whatever cost. The interest of the second group prevails because it is these same people who control the means of production, and are represented in the majority in parliament. Although the law concedes that some children must work in order to support themselves in the absence of an alternative source of maintenance, they should be given special terms of employment which allow them free time to pursue education with which to better themselves, legal capacity to act independently and free legal aid in case of disputes.

Other criticisms of the Employment Act and the Employment (Children's) Rules, Legal Notice No. 155 of 1977, have been made elsewhere. (18) For the purpose of this paper, criticisms are at a broader level. It is necessary on the part of the authorities to consider the causes of children wanting to be employed. If the fault lies with inadequate provision of necessities in the child's home, that should be tackled by the State by creating facilities to ensure that every family has shelter and food.

The fact that so many press reports on the matter have not been able to stir up the society into doing something about it is indicative of public apathy, or condonation by the authorities, or both of a very unsatisfactory situation. The phenomenon seems widely accepted for obvious economic interests.

2:1:7 The Children and Young Persons Act, Cap. 141
and General Remarks:

This was enacted in 1963, and is designed specifically to make provision for the protection and discipline of children, juveniles and young persons. In looking at the manner in which the Act purports to achieve this magnanimous task, the underlying contention is that in spite of the legislature's good intentions, the Act falls short of the modest expectations a child may have of society's regard for him. Firstly, the law intervenes too late in respect of some children so that the prescribed solutions to particular problems are ineffective. Secondly, the Act has failed to approach the problem of juvenile delinquency and parental neglect of children from a sociological and economic aspect, expecting so much from the parents whereas the State itself does not take adequate measures to ensure that every child's home-life attains a reasonable standard. These two aspects are inter-twined and call for the same solution - the re-examination of the nation's goals and objectives from a more practical point of view.

S. 2 of the Act deals with definitions. S. 3 provides for the establishment of Juvenile Courts to deal with juvenile offenders and delinquent parents. It is the Court's duty to find the most appropriate punishment for the offender, the guiding principle as stated in S.14, being that the welfare of the child is the paramount consideration. The Court is empowered to remove a child from undesirable surroundings and to ensure that proper provision is made for his maintenance, education and training. After considering all the circumstances surrounding a particular case, the Court may order that:-

- (i) the child be handed back to the parents or guardian and may require the parents or guardian to enter into a recognizance that the child will be well looked after;
- (ii) the child be committed into the care of a fit person;
- (iii) the child be committed to an approved school where he is over 10 years old;

(iv) the child be committed to a Borstal institution or Youth Corrective and Training Centre.

This is provided for in Part IV of the Act. Most of these facilities provided for are in short supply and therefore, a Court's good intentions to do the best for the child never work.

S. 31 (1) empowers the court to select a fit person, or approved society of the same religion as the person committed, to take care of him. In this respect, S.71 and S.78 empowers the Minister to make an order for contribution towards the up-keep of the child, to who ever is taking care of him. This falls under the ambit of the Children's Department of the Ministry of Home Affairs which is charged with the day to day administration of the Act. The Department co-ordinates all the legal aspects of all bodies and institutions.

Once a case is referred to this Department by a Juvenile Court, Social workers are sent out to get more information about the child's background. The abandoned child whose parents or relatives cannot be traced is sent to a Childrens Home. The destitute whose delinquency is attributed to poverty is given financial aid, the maximum amount being a meagre Shs.60/- per child for each month. Although the Department is charged with the duty of regulating aspects related to the care, protection, discipline and training of needy children, it has no statistical records. It was thus impossible to obtain data on the proportion of juvenile delinquents emanating from single-parent homes. It was however admitted that poor home conditions contribute a great deal to criminality or difficult behaviour in children. Antecedent to this, broken homes particularly where the mother is the sole parent, was the single highest ranking contributory factor.

Despite the importance of its task towards improving the welfare of children, the Department suffers from the apparent fact that the importance of its role is under-mined as reflected by the proportion of funds allocated to it by the Ministry of Home Affairs. Consequently there is a lack of an adequate personnel to effectively trace the needy cases. These come to their attention mainly through reference by probation officers in Juvenile Courts. The rest are traced by field workers who are sent to the obvious problem areas such as Mathare Valley. It is not an exaggeration to state that a large number of needy children have not been reached.

The Department is to be commended all the same for doing as much as it can on such a limited allowance, for instance in ensuring that the desperately needy cases get extra money and school uniform.

The powers under the Act also appear to be limited. Under S. 23, a parent may be prosecuted for wilful neglect of his child but only where the neglect is likely to cause the child unnecessary suffering. In effect if the result of the neglect is simply that the child is deprived of a chance to go to school the section does not apply. S. 22 (f) states that a child is in need of protection if he is prevented from receiving compulsory education. This is unrealistic in that those who do not have money for building funds and school uniform and are not lucky enough to receive aid from the Department, are already in need of protection by the State and it is futile to penalise their parents. S. 22 (h) states that a child found begging or receiving alms or inducing the giving of alms whether or not there is any pretence of singing, playing or performing is also in need of protection. It would not be unfair to say that the Department has turned a blind eye to the great incidence of child beggars, sometimes accompanied by their parents and roaming the streets daily, because this is an eye sore. Incidents of petrol sniffing by parking boys have also been reported by the press.⁽¹⁸⁾ Failure to take the requisite action can only be attributed to lack of man power in the Department and apathy of the public.

The Act deals extensively in Part V with the establishment of Institutional Homes, approved schools, juvenile remand homes and Borstal Institutions. It is admitted that institutional care is not wholesome for the rearing of a child. It has also been observed that Rehabilitation centres like the Undugu Society in Nairobi sometimes fail to reform certain boys who prefer to go back to the streets. In the same vein, children who come before a Juvenile Court are bound to return several times in their life. In an unreported case,⁽¹⁹⁾ the accused had a history of 12 previous convictions over a period of 15 years, and had been referred to a Borstal Institution several times. He had managed to evade the authorities by escaping and using false names. This was not detected even through police records until a very late stage.

It has been observed that the principle causes for putting up children's institutions are a rapid social change taking place within a decline of authority and responsibility of traditional institutes, dislocation of family life and parental control, and prostitution and the influx of unmarried mothers into urban centres.⁽²⁰⁾ In the management of these institutions⁽²¹⁾ it has become clear that events in a child's early life that cause separation from one or both parents adversely affect physical and mental growth, (this is clear even from the nutritional aspect)^(21a) and that such deprivation stands foremost among the causes of delinquency. Child psychologists find that it is essential to the infant's life and young child's mental health to experience a warm, intimate and continuous relationship with his mother in order to decrease emotions of anxiety and guilt and therefore that institutionalisation in early life is very injurious to personality growth. The complete deprivation in early years, the more isolated and anti-social the child becomes. Kleptomania in children for instance is only an attempt to restore the love relationship he has lost. The Act's emphasis on institutionalisation rather than helping alleviate the poor conditions in the children's family life is clearly the wrong approach.

An institution, no matter what advantages it may offer can never be an adequate substitute for a family.⁽²²⁾ Thus whenever possible a child should be maintained in his own home. The Act in providing that certain children be committed to the care of "fit persons" apparently recognises that even bad the parent who neglects the child may non-the-less be providing much for him. This is the reason why even unmarried mothers will cling to their child as long as they can provide him with food, shelter, comfort him in distress, teach him simple skills, and above all provide him with that continuity of human care upon which his sense of security lies. He may be ill-fed, ill-treated and ill-sheltered but unless he is wholly rejected, he is secure in the knowledge that there is someone to whom he is of value and who will strive to provide for him, even though inadequately, until such time as he can fend for himself. It is for these reasons that children with bad parents are apparently unreasonably attached to them.

It should not be necessary for a child to be admitted into an institution for financial reasons. Possibilities for assisting their parents should be sought, in addition to those

already provided by the Act. For those in need of correction, the possibility of providing this in a day school rather than boarding school should be looked into, so that they are not alienated from family life, and stability in their daily lives should be enhanced. This is not to say that there are no circumstances justifying the existence of institutions. These are indispensable for complete orphans, abandoned children, those whose parents are imprisoned or otherwise unable to take care of them and the handicapped. The incidence of such justifications arising in respect of illegitimate children is very high. The single parent may be taken away by any of these circumstances, and given the fact that such a child has only one set of grand parents to turn to and who may not be willing or able to receive him, he must end up in an institution. This could also happen due to the illicit means by which some single parents have turned to in order to provide for their children.

In a study on the living conditions of unmarried mothers, one writer⁽²³⁾ has observed that although they receive aid from both government and non-governmental bodies, this is duplicated and not lasting, being in the form of food and clothes. Intergration of both efforts would improve their lot and thus give full legal effect to the Act's provision, that the child's interest is paramount. The fact that the mother's welfare greatly influences that of the child must not be neglected in the Act, so that where an allowance is given to the destitute child, half of it will not have to be spent on an entire family. It would appear that our laws do contribute to juvenile delinquency or abandonment of children by failing to give legal effect to these basic realities. This is particularly real in reference to illegitimate children to whom the law denies the maternal care that we have seen is indispensable in early life, and material needs which any single-parent who is economically in the lower echelons cannot adequately supply, however good-intentioned. A distinction is drawn here between legitimate and illegitimate children: the former category have the full benefits of family life, with both parents to provide and guide them through life, and the added comfort of an extended family. The illegitimate must suffer the insecurity of an incomplete family life, with a single parent who toils to provide maternal care, fatherly guidance and discipline together with material necessities single-handed.

It is a truism to say that a nation's future lies in its children. Failure to upgrade child welfare in order to raise responsible citizens costs the country a lot in the way of curbing criminality. The proper care of children deprived of normal home life should be seen not merely as an act of common humanity, but as essential to the welfare of the nation as a whole. As far as possible, children should be encouraged to grow up in their own homes, and this is only possible if the standard of living of the people is improved. Rather than accede to half-way and unco-ordinated measures a lot would be accomplished if the issue was treated seriously from a juridical, psychological, social and economic approach.

CHAPTER 2

PART 2:

2:2 Recapitulation:

Apart from the Legitimacy Act which provides conditions for legitimation and the rights of children legitimated in accordance therewith, there is no Kenya Act which expressly provides for the maintenance of illegitimate children, viz the Acts considered in Part I of this chapter refer inconsequentially to illegitimate children. One would have thought that this should be the purview of the Legitimacy Act (Cap. 145). However, the Act does not even define an illegitimate child. All that the preamble states is that it relates to "children born out of wedlock" presupposing that we know what the phrase means. We saw in chapter 1, that the concept embodied in the Act is a purely English one.

Like most systems of jurisprudence, English law has based the legal relationship between parent and child not simply upon the fact of parenthood but upon the concept of legitimacy, to be determined upon reference to the existence of a valid marriage of the parents. The feudal doctrine which insisted that the parents of a child must be married lawfully at the time of birth or conception in order to entitle him to inherit an estate in land led to the principle that it was only in respect of such children that the legal rights and duties attached to the parents could be conferred. We also noted that although reform had been achieved both by enlarging the relationship between the parents and the illegitimate child, thus broadening the concept of legitimacy, the changes have been slow and cautious. Therefore, even after the introduction of legitimation by subsequent marriage, legitimacy with its extended meaning has remained a status dependent upon the validity of the marriage of the child's parents. In the amendment tabled in the Legislative Council (1) the intolerance of our inherited brand of Christianity was expressed by members who did not want the benefits of legitimacy to cover adulterines. The moral blameworthiness of the child's parents appears to be intended as a life long burden to be borne by the illegitimate child. *Sure!*

It is against this background that we shall now look at the customary law definition of illegitimacy and its consequences.

We shall see that under customary law, the illegitimate child was never regarded as the whipping-boy for a wrong to which he was not party. We shall categorise illegitimate children into two classes:-

- (i) Those who are legitimated by the subsequent marriage of their mothers.
- (ii) Those whose mothers remain unmarried.

The first category will be considered in the light of the Matrimonial Causes Act and the Subordinate Courts (Separation and Maintenance) Act. The second category will be considered in the light of claims for pregnancy compensation, actions for breach of promise to marry and the now repealed Affiliation Act. It is submitted that both pregnancy compensation and damages for breach of promise to marry are not expressly intended for the maintenance of illegitimate children, but that in the absence of affiliation law or social welfare benefits, recourse has been had to these actions in order to secure a measure of maintenance, however meagre, and which although intended to compensate the aggrieved parties themselves, has been spent in most cases on the illegitimate children of the aggrieved party. Social necessity has therefore upraised such compensation to the only form of maintenance for illegitimate children. This is the justification for their inclusion as heads under which maintenance for illegitimate children may be obtained.

Finally, we shall attempt to carry out a comparative analysis of the trends in legal development in the field of illegitimacy in other countries, from which we shall derive possible solutions towards the eradication of the problem of illegitimacy in Kenya.

2:2:I. Maintenance Under Customary Law

The concept of illegitimacy in the African sense is considerably different from the English one and has ^{less} significance attached to it. The term can only be used to refer to the child born of an unmarried woman, and who has not been acknowledged by the man who marries its mother. Once the mother got married and her husband took responsibility for the child, the child was no longer illegitimate. Thus, in contradiction to the English concept, legitimacy was not to be determined by the existence of a valid marriage but rather upon the fact of fatherhood.

Consequently, there were very few cases of children who could be called illegitimate. // This is because in all African communities there were strict rules governing the chastity of women. This had a limiting influence on pre-marital sexual practices and therefore the likelihood of children being born to unmarried women. In case of divorce, the father had custody of the children provided that he did not demand his dowry back. If the mother went with the children, the dowry was returned to the husband, the children now belonged to the household of the maternal grandfather and if deceased, his eldest son or brother.

If a girl became pregnant, a husband was quickly found for her before the birth of the child. The child was usually accepted by the girl's husband as his own. In the western Kenya communities of the Luo and Luhya, girls who became pregnant could only be married by old men. This is how the traditional institution of polygamy which is generally viewed with distaste today, surpasses monogamy in its practical usefulness.

Other traditional unions, equally viewed with disdain (2) today, did a lot, towards solidifying the welfare of children born out of wedlock. The first of these is the system of wife inheritance through the custom of levirate, where the widow was taken by the deceased's brother. There was the system where the wife's family gave up her younger sister in the event of the wife's earlier death so that the children always had a mother: this was the sorrorate system. There was also the "ghost marriage" whereby a widow would have children fathered by the deceased's kinsman. Such children were regarded as legally belonging to the deceased although biologically they were the kinsman's. Among the Kuria of South Nyanza the child of an unmarried girl would be given to a married but barren woman. One can safely conclude that therefore, there was nothing akin to illegitimacy in the traditional African set up. The nearest Luo word is "Kimirwa" or "Nyathi mobigo" which means a child whose mother came with (loosely translated). Under this set up, the child was assured of the care of a mother which is indispensable in his formative years. Equally the discipline and guidance of a father was ensured and since traditionally the man was the bread winner of the family, material necessities were secured by the fact that each child always had a father, biological or not.

As far as inheritance of property was concerned, a no distinction was drawn. Children born outside wedlock were no longer illegitimate when, in the event of subsequent marriage, their mother's husband took responsibility for them. They could inherit land and cattle from him and these were the most important forms of property. Although discrimination could arise from the father's biological children, it was almost ineffective once the father had accepted responsibility.

Luhya customary law classifies the illegitimate child into two categories: one who is entitled to property, and one who is not. But even so the primary consideration is whether the father has accepted responsibility, and whether or not he is the putative father. Under this custom, illegitimate children have equal rights with the legitimate children of the testator. This was so when the man was the putative father of the child. An illegitimate son who comes with the mother when she marries is not entitled to any property of his step father. He is however entitled to one cow from the bride price of every daughter born to his mother with the step-father. (3)

The second important categorisation is the illegitimate child whose mother is not married or whose mother has married but the husband refuses responsibility so that he remains with the mother's family. This occurrence was very rare since prospective husbands were usually informed of all the circumstances of the girl so that they knew in advance whether the girl was pregnant or already had a child. Once the man decided to marry the girl, he accepted responsibility for her child. Marriage was then a family affair, as opposed to the individuality that shrouds it today, when couples meet in towns and accept each other before the man knows whether the girl has left children at home or not. The children in this category were disadvantaged only to the extent that they could inherit their grandfather's (maternal) property not as of right, but only as a favour. The position was not as bad as it may seem since every member of the extended family had a floating or beneficial interest over family land and would never be asked to leave for as long as he needed to exercise his usufructory rights.

usufructuary

The application of these customary rules is excluded by the fact that there is a written law(4) dealing with the subject of legitimacy, and the related issues of inheritance and succession. We saw in the previous chapter the consequences of legitimation, the presupposition that illegitimate children have no rights to inherit except as may be conferred by the Act,(5) the implication being that the rights conferred are not absolute, and the nagging emphasis that the illegitimate child does not have the same rights as other children. S. 5(1) deals with the succession rights of the legitimated person, the emphasis throughout being on the date of legitimation. The unfortunate conclusion is that if the testator dies before the date of legitimation the illegitimate child does not have interest in any property even if he is legitimated afterwards by the surviving spouse. The act therefore provides only for those who have been legitimated, to the total exclusion of those who remain illegitimate. The validity of any law that will strip any person of his right to a reasonable existence in a society where the basic principles preach a presumption of innocence before any punishment can be meted out, a society that has the pretention of sanctifying the right to life, must surely be put to question. The illegitimate child has wronged nobody but he is victimised for the wrong done by his parents in the eyes of society. The stark cruelty of this injustice to the most harmless members of society calls for a re-examination of the entire legal system, starting from the supreme law, the Constitution.

At this juncture, it is necessary to examine the other legal provisions purporting to confer rights of maintenance to the illegitimate child. We shall again categorise the illegitimate child so that we may deal first with those who have been legitimated by the subsequent marriage of their mothers, and secondly with those who have been denied the status of legitimacy and the rights which accrue therefrom, due to the mere fact of their mothers remaining unmarried.

2:2:2 The Matrimonial Causes Act, Cap. 152

We saw that this act defines 'children' to the effect that African, Arab and Baluchi children mature at 16 years and 13 years X according to whether they are male or female, respectively. All other children (and this basically means European) mature at 21 years. S. 30 provides for the custody and maintenance of 'children' as defined in the Act.

Consequently the Act gives longer protection to that category of children who mature at 21 years. There is no logical basis for such discrimination.

The Act does not specify the factors that may disentitle a spouse to custody of children but leaves it to what "the court may from time to time, either before or after the final decree make such provision as appears just with respect to the custody, maintenance and education of the children of the marriage, whose parent is the subject of the proceedings, or if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the Court". This is contained in S. 30(1) (c).

Probably the legislature thought that this Act would be mainly invoked in proceedings at the High Court level where the judges are presumed to know without specific legislative guidance what it is the best interest of the child. The Act does not preclude the application of Guardianship of infants Act in proceedings under it. The conclusion is that the court shall have recourse to S. 17 Cap. 144^u deciding issues of custody and maintenance. The problem that arises is how to determine what really are the best interests of the child as opposed to those of his parents.

The courts have interpreted "welfare" differently at different times. Its meaning rests upon the importance of age and sex of the child in custody conflicts or the promiscuity and general bad character of particularly the mother. Interpretation in such cases involves values judgements, differing according to the social group and the time. Judges and social workers, the family and the child may all differ in opinion. Thus the enunciation of the principle that the child's welfare is to be the paramount consideration does not render the responsibility of the court to make a choice any lighter. Since most custody and maintenance suits come in the adversary form, the best interests of the child may be overlooked in trying to ascertain each parents rights.

The manner in which this principle is applied in cases under the Matrimonial Causes Act, under the guidance of the Guardianship of Infants Act, affects the child legitimated by subsequent marriage of its mother in the same way as it affects the illegitimate child of unmarried parents, and may be considered together.

In the unreported case of Church v Kennedy (6), where the issue was the custody a five year old illegitimate child, the girl was declared a ward of the court, until arrangements could be made by the mother, with the court's approval for her removal to Zimbabwe. The best interests of the girl were assessed only in relation to the competing claims of both parents, without any regard being had to her sentiments. It was admitted that she had been greatly disturbed during the wrangling in and out of court, but had recovered stability under the care of her god-parents.

In support of his claim as the better parent, the father produced documents relating to the good education he was offering the child, evidence showing that the girl's mother was an irresponsible drunkard, and that her new husband was a drunkard and was unstable in that he could not keep jobs. In retaliation, the girl's mother tendered evidence showing that she and her husband had reformed their ways, had bought a farm and house in Zimbabwe, that they had obtained admission to a high class girl's school for the child, that stability had resumed after the civil war in Zimbabwe and finally that it would not be fair to alienate the child from her half sister and half-brother, the issue of the defendant's first marriage. The case was decided on the usual rule of prudence that the custody of a young female child be bestowed on the mother (7) in the absence of exceptional circumstances such as the likelihood of the mother being a bad influence on the child. (8).

All this goes to show the difficulties that the judge or magistrate who is pre-occupied with other legal matters is faced with in deciding where the best interests of the child lie. It underlines the need for specialisation possibly in the establishment of a Family Court System.

2:2:3 The Subordinate Courts (Separation & Maintenance) X
Act, Cap 153

This Act applies in matrimonial applications made by the wife in subordinate courts for separation from her husband. Applications may be made by any woman against her husband. S. 6 entitles either the husband or the wife to apply for variation of any order given pursuant to an application under S. 3.

Of direct relevance to this paper are sections 3(1) (c) and 3(4).

The former provides that an application may be made by a woman on grounds that her husband has been guilty of wilful neglect to provide reasonable maintenance to her or her children, or of persistent cruelty to them.

The latter section provides a definition of children to the effect that those who the husband is legally liable to maintain include, in addition to the children of the marriage, any child of the wife born before such marriage (whether the child is legitimate or illegitimate) until such child attains the age of 16 years, or until the death of its mother, whichever first occurs. Although illegitimate children are recognised, there is a discrepancy in that any child included would be left unprotected by the law should its mother die before it attains the age of 16. It is further wrongly assumed that at 16, a child matures and is not entitled to parental care.

S. 5 deprives the court jurisdiction to make orders under the Act if the applicant has committed adultery unless the husband has condoned or connived at it. This is an extension of the matrimonial offences doctrine used in the dissolution of marriage, to the sphere of maintenance of children. Of relevance to us is that once again, we see the sins of the parent being visited on the children.

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S. 12 of the Act gives the Attorney-General as agent for the state, power to apply for orders of custody and maintenance of the children of a marriage where the wife is dead or if alive has disentitled herself to any orders under the Act by reason of having committed adultery.

S. 15 purports to exclude from the protection of the Act children born to a marriage contracted under customary law, by providing that the Act shall apply only in cases where the parties have been married within the definition of the term "marriage" as contained in S. 2 of Cap. 152. The latter section defines marriage as being a monogamous union. The court however has power to make provisions for maintenance and custody of children born of the marriages contracted under customary law. This power derives from the Magistrates Court Act (9) which empowers the Magistrate courts to determine all matters relating to customary law. There is no similar provision in Cap. 152, which applies primarily in proceedings before the High Court.

In effect, the two Acts leave it to the spouses to initiate proceedings relating to the maintenance and custody of their children. It assumes that at least one of the spouses will be responsible enough to do so when the marriage encounters problems. The power given to the A-G in S. 12 of Cap. 153 has not in the writer's knowledge ever been exercised. The practice it would require a surveillance machinery within the A-G's Chambers to track down the cases deserving treatment. The unsatisfactory conclusion to be drawn is that although the importance of the need for maintenance and custody of children has been conceded, little is achieved in that the existence of any benefits accrues to the children not as of legal right, but subject to the conduct of their parents - the state does not assume the responsibility itself to ascertain that these questions are not hampered by reliance on extrinsic factors.

2:2:4 Pregnancy Compensation

This customary law remedy is very important as the only legal means of securing maintenance to a small extent, for those children whose mother's remain unmarried. It is provided for in S. 2(c) of the Magistrates Courts Act. It is also recognised by the Judicature Act which provides in S. 3 (2) that unwritten law may be applied in the absence of any written law on the subject, provided that the custom embodied in that unwritten law is not repugnant to justice and morality. Thus before the repeal of the Affiliation Act, pregnancy compensation would not be granted where an affiliation order had been made against the putative father of the illegitimate child. The supreme law - the Constitution allows the application of discriminatory personal laws to each of the four sociological communities. This constitutes the legal basis for the existence of the remedy.

The importance of this remedy is greatly undermined by the courts, in spite of it being acknowledged as the sole means of augmenting funds for the maintenance of the ex-nuptial child. Firstly, there is a stubborn refusal by the courts to reform the law in order to keep pace with economic changes. Secondly, the courts also fail to recognise the social changes which have led to the disintegration of the close-knit traditional African family and therefore denies the benefits of the remedy to the children whose unmarried mothers may be estranged from their families.

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This continues the trend we have traced all along whereby the law recognises the plight of illegitimacy and yet defeats its own purpose by failing to improvise the requisite mechanisms to achieve its goal.

A claim arising out of the impregnation of an unmarried woman was in the past regarded as a wrong against her father or guardian. Any compensation granted seems to have been designed to compensate him for the spoilt marriage prospects of his daughter. The child born to the woman became a member of her father's household and he was recognised to bear the responsibility for its maintenance and upbringing.

In the typical case of Irungu Macharia V Ngugi Waithiru (unreported) (10) the defendant impregnated the plaintiff's daughter and refused to marry her. The defendant conceded liability conditionally, upon the birth of the child falling within the proper gestation period. Once this condition was satisfied, it was held that the defendant pay the plaintiff 20 goats and 6 rams, as claimed, and that the amount in cash be calculated at the customary value of livestock which amounted to a meagre Shs.700/-.

In a different case of similar facts (11) the award was calculated at a value close to the current market value of livestock, rather than the archaic one of the 1930's which was used in the previous case. It is notable that in this case the plaintiff was represented, whereas in the previous case he was not. It is also significant that the Magistrate conceded only to a half-way measure in recognising the inadequacy of the usual cash equivalent of the award, which is never more than Shs.700/-. This does not vary significantly among the different ethnic groups. The additional claim for loss of education of the plaintiff's daughter was rejected by the court as being remote. No regard was had to the practical difficulties of self-support this loss would entail.

Traditionally, the amount was payable in kind or in cash. Under Kikuyu customary law, this constituted a bull or a cow valued at Shs.100 @ , and 10 goats or sheep valued at Shs.20@. In the second case, on a plea by the plaintiff's advocate, it was ordered that the amount be calculated at the present market value of improved traditional type of livestock.

This brought the total amount of Shs.4,500/-. The reluctance on the part of the Magistrate to boldly reform the customary law to suit modern requirements is apparent in that he based the assessment of damages on the value of "improved traditional livestock" whereas the reality today is that many people do own modern or what he called "grade" livestock. The result is that the amount payable is pitiable when it is considered that the sum represents the sole payment that the family receives towards the maintenance of its new member, until he reaches the age where he can fend for himself. We must not overlook the fact that the traditional willingness of African men to admit responsibility for pregnancy is on its way out.

Therefore, even the somewhat little pregnancy compensation will benefit only those who can strictly prove the allegation.

Today the security traditionally offered by the child's membership of its mother's family may no-longer be available. Many women now break away from their kin in the search for employment. The traditional willingness of their families to assume responsibility for any children born to such women can no longer be taken for granted. In addition, the intolerant brand of Christianity practised today, abhors pre-marital sex and the unmarried girl who finds herself pregnant may be disowned by her family. The benefits of this remedy will not avail the ex-nuptial child whose mother has been estranged from her family. This has made the court in Botswana (12) to modify and extend the traditional form of the action in such a way that the whole direction is towards securing the future maintenance of the child. In this age of individuality it is wrong to direct the award towards compensating the girl's father for an impersonal injury to himself. These courts have recognised that the paramount interest is that of the child and not that of the other three parties involved.

In Botswana, a woman who is pregnant may now bring the action herself against the putative father. This new form does not entirely replace the traditional one but lies in the alternative to it - the woman may bring the action herself where none of her senior relatives are willing or available to bring it on her behalf, or where she has quarreled with her family and has decided to stay apart from them.

This development represents a revolutionary change in the traditional court procedures under which women never appeared unsupported by male relatives in a dispute of any kind. Another development which constitutes the recognition that the main purpose of the action is to secure maintenance for the child is that damages may now be claimed in respect of second or subsequent pregnancies. This was not possible under the customary law. It appears that the values of Kenyan courts are couched in decadent conservatism - a persistence to preserve the traditional mode of dispute settlement unsupported by the traditional institutions with which it is inextricably integrated and without which it cannot endure.

2:2:5 Actions for Breach of Promise to Marry:

This concerns situations where the basic elements of a traditional marriage are absent. The parties have cohabited solely on the basis of a promise to marry, often extended without parental acquiescence, or knowledge. One device with which the courts in Botswana have met this situation is the creation of a new action founded on the breach of a personal promise to marry. This seems to have grown out of the traditional one which was only available to the guardian or father of the aggrieved party where a formalised betrothal was broken off unilaterally and without good cause. The traditional action enabled the guardian to recover expenses incurred in contemplation of the marriage, including further compensation if any children had been born to the betrothed couple. Its basis was the breach of a formal agreement reached by negotiations between the two families. It did not contemplate the situation where a woman, on her own initiative, cohabited with a man on the strength of a personal promise to marry, unsupported by the approval of her senior relatives.

In Kenya, an action for the breach of a promise to marry lies under common law only, which applies by virtue of the law of Contract Act. (13) Under this act, an agreement between a man and a woman to marry may be legally recognised as a contract if the requirements essential to the formation of a valid contract are fulfilled. The action does not lie under African customary law as per the decision in the case of Muinde V Muinde (14) where both parties were Kamba.

Under customary law if a sexual relationship occurs when it is not supposed to, two actions lie. The first is a claim for damages for the "seduction or pregnancy of an unmarried woman or girl" (15). The second one is compensation for fornication. Customarily a man is not permitted to have sexual intercourse with the girl he is to marry, even with her consent. Under Taita customary law, the man may be sued by the girl's parents but this position is not supported by any court decisions. (16) Under Hindu customary law, the action lies as established in the case of Singh v Singh (17) but only for the purpose of restitution of the respective families to their original position. Hindu marriage is essentially a family affair and restitution cannot be claimed by the individual parties. The same position obtains under Islamic law. (18) This means that individual parties can only claim under the common law.

The courts will apply the doctrine in Conflict of Laws which says that in the case of internal conflict between two systems of law, the proper law of the contract will apply. The determination of this is therefore crucial to the unmarried mother who is jilted by her erstwhile fiance, in the event of conflict between African customary law, since an action does not lie under the former system. The burden of proving that the intended marriage was to be under statutory law lies on the aggrieved party. Under the Law Reform Act, S. 2 the action cannot be brought by the administrator or executioner of the deceased's estate as this is deemed to be a personal injury which dies with the aggrieved party. Thus if a child has been born and the putative father breaches an agreement to marry the girl who subsequently dies, damages which would have gone a long way towards the maintenance of the child become unrecoverable. All these limitations to the action do not augur well for the ex-nuptial child.

In addition to proving the requisite essentials of a valid contract in respect of the agreement to marry, parties face the uphill task of proving that they had removed themselves from the operation of their respective customary laws. In only one case have the courts recognised the existence of a "hybrid customary law". (19) The poignancy of this predicament was aptly portrayed in the unreported case of Miriam Charo d/o Matano v D.N. Mwangangi (20). Societal awareness of the problem is clear from a press report of the case and related issues. (21) This case has been hailed as a high water mark in legal development in this field.

In his judgement, the learned Magistrate observed that:-

"with the repeal of Affiliation Act courts cannot enforce the maintenance of illegitimate children. Under customary law, only the fathers of the unfortunate girls can claim pregnancy compensation which is merely nominal. This is a sad case showing the plight of many young girls in this country at the mercy of their boyfriends..... The plaintiff is still willing to honour her promise to the defendant. She is therefore entitled to an award of damages to compensate for her injured feelings, pride and loss of marriage prospects.

Also taken into account in the consideration of the amount of damages is her family background: that she is an orphan, that the defendant took advantage to marry her by exploiting her sexually and continuing to seduce her during her pregnancy, leaving her with a child to support all alone.

The final consideration is that inflation has greatly reduced the value of money and an award of Shs.3,000/- to the plaintiff as general for what she has undoubtedly suffered is just unreasonable....."

In this case, the plainfiff and defendant had entered into a mutual agreement to marry each other within resonable time. They started an affair and the plaintiff became pregnant after which the defendant deserted her and refused to marry her. She brought this action claiming general damages for breach of promise to marry. In order to determine the proper law of the contract, the court considered whether the parties had by their conduct removed themselves from the application of their respective customary laws. The court found that although the plaintiff appeared quite unsophisticated, the fact that she had agreed to marry a M~~K~~amba showed that she was not strictly bound by her tribal Taita customs. All she needed was consent from her relatives. Dowry had not been negotiated even though the relatives of the respective parties had met, thus neither custom was strictly followed. It was concluded therefrom, that a monogamous marriage had been intended.

This is a rare type of civil suit in the history of marriage in Kenya and should be followed as precedent, paving the way towards more fairness in this area of our law which has hitherto left a lot to be desired, especially as regards the quantum of damages, given the dire necessity in some genuine cases, to ensure compensation for the loss of a prospective marriage with its added security of a right to maintenance of a wife and children by the husband. The current trend in legal development is discernible from the Report of the Commission on the Law of Marriage ⁽²²⁾ which recommended that the action for breach of promise be abolished except in cases where expenditure has been incurred. This draws from the English thought at the time, where the action had been abolished since there was no longer an economic basis for its retention

In his judgement, the learned Magistrate observed that:-

"with the repeal of Affiliation Act courts cannot enforce the maintenance of illegitimate children. Under customary law, only the fathers of the unfortunate girls can claim pregnancy compensation which is merely nominal. This is a sad case showing the plight of many young girls in this country at the mercy of their boyfriends..... The plaintiff is still willing to honour her promise to the defendant. She is therefore entitled to an award of damages to compensate for her injured feelings, pride and loss of marriage prospects.

Also taken into account in the consideration of the amount of damages is her family background: that she is an orphan, that the defendant took advantage to marry her by exploiting her sexually and continuing to seduce her during her pregnancy, leaving her with a child to support all alone.

The final consideration is that inflation has greatly reduced the value of money and an award of Shs.3,000/- to the plaintiff as general for what she has undoubtedly suffered is just unreasonable....."

In this case, the plaintiff and defendant had entered into a mutual agreement to marry each other within reasonable time. They started an affair and the plaintiff became pregnant after which the defendant deserted her and refused to marry her. She brought this action claiming general damages for breach of promise to marry. In order to determine the proper law of the contract, the court considered whether the parties had by their conduct removed themselves from the application of their respective customary laws. The court found that although the plaintiff appeared quite unsophisticated, the fact that she had agreed to marry a M~~K~~amba showed that she was not strictly bound by her tribal Taita customs. All she needed was consent from her relatives. Dowry had not been negotiated even though the relatives of the respective parties had met, thus neither custom was strictly followed. It was concluded therefrom, that a monogamous marriage had been intended.

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as the woman had become emancipated and also due to the prevailing revolutionary ideas about marriage in the society which no longer restricts sex to matrimonial unions.

A lot remains to be done to upgrade the legal status of this valuable cause of action, by increasing the award as well as removing the outdated restrictions to claimants.

2:2:6 Affiliation Law

This is also known as Bastardy Law^(23a.) Parents of legitimate children are bound by law to provide for their children. Generally without affiliation law, there is no legal liability on the part of any person to provide for the maintenance of illegitimate children. Mothers of such children are only forced by natural instincts to maintain them. They are not strictly speaking bound to do so in law. The main aim of bastardy law is therefore to provide for the maintenance of illegitimate children and to impose the legal duty to do so on those responsible for their existence. Affiliation law also aims at enabling the mother of an illegitimate child to obtain assistance from the only other person who has a contributory responsibility for the child's existence, since it would be unfair to leave it to the tax-payers. Thirdly, affiliation law sees to it that an illegitimate child is maintained until it is of an age suitable to maintain itself. Finally, it aims at settling disputes between mothers and putative fathers in favour of illegitimate children.

Kenya had an Affiliation Act until 1969 when it was repealed⁽²³⁾. This was based principally on the U.K. Affiliation proceedings Act of 1957, which had been passed to remove the existing doubt as to the obligation of unmarried parents to maintain their child. According to certain writers, the child born out of wedlock has no right to be maintained by either parent⁽²⁴⁾. Blackstone's view was that the unmarried parents' duty to maintain their child is a natural one, and consequently, that it existed contrary to the above view⁽²⁵⁾. This view is the more tenable one since even common law was not extremely hostile to such children. The mother of an illegitimate child was first given a private right of action against the putative father as far as 1944, in fact before the mothers of legitimate children had any comparable right⁽²⁶⁾. The proceedings still clearly reflect their connection with the Poor Law, whose authorities it was extended to assist in reducing expenditure for maintaining illegitimate children.

Various arguments were raised against the introduction of the Affiliation Act in Kenya, culminating in its repeal in 1969. Some people argued that the Act leaned in ^① favour of women, and others that the ^② customary law which had hitherto dealt with the question of maintenance of illegitimate children and which the Act sought to replace, were adequate. ^③ Proponents of this argument go on to say that the Act imposed English values and did not reflect the African philosophy of life, hence its repeal by independent Kenya's African dominated legislature. (27) Others simply argued that the Act ^④ contributed largely to the increasing number of illegitimate children. One correspondent to the press had this to say:-

"The Act has made some women deliberately lazy, loose and parasitic. They do not want to think and work hard for their future. They merely dream of getting children and to affiliate rich men or male students with a bright future. Generally, they are not developing and are in many respects, socially, economically and mentally inferior of men". (28)

The principle arguments against the Act may be summarised as follows. That the Act:-

- (i) did not reflect the philosophy of life of Kenyans;
- (ii) tended to encourage promiscuity among women;
- (iii) did not reflect the equality of the sexes in the obligation to support the child;
- (iv) enabled women to blackmail men into maintaining children whom they had not fathered;
- (v) was abused by women who obtained maintenance orders against several men in respect of the same child;
- (vi) did not ensure that women did not spend maintenance money on themselves neglecting the children for whom it was intended.

Support On the other hand, the Act has received staunch support from the more level-headed and conscientious members of society who advocated for its amendment. This group conceded the existence of certain defects in the Act, as well as the need to cling to it until an alternative legislation had been enacted to cater for prevalent and increasing problem of illegitimate births and related social problems. (29)

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It would therefore appear that in spite of the acknowledged plight of the illegitimate child created by a cataclysmic change from a communal to a capitalistic mode of production, and the pressing need to bridge the gap in the realm of social welfare, the question of the reinstatement of affiliation law in one form or the other remains a very controversial one. In the present writer's view, the inclusion of extraneous issues which boil down to the age-old war between the sexes has clouded the importance of the delicate issue sought to be resolved. This contention is supported by a critical analysis of the operational aspects of the Act when it was in existence, and furthered by the trend of arguments in the debates which led to its repeal. The latter were characterized by a lack of diligence, and male chauvinism rightly attributable to the predominantly male membership of the house.(3) It is a very sad state of affairs for any nation if personal prejudices and bias will temper the tenor of issues that are crucial to the whole nation's well-being. A humble contribution to bettering the lot of ex-nuptial children would start by looking at the Act objectively in order to elucidate the merits and demerits which have remained shadowed by sentimentalization, and consequently evaluating the main arguments raised for its repeal. It is only after such an analysis that the way may be paved for future legal protection of the most vulnerable and helpless members of society.

The first criticism levelled against the Act was that it did not reflect the way of life of the indigenous Kenyan people. Among these people, the child born out of wedlock belongs to the family of either the mother or the father. Usually, the unmarried mother has complete custody of the child. In certain communities such as the Luhya, the mother looks after the child until it is about 4 years old when it may join the father's family. Pregnancy compensation is payable to the girl's family but only as reparation for the wrong deemed to have been done to her father, rather than specifically as maintenance for the child. The responsibility of maintenance was completely and ably assumed by whichever family had custody. That the traditional law of custody catered for the material as well as non-material needs of the child is undisputable. This material need of the child relates to his identity as an individual and his status in society to which is attached a host of rights and obligations.

On these grounds it is further argued that the problem of maintaining children born out of wedlock does not exist among Africans except for the few who live in urban areas and have possibly cut their links with the family land and other forms of property and ties. One member of the house had the following to say:-

"Now sir, what we must understand first is where the affiliation issue emanated from. To this country, the essence of this and the way it was enacted and implemented is foreign. Are we not confused? It is absolutely un-African to use Affiliation Act the way it has been used in the past 10 years. If we are proud of our heritage we must go on being African. Today it happens that children are starting to belong to their mothers and not their fathers. This is what I am saying is absolutely un-African". (31)

The root of this argument is sound but has been marred by an obsession to cling unrealistically to the crumbling past. The disintegration of the traditional extended family with its brand of egalitarianism and mutual social responsibility is an unpleasant fact that must however be accepted. In fact the whole tenor of our legal development militates against the survival of such an institution. This is illustrated by the Law of Succession Act, the abortive Marriage Bill, the Registered Land Act, financial constraints imposed by Income Tax laws, an inflated cost of living and the like, all of which have not been counter-balanced by increasing social welfare benefits such as relief for the unemployed. This trend in legal development proceeds largely by way of replacing traditional concepts with English ones. The result is a body of laws reflecting the western ideal in life which centers around the nuclear family and embodies the view that man lives by bread alone. This is reflected in the Affiliation proceedings which took the form of an accusation of paternity by the mother, but did nothing to enhance the relationship between the putative father and his child once paternity had been established. It provided no procedure for the recognition of the ex-nuptial child by his putative father, nor did the judicial determination of paternity have the effect of granting a man the status of a father.

Some men were heard to complain that affiliation law leaned heavily in favour of mothers. This was attributed to the Act's failure to recognise the equality of the sexes. The proponents of this criticism argue that it stems from the minds of neo-colonialists who are the products of colonial type education which sought to make Africans see social reality from the European view point. (32) In England the Victorian morality obtains which treated the father as a sinner and the woman as a weakling who was manipulated by the cleverer and cunning man, and was supported by the 19th century free enterprise economy which offered women less job opportunities than men. This Victorian morality, it is argued, rejects the humanity of the woman since she is an equal partner in the act that results in the child.

The fact that the law did not reflect this equality was raised as a criticism both at the enactment of the Affiliation Act in 1959, and at its repeal in 1969. (33) This is a valid point in view of the equal opportunities available to both men and women today. It remains debatable however, as to the extent to which this equality of opportunity is manifested in practical life. A major point against the contention that women have been emancipated in this country is the obvious lack of a representative ratio in Parliament for instance. Precision is therefore called for particularly with respect to school-girl mothers. With this category of mothers in mind, the House was urged to consider the possibility of amending rather than repealing the Act (14). This would take the form of narrowing down the definition of "single-woman" in S.2 of the Act, to exclude divorcees, separated women, and those with previous births. Technically however, such a categorisation would discriminate against certain illegitimate children merely on the basis of the actions of their mothers. It is clearly a case of championing the rights of the adversary parties at the expense of the child. One must concede that the contributions of a mother in bringing up a child are numerous and difficult, and the mere understanding to look after a child properly is deemed in law, to be a sufficient contribution on the part of the mother. Indeed mothers would argue that the costs and labours involved in bringing up a child are worth much more than a mere Shs.200/- a month. The proponents of the argument that affiliation law does not consider the non-material needs of the child have overlooked this legal presumption. In legal terms therefore, the mother's understanding to maintain the child is sufficient consideration on her part for any agreement between herself and the putative father.

The fourth and fifth criticisms of the Act will be treated together. The allegation that some men were blackmailed into maintaining children they had not fathered, except in very few probable cases must be dismissed as mere sentimentalization by the affluent member of society who may be involved in illicit or extra-marital unions whose responsibilities they shun largely due to the embarrassment that may be caused on discovery by their families or friends. This is clearly a case of self-preservation, at a time when polygamy, which traditionally took care of this need for such unions, is regarded with mixed feelings. The word "blackmail" itself has connotations of wrong doing or guilt on the part of the person blackmailed. It is a baseless argument as noted by one member, Mr. Omar, who castigated supporters of the Bill who relied on records from the Makadara Law Courts in Nairobi, unsupported by any documentary evidence. (35) On a closer scrutiny of the Act it is clear that adequate safeguards were incorporated by the draftsman to preclude such irregularities.

By S. 3 of the Act, the mother may apply to "A court having jurisdiction in the place where she resides" A court has jurisdiction by virtue of the fact that the mother resides in the area. What matters therefore is the residence of the mother, her nationality and domicile being immaterial. Residence is a matter of fact and means where a person habitually dwells. A woman who has no settled residence may probably apply at the court in whose area she happens to be for the time being. Where a woman deliberately moves to another court's area because she hopes to have a more favourable hearing there and for no other purpose, she does not reside there for the purpose of the Act. Even if she resides a few yards outside the jurisdiction of the court to which she applies her application is invalid. To preclude confusion that may arise, the test adopted by the court is of the mother's residence at the time of application rather than at the time of the birth of the child. Rule 6 of the Affiliation Rules, 1959 provides that the court shall keep a record of all payments due, and all payments made. The court may also direct the putative father as to the hours during which and the place at which the payments shall be made. The names of the putative father, the mother and child in question must be clearly stated in the application and order. A birth certificate in respect of the child is also required to be produced, and it is not difficult to discover defects or alterations in birth certificates. Indeed in the case of Parmuat v Montet (36) a forgery concerning the date of birth of a child where paternity was in dispute

was discovered by the court. This means that any new claim may be easily counter-checked in the court records. The evidence of an existing affiliation order in respect of any child accords very strong documentary evidence in favour of any man to rebut the allegation of paternity made against him. This had it not been for the constitutional protection accorded to members of the National Assembly in the House these imputations would have amounted to contempt of court. (37)

The type of evidence required in affiliation proceedings requires strict proof on the part of the applicant. In effect, this accords great protection to the alleged father. The mother is an essential witness in the proceedings. If she dies before the proceedings, or is too ill to testify, or does not understand the nature of an oath, an affiliation order cannot be made. Whereas S. 5(1) allows evidence to be tendered on behalf of the defendant, it does not allow the mother's evidence to be tendered on her behalf. She must start by showing that she is a "single woman" as defined in S. 2. If married, she must give evidence of non-access by her husband. She should then show how she met the accused and the first occasion on which they had intercourse, citing an occasion near to the probable time of conception. Medical opinions differ on the exact commencement of pregnancy, but it is generally accepted that fertilisation follows intercourse quickly, consequently anything beyond 24 hours is improbable. Having established the knowledge of her pregnancy, she must say whether she disclosed this to the defendant. What he said in response is very material and should be disclosed to the court. If there are other candidates for fatherhood blood tests may be used to show that none of the other men could be the father. Needless to say, it may prove practically difficult for the applicant to get all these other men to undergo such tests. The onus of proving that they could not have fathered the child either because contraceptives were used with them or that even though there was an opportunity for intercourse with them, it did not actually take place is on the mother, and this is by no means an easy task. Satisfaction of the requisite gestation period may also prove difficult. The normal period is around 230 days but could vary between 200 to 300 days in exceptional cases, and should be the subject of the expert evidence of a medical specialist. The whole process of securing an affiliation order could therefore be time consuming and expensive and it is unlikely that many women will resort to it as an easy way of obtaining additional income, as may wrongly be assumed.

Unlike the mother, the defendant is not an essential witness although no order may be made if he is dead. If the court is satisfied that the defendant has been served with a summons, it may proceed to make an order in his absence. If the defendant is outside Kenya, no service of summons is legally possible. Where an order is made in the defendant's absence, but it appears that he intended to contest the case but failed to appear for any plausible reason, the court should hear the case de novo.

S. 5(2) requires corroboration of the mother's evidence only hence the defendant has a lesser standard of proof. Technical defects in the application and summons such as the proceedings being out of time, or that there has been undue delay (S.3 (i)) or that the court lacks jurisdiction to hear the case, will all operate in the defendant's favour. Other defences include physical incapacity of the probable time of conception, either due to impotence (corroborated by medical evidence) or infancy. Under S. 15 of the Penal Code, there is a presumption that a boy under 12 years is incapable of having carnal knowledge. The mother's immoral character is also material if related to the time of conception. Here, evidence of her general reputation will be admissible to discredit her allegation that she did not associate with other men at the material time. Where an order has been made, S. 8 enables the putative father to apply for the order to be varied, particularly on the ground that his means have decreased. As regards the individual parties, it is clear that the Act goes to great lengths to ensure fairness.

The preponderant criticism that remains to be considered is that the Act did not fulfill its specific intendment. The ex-nuptial child is still disadvantaged in that there is no power to make provision for his mother as well. If he is so young that his mother has to leave work in order to care for him, or where she may be a mere school-girl, this should be taken into consideration. Most affiliation orders are very low especially in comparison to maintenance orders for legitimate children and their mothers. S. 9(2) provides for the attachment of the putative father's earnings in order to enforce payments. S. 10 provides that any sum ordered to be paid under an affiliation order shall be a civil debt recoverable summarily. The mother or custodian may therefore by complaint make a claim for any amount of which the putative father is in arrears under the Debts (Summary Recovery) Act of 1913.

Failure to comply with an order under this Act renders him liable to imprisonment not exceeding 6 weeks. It is submitted that committal proceedings have the effect of frustrating the objectives of the Affiliation Act in three ways. Firstly, imprisonment does not wipe out the arrears for which it was imposed; secondly, the aim of enforcing an affiliation order is to obtain money for the maintenance of the child, hence for as long as money is forthcoming it should not be blocked; finally the short term of imprisonment does not help the putative father to improve himself financially or otherwise. It is not surprising that for the short history of the Act, committal proceedings were rarely, if ever, resorted to for the enforcement of payment of arrears.

Other defects in the affiliation orders are reflected in the outdated and unenlightened assumption of the irreconcilability of the mother and putative father. An order may establish paternity but not any other legal relationship between the father and the child, apart from the obligation to pay money. Not surprisingly therefore, affiliation orders are regarded as punishments rather than genuine attempts to affiliate the child to his father for the satisfaction of non-material needs. The obvious solution would be to extend the powers under the Guardianship of Infants Act to all parents and children without distinction, and to allow the courts to make the same capital and property provisions as there are in divorce. This may be unconcionable where the father has another family to maintain, or where equal economic opportunities exist for both sexes.

The child relies entirely on his mother's willingness or capacity to make an application. She may be deterred by embarrassment of the uncertainty of the child's father, or wish to have nothing more to do with him, or by difficulties of proof or incapacity due to mental illness. This inadequacy alone shows the inappropriateness of the Act to secure maintenance for the ex-nuptial child by imposing this initial handicap against such a child. S. 11 of the Act empowers the court to appoint a custodian for the child where the mother dies, is in prison or is of unsound mind. The custodian so appointed has the same rights of receiving and recovering payments as the mother. This provision however appears to be operational only where an affiliation order has been previously granted to the mother.

Prima facie under S. 3, it is only the mother of an illegitimate child who may commence proceedings. S. 6(2) provides that "An Affiliation order may on the application of the custodian be made or varied by the court so as to entitle the custodian to any payments to be made under the Order". This provision has two possible meanings: that while an order can only be made on the mother's application, the custodian may intervene in the proceedings as a third party and request payments to be made to him and not to her, or that the custodian may himself apply for the order in his own name. If the first meaning is correct, the custodian can only ask for a variation in the order where the mother is the complainant. But if the second meaning is the correct one, the custodian himself can obtain an order against the putative father. It is only then that maintenance of an illegitimate child whose mother is unwilling or incapable of taking proceedings can be obtained. Thus it is conceivable that the parents of the mother may be supporting the child themselves while she refuses to take proceedings. Alternatively she may die leaving behind the child and an agreement by the putative father to support the child. The Act did not provide for such eventualities. Even an amendment of the section to enable the custodian to apply for an affiliation order using the agreement as evidence of the child's paternity would be met by limitations among which is the necessity for the mother's oral evidence. Under the Act, a cause of action therefore dies with the mother.

S. 12 of the Act prescribed a penalty for any woman who was found guilty of either neglecting or deserting her child. Such a woman would be guilty of an offence and liable to a fine not exceeding Shs.2,000/- or imprisonment for one month, or both such fine and imprisonment. S 13 made it an offence for any custodian to misapply money paid by the putative father. S. 14 provided for the right of the putative father, custodian or mother of an illegitimate child, to appeal against any order made in a Subordinate court hearing the affiliation case. The above criticisms on committal proceedings would apply here rendering such penalties worthless. The Act gravely overlooked the need to keep the mother of an illegitimate child in check. There were no express provisions within the Act to regulate the behaviour of the mother or to ensure proper use of payments received under an affiliation order.

These numerous shortcomings of the Affiliation Act which purported to encompass all the questions relating to the welfare of illegitimate children must certainly mean that the specific legislation, either because it was designed to cope with a diverse set up in England, or due to its inherent defficiencies was not, and is not the solution to the Kenyan cataclysm. Other means must be sought to bridge the persistent gap. This topic calls for wide comparative research and inter-communication in the sphere of family law.

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CHAPTER THREE

3:0 COMPARATIVE ANALYSIS AND RECOMMENDATIONS

It has been observed⁽¹⁾ that the status of children born outside marriage has greatly improved in common law countries in the last decade but still falls behind that in civil law countries. Most British Commonwealth countries do not possess anything akin to the United States Bill of Rights, or the West German 'Grundgesetz', so that no claim can be made that children born out of wedlock are constitutionally entitled to "equal protection". But this absence of a constitutional mandate is not necessarily a disadvantage. The same author points out that the issue of improving the lot of children born outside marriage is clouded by rigid doctrinal adherence to a concept of equality. In his view, a legislature can attempt to improve the lot of children born outside marriage in three ways:-

- (a) by attempting to equalise the rights of all children whether born within or outside marriage;
- (b) by improving the rights of children born outside marriage while still conceding them an inferior status;
- (c) by changing the law so as to actually place children born outside marriage in a favoured position.

There is an intermediate position which has found favour in some American States, which grants a superior status policy to children who are acknowledged by their fathers.

The principle English Legislation, the Family Law reform Act, 1969, adopted position (b) and claims to have removed the legal disabilities of illegitimate children. The Act simply improved the child's succession rights and even then not comprehensively. It represents supercilious conservatism and is unfortunately the same approach that the Kenya Acts have adopted.

Course (a), the equalization policy, is exemplified in the New Zealand approach, and is also seemingly favoured in Canada. The Law Reform Commission of Canada observed that there had been total failure in the past to accept that family problems are of sufficient significance to merit the attention of the highest courts.

In particular the commission identifies a serious problem with respect of maintenance orders. It was estimated that some degree of default results in considerable public expenditure by way of welfare assistance. It then proceeded to recommend that a unified Family Court should assume substantial responsibility for the enforcement of its orders. It proposed that enforcement services should be established as an integral part of the Family Court system. Its responsibilities would include:-

- (i) the receipt and disbursement of monies paid under court orders;
- (ii) the maintenance of records and accounting systems to ensure an up to date picture of the status of court orders;
- (iii) taking action to ensure that any defaults are explained and where appropriate, made good;
- (iv) the development of an effective system of tracing the spouse or parent who has disappeared.

The recommendation for a National Fund for the maintenance of illegitimate children which was proposed by certain Parliamentarians after the repeal of the Affiliation Act, appears to have been inspired by the Canadian approach to the problem. It was suggested that the fund be initiated on a "harambee" basis by the Government. The responsibility to maintain an illegitimate child would be borne by both its parents, who would be required to make contributions to the fund from which the parent with custody of the child would draw allowances on a periodical basis, and make returns as to the precise expenditure incurred. Field officers would be sent out to ensure that the allowances are properly used for the maintenance of the child, and also to recommend the very needy families who may draw supplementary benefits from the fund. The management of this would fall under the Ministry of Social Services or the Office of the Public Trustee. This it was hoped, would ensure that the benefits would accrue to all children, legitimate or illegitimate and not only whose parents or close relatives are better placed.

Kenya should not copy the general policy as Canada and New Zealand, to proclaim a general clause stating that all children are of equal status, and then make a few consequential amendments to earlier statutes which did not accord equality.

This approach is fundamentally misguided. "Equality" as such is impossible to achieve. The fact is that children born outside marriage start life at a huge disadvantage most of which is ineradicable. Society cannot ignore the factual differences of birth outside marriage it is impossible to equate remedies, status or rights of children. The law should rather acknowledge the realities and should seek to compensate the ex-nuptial child for his initial disadvantages. In other words, there is need for greater surveillance, greater procedural amenities and more extensive social services in order to grant ex-nuptial children equal conditions for physical and spiritual development.

The tendency of the laws should therefore not be to strive for doctrinal equality, but to provide an additional crutch, or at least a walking stick to assist a highly underprivileged class of society. The provision of a guaranteed state maintenance to one parent families supplemented in appropriate cases by private maintenance and provision for good facilities for child care for single mothers are far more meaningful than grandiose declarations.

The whole range of social legislation should be inspected to see whether the ex-nuptial child is being advertently or inadvertently excluded. This is particularly necessary in countries following the English system of the supremacy of the legislature, where it is impossible with one sweep of the pen to enact a constitutional provision annulling or countermanding discriminatory legislation. Under the Workmen's Compensation Act, for instance, where a relative is entitled to receive financial benefits from the death or accident of another, the ex-nuptial child should in principle be entitled to the benefit of this type of legislation as if he were born within marriage.

Where however there is a question as to quantum of benefit, there may be certain legislation where it is still desirable to make different provision for a child born within and one born outside marriage. The policy prima facie, in these cases must be to favour the child born outside marriage. Perhaps where the legislation vests a discretion, a mandate could be given to the courts to have regard to the hardships suffered by illegitimate children in assessing the quantum of benefits.

A more difficult policy decision is whether to grant parallel reciprocity. If you opt for a manifesto of equality, you must. There seems however to be little justification for allowing the father who has ignored his ex-nuptial child to benefit pari passu with the father of an ex-nuptial child born of a stable non-marital union, and who has constantly behaved paternally towards the child. It would be especially unjust if the former child were in foster-care and the foster parents derived no benefit from the legislation. This legislative approach stems from excessive zeal for legislative tidiness. The Legislature needs to re-examine social welfare statutes in this spirit.

3:1 DETAILED RECOMMENDATIONS:

Private Maintenance:

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The ex-nuptial child should not be equated with one born inside marriage for this purpose since, for the latter, the father has an imperfect obligation to maintain so long as there is no split in the family. The ex-nuptial children should retain their right to affiliation actions, but much greater encouragement should be given to fathers to agree outside court to maintain their children. The action should also be denuded of its criminal overtones. A Family Court system, like the Industrial Court or Rent Tribunal should be created specifically to deal with the maintenance of illegitimate children. Specialisation in this field would ultimately come up with a more viable form of maintenance legislation to fill the gap left by the repeal of the Affiliation Act and to enhance both actions for breach of promise to marry and pregnancy compensation which barely reflect the need to maintain ex-nuptial children. The intendment of both these actions is solely to compensate the aggrieved parties, and benefits accrue to the child not as a matter of right but on purely humanitarian grounds. The Family Court system would have the task of sifting the wheat from the chaff and come up with the most favourable aspects of these actions in favour of the child. The hearing of these two claims together with affiliation proceedings would be transferred to the Family Court whose counselling services would encourage conciliation of the parties. If an acknowledgement procedure is introduced, then the goal of counsellors would be to encourage fathers to acknowledge their ex-nuptial children.

The Affiliation procedure must be radically amended if the Act is to be reinstated. Blood testing facilities are underdeveloped and under used. Other genetic tests are hardly ever admitted. The mother is subject to humiliating pressures, hardly conducive to any degree of conciliation with the putative father. Not surprisingly then, only few mothers brought action and even then probably under coercion, not merely due to the deprivation of pecuniary resources but because it prevented the possibility of the father ever entering a paternal relationship with his child.

3:2 Establishment of Paternity:

A major obstacle in common law countries in the advancement of a relationship between the father and his ex-nuptial child lies in the fact that there is no procedure available legally to cement a full and complete father and child relationship. There is no procedure for recognition, and a judicial determination of paternity does not have the effect of granting a man the status of a father.

The New Zealand legislation provides for a declaration of paternity. The safeguard of a separate legal representation on behalf of the child should be built into this provision due to the great importance of this to the child.

3:3 Acknowledgement:

New Zealand introduced a procedure for voluntary acknowledgement but only if it is acquiesced in by the mother. The consequences of acknowledgement should be to establish a complete relationship of mutual rights and obligations between the father and the child. It is arguable whether all incidents of patria potestas which vest in a father of the child born within marriage should fall upon the acknowledging father. Should the child's domicile, nationality or surname follow those of the father or remain as those of the mother's? Should the court or child be able to reject acknowledgement if the acknowledgement is not to the child's best interest, such as where the father is a criminal or has been cruel to the child? Should acknowledgement be revocable at the instance of the acknowledger if facts later come to light throwing doubt on his paternity of the child?

3:4 Guardianship, Custody, Access and Consent to Adoption:

These essential elements of the child-parent relationship are normally exercisable by both parents if the child is born within marriage.

Should the father of a child born outside marriage ipso facto have the same rights? Once it prescribes a procedure for acknowledgement, the law clearly distinguishes three types of fathers:

1. those who voluntarily undertake the duties of a father;
2. those who cannot be identified;
3. those who refuse to establish a full relationship with their children.

Provided that safeguards are built into the acknowledgement procedure it seems just that the acknowledging father should be treated as if he were the father of the child, as if born within marriage. He ought to be able to apply for guardianship and custody on the same footing as the mother. His consent to adoption should be required subject of course to the dispensing power of the court, already existing in the case of married parents.

As regards access, the right to grant this is normally with the custodian, in this case the mother. No common law jurisdiction takes this view as regards fathers of children born within marriage, who have virtually an automatic right to access on separation, and it would be anomalous presently to deny access to the acknowledging father of an illegitimate child.

Consent to adoption raises the question of stubborn mothers who refuse to reveal the child's father's name. A Canadian report suggests that strong pressure be put against the mother such as denial of welfare benefits. But also, the potential advantages to her child should be pointed out to her—proprietary, or health where knowledge of the father's blood group is required for the child's medical development. However, all the solutions to this problem seem to infringe the mother's human rights and renders the policy that all children have equality of status, fictional.

3:5 American Law relating to Illegitimate Children

Further guidance in the creation of Kenyan legislation to cater for the welfare of illegitimae children may be derived

from the American experience. (2)

Except from inheritance from his unlawful father, an ex-nuptial child has nearly all the rights of a legitimate child.

In 1968, the United States Supreme Court decided numerous cases on the bases of the Equal Protection Clause of the Federal Constitution which established the principle that the illegitimate child is entitled to legal equality with the legitimate child in the most substantive areas of the law. Numerous state statutes discriminating against illegitimate children have been declared unconstitutional.

In Levy V Louisiana (3), the U.S. Supreme Court held invalid as denying equal protection of the law, a Louisiana statute which barred an unacknowledged child from recovering from the wrongful death of its mother when such recoveries by legitimate children were authorized.

"Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent on her, she cared for and nurtured them, they were indeed hers in the biological sense, in her death they suffered wrong in the sense that any dependent would."

In Weber V Aetna Casualty & Surety Co. (4) the U.S. Supreme Court held that dependent, unacknowledged illegitimate children were entitled to recover under the Louisiana Workmen's Compensation statute, benefits for the death of their natural father on an equal footing with his dependent legitimate children.

"The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liasons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility for wrongdoing. Obviously no child is responsible for his birth and penalizing the illegitimate child is an ineffectual.... as well as unjust way.... of deterring

the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where.... as in this case.... the classification is justified by no legitimate state interest, compelling or otherwise".

In 1973, the U.S Supreme Court held that under the Equal Protection Clause of the 14th Amendment to the Federal Constitution a state may not constitutionally grant legitimate children a judicially enforceable right to support from their natural fathers and at the same time deny that right to illegitimate children. There was at issue a substantive right of great importance to an illegitimate child - the right of support. The court stated:

"We therefore hold that once a state posits a judicially enforceable right on behalf of children to needed support from their natural fathers, there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a state to do so is illogical and unjust. We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination."⁽⁵⁾

The lesson to be derived from the American approach to the problem of illegitimacy by Kenyan legislators is that a lot of the discriminatory provisions in Acts dealing with the welfare of children generally, viz those discussed in the first part of the previous chapter, could be countermanded by the inclusion of something akin to the Equal Protection Clause, in the Kenyan Constitution.

A small number of American states have attempted to erase entirely the distinction between legitimate and illegitimate children by passing statutes which provide that every child is the

legitimate child of his natural parents. S. 2 of the Uniform Parentage Act, approved in 1974 by the American Bar Association provides:

"The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents."

The rights of the putative father have also been considered and several steps have been taken to ameliorate them. The proposed 27th Amendment to the U.S. Constitution reads:

"Equality of rights under the law shall not be denied or abridged by the U.S or any state on account of sex."

The Kenya constitution outlaws discrimination by virtue of sex. The implications of this in respect of the Affiliation Act which did not accord parental rights to the putative father who was merely made to pay maintenance for his child, is that if care was taken to evaluate legal provisions in the light of superior constitutional ones, the Act would not have passed such a scrutiny and should not have been enacted.

3:6 Marriage and The Parent-Child Relationship

Under this head we shall consider whether there is any tenable legal or moral justification for basing the legal rights of children on the marriage institution. It is submitted that the basis of the distinction between filiations is wrongly based on a generalised conceptualisation of marriage which does not reveal the duality of the pure concept.

When we speak of "marriage", there is an ambiguity of which we must be aware. In the fundamental Western sources of family law, this duality of concepts is not always made clear in precise expressions of vocabulary. "Marriage" when taken in a juridical context, is not a univocal expression: it denotes not only the act through which two persons accept each other as spouses before the lawful authority, but also the state created to these same persons as a result of that act. According to Leclerc (6), Catholic canonists and theologians classically distinguished these two categories by using the expressions 'matrimonium in fieri' and 'matrimonium in facto esse', the former one indicating the celebration, the latter the state which results from it. In Roman law (7) this duality of concepts

is revealed by the use of the words "nuptive" to denote the celebration, and "matrimonium" to express the married state. The latter already implies in its etymological root, the idea of motherhood itself, which must be so much closer to the lasting state than to the act itself. Thus the term "marriage" is subject to terminological ambiguity, but remains the basis of distinction between filiation.

The juridical condition of children has been equated to their legitimate and illegitimate, or matrimonial and extra-matrimonial state. And when their status is to be determined, the question is related to the concept of marriage as an act celebrated before a lawful authority. It must be emphasised that the basis of the classical distinction between legitimate and illegitimate children is in reality extrinsic to the children themselves. There is no effective importance to one's juridical condition of the fact of having ones parents express their will to accept each other as husband and wife before a lawful authority on a particular day. Nor is this a denial of the social and juridical meaning of marriage as celebration, nor to advocate the practice of free love. The responsibility which the betrothed undertake before the community is one of the juridical facts of the greatest human and social consistency that can be achieved. The importance of this bond is the depository of their solemn promise. As to the child born to the couple however, he neither took part in the act, nor was he a depository of their promise. Neither did he agree to the union. As such, to subject his status to such an event is unreasonable and prejudicial, so absurd in a juridical sense as to be equaled only by apartheid.

Marriage as a lasting state - matrimonium in facto esse - on the contrary, is directly related to the sphere of interests of the child since his development as a person is greatly influenced by the environment in which he grows up, procreation and birth are just the physical part of becoming a man, whose accomplishment requires love, affection, advice and guidance. These are best fulfilled in the continuity of a marriage. As such marriage as the source of the family institution is bound to play necessarily a selective role.

It has been argued that the principle may be justified as being effective against illicit sexual unions, but once the selective role is exercised against children who do not themselves have any responsibility for those unions, it loses justification.

A change in terminology alone (matrimonial and extra matrimonial) will go a long way in freeing children from guilt in acts in which they did not participate. It is highly offending to refer to a person as illegitimate as if some persons have more right to be born than others.

Once a person has been born he should be accorded equality of status by the law. The way should be paved for immediate abandonment of crude and defamatory terms such as "illegitimate", still regrettably to be found in statutes, caselaw and common parlance. Once this is done and phraseology such as "children born outside marriage" or "ex-nuptial children", is substituted, it would only be necessary to go a step farther and define what the phrase really means and includes so as to avoid uncertainty. The exigent need for welfare law that does not discriminate against ex-nuptial children requires that no distinction be made in particular on a basis such as the existence or absence of the act of marriage, which as we have seen is extrinsic to the children themselves. This is what Kenya legislation should strive to achieve.

CHAPTER 4

4:0 Illegitimacy in the Socio-Economic Context

The problem becomes the practical one of providing the basic needs of the ex-nuptial child. To delve into the circumstances under which he came into existence would only obscure his humanity. This seemingly minor problem attains national significance in a recurrent form. From the simple act of birth crimes such as child-dumping, abortion, infanticide and various forms of juvenile delinquency abound. From the preceding study of the unsatisfactory law on the welfare of ex-nuptial children, it appears that society itself has heeded the unvoiced plea of its underprivileged members for deliverance from a life of unwarranted drudgery, whereas the state which properly should play the role of patrias potestas has turned a deaf ear. This is evidenced by the continuous debate in the press on the suitability of legalising abortion, as well as the great zeal with which the calamities which befall illegitimate children, pregnant school-girls, parking-boys, juvenile prostitutes and the like, are reported.⁽¹⁾ A good word is always put in for the voluntary organisations and individuals who undertake humanely, to care for the less fortunate. These commendations are always coupled with pleas for donations to enable the volunteers to spread goodwill further afield.

This is a very unsatisfactory condition. The magnitude of the problem of illegitimacy is clear not only from the larger section of the population concerned but also from the wide range of crimes attached to it. That it has great repercussions on the well-being of society as a whole is illustrated by the large amounts spent in curbing crime, rehabilitating criminals, running children's homes, aiding the destitute and providing medical services for victims of the whole fiasco be they those at whom acts of violence are directed, or those who try to extricate themselves from the web of misery as early as they can - through illegal abortion. Why these lucid and numerous indications elicit no effective response from the government, why social welfare must to the larger extent be left to the "Mother Theresas" of society is reminiscent of colonial rule characterised by the emphasis to maintain law and order at the expense of all else. This is the light in which we shall proceed to examine the

- 27

72
From P 71
case if goals were successfully emphasised by a society, while legitimate, socially structured means for attaining these goals with reasonable effort **are lacking**. In Kenya, it would appear that the goals include material wealth and high social status to be attained chiefly through educational achievements. Whether education is available through reasonable effort for most Kenyans is a moot point.

Goals and means are out of step if a society succeeds in selling certain common material and egalitarian values to the population at large, while its social structure is too rigid and economic opportunities too few and unequally distributed to allow access to these values and symbols by all members of society. In such a situation some people will reject society's norms or turn to crime in order to reach the goals they share with society at large. Thus it is not only the fact of poverty, nor even of poverty in the midst of plenty which results in criminal behaviour: it is unobtainable goals and thwarted expectations which lead to delinquency. This can occur in a rural as well as an urban setting, as is true for the Kenyan experience where all the crimes attendant to the problem of illegitimacy cannot be confined solely to either setting.

At the higher level, the scourge of illegitimacy may be held against society as a crime it commits by relegating innocent children to inferior status. Society goes further and compels its members to resort to child-dumping and abortion (which society itself terms "illegal") so that they may not be encumbered with children they cannot raise. The social significance of this crime in the first instance reflects tensions and dislocations in a period of social change - society protests against the changing trends by expressing its disapproval of illegitimacy and illogically punishing the victims rather than the perpetrators themselves! Conversely, in the second instance, the crime represents an attempt by society's members to adapt to prevailing social goals. Logically, if society would reconsider its goals and the means for attaining them the occurrence of the crime would be reduced. If crime does serve some purpose, if it is closely related to other social, economic and political processes and if it is participated in by a large number of people, then it

norm p 70

government's development policy and its apparent lack of regard for social welfare in this area,

4:1 Social-Legal Significance of Illegitimacy:

Illegitimacy has until now been regarded as a scourge but it really is a boon to Kenyan society. It may yet be the most practicable source of solutions to the apparently irreconcilable contradictions, the cataclysm resulting from the transition from a communal society to a modernised one. Transition has been sudden and traumatic, with the disruption of traditional welfare institutions displaced by new ones which have been slow to take root. The problem of illegitimacy signifies the resultant void and consequently furnishes the best incentive to bridge it. Indeed, in 1895, Emile Durkheim made the startling observation that crime is normal in a society, "an integral part of all healthy societies"(2)

Crimes such as child-dumping, illegal abortion and various forms of juvenile delinquency may therefore be seen as forms of social adaptation, representing an attempt to adopt to social norms albeit in socially illegitimate ways. This is well illustrated by studies in criminology, and in particular the concepts of social disorganisation and anomie. Social disorganisation refers to the disruption or disappearance of social systems and anomie means normlessness and refers to a disruption or disappearance of value systems. The two terms refer to similar situations taking place in different spheres, and are closely interrelated. Thus a link between crime, normlessness and social disorganisation is clearly reasonable. Crime is a form of disorder because it suggests a breakdown of the public consensus or morality. Rural and urban are assumed to be opposite poles on a continuum and urbanisation or modernisation represents an historical and traumatic movement between the two poles.

Urbanisation is by no means the only process which theorists have felt could give rise to a situation of anomie and thus to delinquency. According to Merton, (3) anomie hence delinquency stems from a discrepancy between the goals which a society sets for its members and the means which it legitimises for attaining them. Anomie may occur when society's goals have been internalised but its norms governing means have not. This would be the same

75
cannot be dismissed as an isolated phenomenon confined to the dregs of society.

Crime tells something about society itself and what is happening to it. Crime is also functional in that it tends to counter tendencies towards rigidity and stagnation which are present in all societies. Kenya must therefore establish a forum for interpreting and explaining crime if the present social problems are to be overcome. The present study has underscored the need for diligence in the legislature. Finally, we need to realise that the scourge of illegitimacy as a crime is essentially political. If crime does not imply a rejection of, or a protest against society and its norms (which is the case where people choose to keep their illegitimate children) then the subsequent deprivation that ensues is obviously a political act. It is often the result of political decisions as to the relative expectations of each individual, and as to what acts in achieving these goals will be considered criminal.⁽⁴⁾ Crime - its commission, its causes, its definition, its enforcement - is a political act and not until we admit this can we begin to deal with the phenomenon fairly. In order to confront the problem the root cause rather than its expressions must be eradicated, and our own prejudices must not obscure its identity.

4:2 Planning Policy and Ideology:

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What remains to be considered now is the government development policy, what it is, how it operates and its relation to the plight of illegitimacy. As a general term of policy planning is used to describe state intervention to influence social, economic cultural and political change in a desired direction through the allocation and distribution of resources. To the extent that economic planning is a philosophy, its form and content depend on the socio-political and economic ideology of the country. It does not take place in a vacuum. Planning policy in Kenya must therefore be posited contextually within its historical fabric of a colonial legacy and its post-colonial continuity.

Socially, the colonial administration had in collaboration with missionaries ensured the attitudinal acculturation of Africans, and introduced institutions and an educational

system to structure English imperialism. Governmental structure and institutions were premised on a law and order orientation rather than a developmental one. In all by 1950 the political economy of neo-colonialism was firmly in place. The backbone of the colonial economy was the exploitation of African labour and alienation of African land. This precipitated the Mau Mau peasant revolt, a contradiction that was pre-empted and cushioned by extending the benefits of the colonial venture to an emergent African petty bourgeoisie through various modalities including the Swynnerton Plan, enabling African small-holders to participate in the monetized economy as land owners with access to credit and other extension services. This was Kenya's legacy at independence.

Politically, independence was only possible for according to imperialism, growing nationalism had underlined the fact that the longterm interests of metropolitan accumulation lay in a rule by Kenyans which ensured continuity in the political economy. In this sense independence would ultimately be reduced to the management of the colonial economy by an indigenous political hierarchy. It is this fact which makes Kenya a neo-colony and constitutes the historical background to economic planning in Kenya. This gives a lot of insight into the deprivation which is characteristic of the status of illegitimacy, since a lot of resources and efforts are geared towards production for metropolitan accumulation, social welfare being left largely to make its own erratic and slow progress.

The major ideological and policy blueprint of economic planning to date is Sessional Paper No. 10 of 1965 on "African Socialism and Its Application to Planning in Kenya."⁽⁵⁾ It outlines policies and objectives of planning, charting out measures for their achievement. It has been reiterated by all the three Development Plans since independence. The paper begins by noting that under colonialism the nation's natural resources were organised and developed mainly for the benefit of non-Africans, and that the nation's human resources remained largely uneducated, untrained, inexperienced and unbenefited by the growth of the economy.⁽⁷⁾

The independent government's objective is to mobilise its resources to attain a rapid rate of economic growth for the benefit of its people. The paper then proceeds to set out policy objectives and mechanisms for their achievement.

African socialism is defined as a purely African political and economic system, which rejects Marxian socialism as inapplicable because class distinctions, unrestricted property rights and acceptance of exploitation characterising Marx's Europe do not exist in Africa. It also rejects laissez-faire capitalism as having proved unworkable.⁽⁸⁾ On social differentiation it is argued that no class divisions exist among Africans but that there is a class problem largely on the basis of race.⁽⁹⁾ To prevent the emergence of class differences among Africans domestic accumulation is to be controlled by measures such as progressive taxation.

The basic foundation for the achievement of African socialism is emphatically stated to be rapid economic growth. Planning has been premised on the assumption that growth is the central aim of development.⁽¹⁰⁾ Critical shortage of domestic capital, skilled manpower and foreign exchange are identified as the major problems to be solved for rapid growth to occur.

To the extent that growth is the primary concern of planning, equity and distribution, though given recognition as desirable are either subsumed or equated with growth per se. The Development Plan for 1979 to 1983 views equity as "a second generation problem" of economic planning.⁽¹¹⁾ In other words, equity is to be achieved after growth and not as an integral part of planning. Indeed, whereas Kenya's economic growth rate is impressive at 5.8% between 1964 and 1977, the class differentiations, and contradictions which have crystallised bear testimony to the result of economic policies. The plight of illegitimacy is therefore not a wild accusation, but is well-founded. It is true to say that while the formal ideology of planning implies a serious restructuring of the economy and society so that the principle of equity is served, the actual plans suggest that the present structures resting largely on private ownership and co-operation between public officials and private enterprises will be sustained and employed to advance economic growth.

Put quite simply, there is nothing African or socialist in the programme. While rhetorically rejecting foreign ideologies the prescriptions are emphatically objectively capitalistic. The basic structure of the colonial economy is left intact. Whereas imbalances arising from colonialism are acknowledged, they are perceived in quantitative and racial terms and consequently the prescription for their correction is logically quantitative and socially particularistic. In denying the class differentiation within African societies, both traditional and contemporary, the paper mystifies the reality of the exploitative and oppressive character of neo-colonialism in an effort to pre-empt a political solution to development.⁽¹²⁾ Without pursuing this point further, the subject-matter of the present study demystifies the contention of the paper on African Socialism - the status of illegitimacy, which we have traced back to certain African communities, and which exists without doubt in the present society is itself an expression of the differentiation within the class of children.

The importance of achieving a declining birth rate has been recognised as one of the strategies through which a higher quality of life for all may be achieved. Lower resources would be required for social services and more would be devoted to the essential task of creating income-earning opportunities. The population growth rate at 3.8% is alarming. The population structure itself leaves a lot to be desired with the majority consisting dependent children and the aged.⁽¹³⁾ Although family planning has long been identified as the long term strategy to achieve both a declining birth-rate and properly structured population little progress has been achieved so far. This may be explained first by the fact that this has not been regarded as being of prime importance. A re-examination of priorities is called for. Indeed our national planners appear not to realise that the nation's long term objectives must take the form of improving the welfare of the individual and family. In the final analysis this is the real test of effectiveness.

Secondly, the efficiency of plan implementation policy draws the line between the success and failure of all plans. Such implementation largely relies the administrative structure of the government hence the quality of that structure is crucial.

A United Nations study of planning in Africa has identified a paradox which is applicable to the Kenyan case. Whereas planning is a new phenomenon in the apparatus of government, the administrative machinery is more solidly established and cannot be easily reformed under the pressure of the requirements of the new plan so as to make it suitable for the implementation of a development plan.⁽¹⁴⁾ The administrative structure in Kenya is law-and-order oriented, arising from colonial roots, rather than being developmentally geared. Plan implementation in Kenya under the circumstances relies on instruments which can be applied through existing machinery rather than those which require new administrative bodies.

Family planning has made little progress due to poor implementation. Most of the important work is still left to the Family Planning Association of Kenya a voluntary organisation founded in 1955. It was not until 1967 that the Government adopted a family planning programme with services to be offered free of charge in all its hospitals. In 1974, the Government launched its first 5 year family planning programme emphasising that its interest was in maternal and child health rather than population explosion.⁽¹⁵⁾

Implementation here is hampered by numerous restrictions to be found in the Penal Code, Public Health Act and the Pharmaceuticals and Poisons Act which have not been reviewed in spite of the Government's change of position.⁽¹⁶⁾ S.181 of the Penal Code prohibits the use of any obscene objects for whatever purpose which may tend to corrupt public morality. This sanction provides no acceptable defences, but a similar provision in the Public Health Act⁽¹⁷⁾ makes exceptions for publications by the Ministry of Health or any person acting under its authority. It would seem that the exceptions here are wide enough to cover the Family Planning Association. It would seem also that the Government has not seen it fit to provide the Association with a proper legal basis from which it may undertake its magnanimous task.

Another area that would provide a possible solution to the whole problem of illegitimacy is legalised abortion. This is an area where the law as well as the general attitude of the people (rooted in religious belief) is most in conflict with the declared aims of the Government both in the Development

Plans in respect of population growth rates and in other policy statements. This position is understandable, given the dangers under which illegal operations are performed in countries with near-total prohibitions against abortion. It has not often been realised that those who oppose the legalisation of abortion in Kenya on the basis that it is dangerous to the mother's life, in addition to destroying the life of the foetus are engaging in circular reasoning. It has not been conceded that the danger could be and is in fact removed where abortion is permitted in properly supervised settings, and that the existing dangerous situation itself is a creation of the present law which roundly condemns abortion practices by qualified medical practitioners in Kenya. The law has the effect of forcing those who seek abortion to do so under clandestine and unsavoury conditions. (18)

Throughout this chapter, Government Development policy has left no doubt that the problem of illegitimacy is regarded as a demographic one. It has continuously been emphasised that population growth constitutes the most dangerous obstacle that faces the nation in its quest to raise the standard of living in an effective and efficient way. Reduction of the birth rate - birth control - is the goal crucially tied to the primary objective of raising income levels. Such a position necessarily calls for quality rather than quantity. Illegitimate children in this context, must therefore be deemed as undesirable in so far as they are a burden to the family into which they are born, which burden, as we saw in the previous chapters, is shifted to the nation as a whole.

The provisions of the law sit rather uneasily on the professed policies of the Government to reduce the population growth rate. Yet, illegal abortions still proliferate and the professional abortionist flourishes with an outrageous disregard of the dangers to the health and lives of women. Here as in the areas of succession law, land law and matrimonial law, the legislature has a duty to protect the population from the dangers of illegal abortion and to carry through the developmental plans of the country. (19) In view of the absence of a welfare state, the problems attendant to the status of illegitimacy may almost totally be obliterated if abortion in Kenya were to be granted on demand. The slogan that no baby should be born unwanted should be made a reality. What is required,

in short, is a comprehensive Family Planning Act for Kenya embracing and rationalising all the law on the subject so as to compliment the policies set by our Development Plans. Following this, all the laws concerning the welfare of children should be consolidated and rationalised, on the lines of an equal protection guarantee so that once and for all the status of illegitimacy which has now outlived its usefulness, will be done away with.

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37. Cap. 156.
38. (196) E.A. 801.
39. Cap. 144.
40. Rex v Amkeyo (1917) K L R 14.
41. Cap. 156, S.6; Cap 151, S.9, respectively.
42. Act No. 16 of 1967, Cap. 8.
43. C O K, 1969, S.82 (4) (c)
44. Act No. 17 of 1967, S.2.
45. Cap. 80. see also SS.59, 60 and 127.
46. Cap. 150, S.37.
47. Cotran's Restatement of African Customary Law Volume 2.

This is a customary law device for salvaging the otherwise broken union of husband and wife, to the benefit of the children.

CHAPTER TWO
PART ONE: * * * ? ?

1. (1969) E.A. 279.
2. S.52, Income Tax Act, No.16 of 1973
3. (1961) E.A. 652.
4. S. Coldham: "The Kenya Law of Succession Act, 1972" in 1974 E.A.L.J. Volume 10. This offers a useful critique of the Act.
5. S. 3(2) Cap. 160.
6. Footnote 4 (supra).

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7. S.2, Cap. 470.
8. Patick Devlin: "The Enforcement of Morals", Chapters 2 and 3.
9. Report of the Commission on the Law of Adoption.
Nairobi, G.P. 1974.
10. Report of the Commission on the Employment of Juveniles:
Nairobi, G.P., 1938.
11. The Standard April 13th, 1978 - there was a rumour that one child had died and had been buried in the forest by his young colleagues.
12. S.103, Cap. 403.
13. Daily Nation: December 14th, 1983: "Baby Buried Alive".
14. Sunday Nation: January 22nd, 1984: "20th Century Slaves".
15. Daily Nation: January 23rd, 1984 at page 1 "Boy 5, scalded to death".
16. LegCo Debates 1947/48 at P.434 per Mr. Vasey (M.C.).
17. LegCo Debates 1933 Volume I at page 42.
18. Daily Nation: October 27, 1982: it was revealed that boys between the ages of 8 and 16 years inhaled petrol in order to get intoxicated, or to enable them brave ~~the~~ cold at night. The long term effect of this practice is poisoning of the lungs and kidneys by lead tetraethyl, contained in petrol. This eventually leads to death.
19. R.V. Robert Mutegi: RMC Nanyuki Criminal Case No.313 of 1982.
20. J. Rainer: Survey on Residential Child Care Institutions in Nairobi. 1978 Ph.D Thesis, University of Nairobi.
21. S.76. This provides for the formulation of regulations as to the management and administration of approved societies and voluntary institutions in relation to the care of children in homes and institutions. The full text is contained in Legal Notice No. 268 of 1965.
- 22.a Miriam Were & Fred Ojiambo: "Medical and Legal Aspects of offences Against Children". Occasional Papers, No. 35 of 1979. Institute of Development Studies, U.O.N., at P.90
22. M.M. Akola: "Legal Aspects of Children's Homes and Institutions" Occasional Papers No.35 of 1979 (Supra) at Pp. 65.81.
See also Mrs. Ruth Sitati: "Juvenile Delinquency and The Law", a paper delivered to the seminar held at the University of Nairobi on 13th and 14th July 1979, to mark the International Year of the Child. Op cit. at Pp. 83-86.

19. Arthur Philips: "Native Tribunals" para.896.
20. Civil Case No. 24 of 1980, R M C Nanyuki.
21. Also reported in the VIVA magazine, September, 1980.
22. G P Nairobi, 1968.
23. Affiliation (Repeal) Act, No. II of 1969.
- 23a. See generally S.N.Waruhiu: "Affiliation Law in Kenya". East Africa Literature Bureau, 1962.
24. Cretney: "Principles of Family Law". Sweet & Maxwell 1974, P. 320.
"Bromley's Family Law", Butterworths London, 1966, 3rd Ed. P. 392.
Stranger: "Eversley's Law of Domestic Relations" Sweet & Maxwell, London, 1951, 6th Ed. P. 425.
25. Blackstone's Commentaries on the Laws of England Clarendon Press, Oxford, 1765 P. 446.
26. Finer & McGregor: "History of the Obligation to Maintain" Appendix 5 to the Report of the Commission on One. Parent Families, Cmnd. 5629 - I (London, H.M.S.O. 1974)
27. G.K. Kuria: "Law of Marriage and Property in English Speaking Africa: A lecture delivered at the Seminar on Women and Development at Maseru, Lesotho in April 1977 at P. 100.
28. E.A. Standard May 16, 1969. For further correspondence on the Act see E.A. Standard 10th May to 18th June 1969.
29. The question of re-instating the Act was raised in Parliament in 1982 by a member of the National Assembly, Mrs. Phoebe Asiyu.
The Sunday Nation, May 6, 1984 carries a promise by the A-G, to have certain sections of the Act considered for reinstatement when the Marriage Bill is re-tabled. One cannot help but feel that this will be another empty gesture to the cause of illegitimate children, more practical solutions are demanded by the complexities of the problem.
30. National Assembly Debates, 17th June 1969, Volume 17 at P. 1247 where Mr. Munyi noted that in discussing a Bill of this kind where women have a particularly strong view it is very desirable that they should be represented in the House.
31. Supra, Column 990.

32. Supra, Column 977, post.
33. LegCo Debates, 1959, Volume 80 part I, Column 42, and National Assembly Debates, 1969, Volume 17, Part I, p. 1025.
34. N.A. Debates, 1969, Column 981, per Mr. Wariithi.
35. Supra, P. 1246, per Mr. Omar.
36. Infra, footnote 8.
37. Mathai v Mathai H.C.C.C. of 1977

C H A P T E R T H R E E

- I. Neville Turner: "Children Born Outside Marriage: Slow Progress in Common Law Countries", from The Child and The Law. Volume 2. P. 449.
2. Supra: Robert Lee: "The Changing American Law Relating to Illegitimate Children". P. 461.
3. 391 U.S. 68.
4. 406 U.S. 164.
5. Gomez v Perez 409 U.S. 535.
6. Jacques Leclerc : "Leçons de droit naturel: La famille". 4th Edition: Société d'Etudes Morales et Juridiques, 1958, P. 41.
7. Corbett, P.E: Roman Law of Marriage: Clarendon Press, Oxford, 1930 P. 68 - 122.

C H A P T E R F O U R

- I. See generally: Sunday Nation 1/8/1971 "Observation on Abortion and Sex Education in Kenya", by M. Kabugua.
Daily Nation, 16/8/1962, 17/8/1982, 27/8/1982.
Daily Nation, 29/8/1982, "Body of Infant lay in Toilet for 3 days".
Daily Nation, 24/9/1982, "School-girl concealed birth-dead body dumped in water-tank".
Daily Nation, 15/10/1982, "Teenage Pregnancy epidemic hits Kenya".
And recently, Sunday Times 19/2/1984 "The Cobra Kid".
2. Howard Zehr: "Crime and the Development of Modern Society" Chapter I: Croom Helm Ltd. London.

3. "Social Structure and Anomie" reprinted in "Delinquency, Crime & Social Process" PP. 254 - 84. Donald R. Cressey & David A. Ward (eds) N.Y. 1969.
4. See "The Caucasian Chalk Circle", a play by Bertolt Brecht_ Heinneman, Nairobi, 1982.
Judge Azdak satirically gives a lot of insight into the paradox of justice in this context.
5. Nairobi, Government Printer, 1965.
6. Printed by the Government Printer, Nairobi.
7. Sessional Paper No. IO, Page I, para. I.
8. Ibid. P. 7 para 2I.
9. Ibid. PP. I2 - I3 para 36.
- IO. Ibid. P. I8 para 53.
- II. See Development Plan 1977 - 1983, Nairobi, Government Printer, P. 6.
- I2. Indeed the term "African Socialism" was coined to pre-empt the intellectual debate then going on in the country. This is clear from the President's introduction to the Paper that "this should bring an end to all the conflicting and theoretical academic debate that has been going on."
- I3. According to the 1979 Population Census, 48.3% of the Population was below 15 yrs of age, 60% was below 20 yrs and only 3.7% was above 60 yrs. Hence the productive population, between the ages of 15 and 59 yrs composed only 48% of the population. The source is the Family Planning Association of Kenya newsletter (infra).
- I4. Development Planning and Economic Integration in Africa" No. I Journal of Development Plan New York: United Nations (1969) P. I36.
- I5. Newsletter: "An Address For the Occasion of FPAK 2Ist Anniversary Celebrations" - available from the FPAK Library, Phoenix House, Nairobi.
- I6. Laws of Kenya, Caps. 63, 242 and 244 respectively. For a fuller study see also U U Uche "Law and Population Growth in Kenya" an article in 'Law and Population Change in Africa' Law and Population Book Series No. 2, East Africa Literature Bureau, 1976.
- I7. S. 55 (4), Cap. 242.

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I8. The penal sanctions against abortion are contained in Cap. 63 SS. 159, 160, 228, 240. See also Mehar Singh Bansel VR [1959] E.A. 813 decided on the basis of RV Bourne [1939] I K.B. 687. For the debate on abortion see:

I: Medicus (Magazine of the Kenya Medical Association)

Volume 2, No. 5, April, 1983

Volume 2, No. II, October, 1983.

these contain the views of eminent medical practitioners and a clergyman.

2: "The Rights of the Unborn Child" O.K.Mutungi contained in N. I6 supra, at PP. 157 - 169.

3: "Abortion Laws in Commonwealth Countries" R J Cook & B M Dickens

International Digest of Health Organisation, 1979

P. 395 - 502.

4: G K Kuria: "Legal and Ethical Implications of Family Planning in Africa" - a lecture delivered at the Seminar on Women and Development at Maseru, Lesotho on April, 18, 1976.

I9. L L Kato: "Methodology of Law Reform" East African Law and Social Change, edited by G F A Sawyerr: Contemporary African Monographs Series No. 6, P. 279

The writer gives valuable guidelines to be followed in any endeavour at law reform. Flexibility must be achieved, there must be a matching of objectives and resources.

SELECT BIBLIOGRAPHY FOR FURTHER READING:

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(1971) 45 Australia Law Journal 82.
2. Hoggett, Brenda: Parents and Children.
2nd Ed. London, Sweet & Maxwell, 1981.
3. Lambert, L: "Children in Changing Families" - A Study of Adoption and Illegitimacy
London, Macmillan, 1980.
4. Levin, J: "Reforming The Illegitimacy Laws" 1978
8 Family Law Journal 35.
5. Mohiddin, A: Notes to Colonial Background to Sessional Paper No. 10 of 1965. "Sessional Paper No. 10 Revisited" E A L J March 1969, P. 7.

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