

"THE MARRIAGE INSTITUTION

AND

THE RIGHTS OF SPUSES TO PROPERTY
WITH SPECIAL REFERENCE TO 'MARRIED
WOMEN'S PROPERTY ACT, 1882'".

Dissertation submitted in partial fulfilment of the requirements
for the LL.B. Degree, University of Nairobi.

BY

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ACKNOWLEDGEMENTS

Human beings by their very nature are weak and incapable of accomplishing much if they were to go it alone. The author is therefore, deeply indebted to all those, who in one way or another contributed towards this undertaking. Specifically, sincere appreciation goes to my parents Mr. and Mrs. Njenga (Senior), for meeting the cost which facilitated the production of this paper. Miss R.W. Kigundu (B. Pharm. II) made enormous intellectual, physical and moral contributions. The author would not have known what to do without her.

Karumbo, Ndungu, Thuo deserves my sincere word of thanks for the pains they took to see that the dissertation was typed in time. The author benefited alot from the highly intellectual discussions held ^{with} ~~with~~; Wambau, Riunga, Nyaga and Akhaabi. This is highly appreciated.

Lastly, but in no way least, special thanks to Kamau, G.K. for his patient and understanding supervision. His help is something I would have really missed.

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ABBREVIATIONS

A - G	Attorney General
A . C	Appeal Cases.
ALL E. R	All England Law Reports.
CAL.REP	California Reports.
D. L.R.	Dominions (Canada) Law Reports.
E. A	East African Law Reports
E.A.C.A.	East African Court of Appeal.
E.A.L.J.	East African Law Journal
E. R	English Reports.
E. A.C. R.	East African Court of Review. ?
G. L. R.	Ghana Law Reports.
H. C.	High Court.
H. C. D.	High Court Digests.
I. C. L. Q.	International and comparative Law Quarterly.
J. A. L.	Journal of African Law.
K. L. R.	Kenya Law Reports.
M. L. R.	Modern Law Review.
L. R.	Law Reports.
O. U. P.	Oxford University Press.
P. D.	Probative Division.
T. L. R.	Times Law Reports.
W. L. R.	Weekly Law Reports.

1. F. J. (1974) 2 All E.R. 228

2. Y. B. (1960) 2 All E.R. 717

3. V. P. CIVIL CASE NO. 43 OF 1963

4. JAGGA V. H. S. (1968) 2 All E.R. 476

5. SINDI V. KUMAR (1966) 2 All E.R. 173

6. W. V. S. V. S. (1976) 2 All E.R. 200

7. S. V. S. (1957) 2 All E.R. 38

8. S. V. S. (1971) 2 All E.R. 16

9. S. V. S. (1951) 2 All E.R. 247

10. S. V. S. (1950) 2 All E.R. 213

11. S. V. S. (1969) 2 All E.R. 1112

12. S. V. S. (1972) 2 All E.R. 227

13. S. V. S. V. S. (1960) 2 All E.R. 160

14. S. V. S. (1969) 2 All E.R. 956

15. S. V. S. (1975) 2 All E.R. 200

16. S. V. S. (1975) 2 All E.R. 271

17. S. V. S. (1969) 2 All E.R. 442

18. S. V. S. (1952) 1 All E.R. 1404

19. S. V. S. (1954) 2 All E.R. 176

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- EQUALITY ACT 1957 (WEST GERMANY)
- FOREIGN JURISDICTION ACT 1890 (ENGLAND)
- FAMILY CODE OF CUBA
- GUARDIANSHIP OF INFANTS ACT (CAP 144 OF THE LAWS OF KENYA)
- JUDICATURE ACT 1967 (CAP OF LAWS OF KENYA)
- LEGITIMACY ACT (CAP 145 LAWS OF KENYA)
- MARRIAGE ACT (CAP 150 OF THE LAWS OF KENYA)
- MATRIMONIAL CAUSES ACT (CAP 152 LAWS OF KENYA)
- MARRIED WOMEN'S PROPERTY ACT, 1882
- MARRIAGE ACT (TANZANIA) ACT NO. 5 OF 1971
- SUCCESSION ACT ACT NO. 14 OF 1972
- SUBORDINATE COURTS (SEPERATION AND MAINTENANCE) ACT (CAP 153 OF THE LAWS OF KENYA)
- SETTLEMENTS ACTS 1887 (ENGLAND).

The third chapter lays the legal basis of the marriage act by laws that are discussed in the paper. The legal basis of the married women's property Act, 1882, is especially discussed. This is because the Act so far has been held to be applicable to state marriages contracted under either the marriage Act or the African Christian marriage and divorce Act.

In chapter four, the historical developments and the modification of the married women's property Act, 1882, is followed. The Act permits spouses to hold separately the property they own before marriage and also recognises their rights to acquire property separately during the existence of the marriage. Acquisitions of property depend, mostly on monetary contribution. The date

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INTRODUCTION.

The aim of this thesis is to throw light on the marriage Institution and the rights of spouses to property. No similar study exists. The marriage Institution forms the basis of social relation necessary for the continuation of the family. The family forms the basis of the community, and it ^{is basic} what to its continued existence.

In the first chapter, the marriage Institution in human society where it seeks to meet not only ^{human needs, but also enables the various} basic [^] communicates to lead the good life as they see it, is discussed. However, the basic human needs that the Institution of marriage, meets, vary in priority from society to society depending on that society's view of the good life or philosophy of life.

The mode of production exercises great influence over the aspects of social life and reveals the link between the social-economic relations and all other relations of a given society. It is for this reason that chapter two discusses the marriage Institution and the ideological setting. The Institution is discussed in a free enterprise society, African society and in a socialist society. It is indicated that statutory marriage in Kenya, which are based on the wrong view of human nature, go with the free enterprise philosophy of life. These exploiting societies or the class societies exploit women, discriminate against them and make them victims of the system. In African marriages, which goes with communalism and in socialist marriages, the woman is portrayed as being given all the respect and the consideration she deserves in society.

The third chapter ^{gives} lays the legal basis of the marriage and property laws that are discussed in the paper. The legal basis of the married women's property Act, 1882, is especially discussed. This is because the Act so far has been held to be applicable to statutory marriages contracted under either the marriage Act or the African christian marriage and divorce Act.

In chapter four, the historical developments and the modern position of the married women's property Act, 1882 ^{is} followed close. The Act permits spouses to hold separately the property they own before marriage and also recognizes their rights to acquire and hold property separately during the existence of the marriage. Acquisition of property depends, mostly on monetary contribution. The dehumani-

sing nature of the Act, as far as the women are concerned is indicated.

The application of the Act is then thoroughly discussed. It is shown that the Kenyan situation. It introduces a conflict between the woman's role as mother and wife and her capacity to acquire property. Furthermore it creates a situation where the spouses are more worried about the physical survival than living as human beings in dignity. Application of the Act to the Africans indicates that their humanity is not recognised.

In chapter five, the property rights of spouses under customary law ^{are} discussed. It is shown that the indigenous people of Africa take the view that every human being is of equal worth. This is reflected in the communal nature of holding property which protects the spouses' right to life. The effects of the money economy on this communal nature of holding property is discussed and suggestions made as to the way conflicts between them may be resolved.

In chapter six, the community of property which best meets the needs of the marriage in any society is discussed.

In the conclusion, the writer points out the defects in the law relating to the rights of spouses to property. The legislative and judicial attempts to reform the law is discussed. The writer is of the opinion that, these attempts are not adequate and consequently makes his own recommendations.

biological foundation of the institution was discussed in CONSENT
V. CONSENT. The petitioner and the Respondent in this case had
purported to go through a ceremony of marriage, though, the Petitioner
knew that the Respondent had been registered at birth as a male. The
Respondent had undergone an operation for the removal of the testicles,
most of the scrotum and had consented to the construction of an
artificial vagina. Since then he had lived like a woman. The
Petitioner, Petitioned, inter alia, for a declaration that the
marriage was null and void because the Respondent was a person of
the male sex. It was held that the purported marriage was null and
void.

CHAPTER ONE

"THE MARRIAGE INSTITUTION IN HUMAN SOCIETY."

The institution of marriage which has origin in human nature and is universal, seeks to meet not only basic human needs of men and women, but also to enable the various communities to realise or lead the good life as they see it, during the short period they are on earth. The sanctity of this institution is a well accepted principle by most of the communities. Though the Emphasis of the objectives of marriage varies from society to society, by and large, men and women marry for generally agreed reasons¹. The good life which the institution of marriage makes possible varies with a particular society's view of good life. This explains why the objectives are viewed differently by different communities. The Principal objectives of the marriage institution are different as the discussion of the institution, below, in free enterprise, socialist and communalist societies shows².

The fact of life is that human beings belong to two different sexes i.e. males and females. No satisfactory explanation has been advanced as to why this is the position since there are limitations to religious and scientific explanations. In every human society, the parties to a marriage are biologically a man and a woman. This biological foundation of the institution was discussed in CORBETT V. CORBETT³. The petitioner and the Respondent in this case had purported to go through a ceremony of marriage. though, the Petitioner knew that the Respondent had been registered at birth as a male. The Respondent had undergone an operation for the removal of the testicles, most of the scrotum and had consented to the construction of an artificial vagina. Since then he had lived like a woman. The Petitioner, Petitioned, Inter alia, for a declaration that the marriage was null and void because the Respondent was a person of the male sex. It was held that the purported marriage was null and void.

The court rightly reasoned that marriage was essentially a relationship between a man and a woman. This decision indicated that although the permissive society of the Western world had allowed people of the same sex to have sexual relationships⁴, it could not tolerate a marriage between parties of the same sex. This biological foundation of the institution came for discussion again the recent case of RE in NORTH ET and MATHESON⁵, where parties both males had undergone through a marriage ceremony in Canada, and wanted their marriage to be registered. The application was refused on the ground on which the alleged marriage in CORBETT V. CORBETT Supra, was held null and void. Ormrod J. stated this truth as follows:-

"For the limited purpose of this case, legal relations can be classified into those which the sex of the individuals concerned is either irrelevant, relevant or an essential determinant of the nature of the relationship sex is clearly an essential determinant of the relationship called marriage, because it is and always have been recognised as the union of man and woman. It is the institution on which the family is built and which the capacity of natural heterosexual intercourse is an essential element The characteristics which distinguish it from all other relationships can only be met by two persons of opposite sex"⁶.

It is from this underlying factor that marriage is between parties that are biologically men and women that the institution derives its essential characteristic. The institution creates a situation where the sexual needs of the parties are met in the best way. Strong desires of sex need to be regulated, otherwise, they might run wild. Ill regulated sexual desires creates such evils as illegitimacy which frustrates the innocent beings (who results) who find themselves with a stigma for which they are not to blame. It is widely believed that most rape cases are committed by unmarried men⁷, and that the notorious problem of "parking boys" in urban areas of Kenya is an expression of the chaotic nature of uncontrolled sexual desires⁸. The marriage institution can minimise if not solve these social evils of un-controlled sexual desires. This is why the law recognizes sexual intercourse as an aspect of consortium which is created after a marriage comes into existence.

Under the statute law, each of the parties to the marriage has a right to sexual intercourse. This right, however, is to be exercised reasonably⁹. Authorities are divided as to whether or not a husband can commit rape on his wife¹⁰. Sexual intercourse in marriage is so important that one party's persistent refusal may be a ground of divorce where it amounts to cruelty. In Sheldon V. Sheldon¹¹. It was justly held that the husband persistent refusal of sexual intercourse over a period of six months without excuse, amounted to cruelty, and accordingly the wife was granted a decree nisi.

In fact the right to sexual intercourse is such a basic need in the marriage institution that if there is no consummation the marriage will be voidable¹². A marriage is said to be consummated as soon as the parties have sexual intercourse after the solemnization¹³. In D - E V. A - 9¹⁴, it was established that in order to amount to consummation, the intercourse must be ordinary and complete and not partial and incomplete. This decision was followed in K.V.K.¹⁵, a Kenyan decision. In this case the applicant petitioned for a decree of nullity of marriage on the ground of wilful refusal to consummate the marriage. It was submitted for the Appellant that Vera Copula (sex) was never full, normal and complete and therefore there was no consummation. It was held that there was consummation and that the test of consummation was not the degree of penetration. In the matrimonial causes ACT (MCA)¹⁶, S.14(1)(a) and (b) stipulate that a decree of nullity of marriage may be given if the marriage is not consummated. In Kenya under statute law, the law is that the marriage is consummated as soon as the husband achieves substantial penetration, Ejaculation is irrelevant¹⁷.

Men and women need material security, which need is ensured by the marriage institution. Women by their very nature are physically weak and their role as good mothers and wives may conflict with the acquisition of material welfare. They look for winners with whom they work jointly to secure material security. The marriage institution creates for the wife a right to maintenance. The fact of marriage, raises a ^{re}presumption that the husband is bound to maintain his wife. The scope of this was indicated by a House of Lords, decision in BEST V. SAMUELS which held that the action for loss of

consortium lies on the part of the husband alone, who is under a duty to maintain his wife. If maintenance and material support are not provided, a wife can enforce these in a court of law¹⁸. Under the customary law, this right to maintenance is discharged if a husband gives his wife a piece of land¹⁹. The land can now be replaced by money²⁰. This customary right is also enforceable²¹. In some countries the position is different and the law has changed. In Tanzania²² and West Germany²³, The law is that a wife has a right to maintain her husband. This right if extended unreasonably may conflict with the commonest expectations of marriage. The crucial expectation is that children will result from the marriage. If wives are to engage in serious wage labour, in order to maintain their husbands, this may conflict with their roles as good mothers. However, notwithstanding the law, wives everywhere have a moral obligation to support their incapable husbands. After all, marriage creates the expectation of mutual support.

The marriage institution makes possible the most intimate relationship that can exist between the spouses. It creates a right and duty to mutual protection. It provides one with a confidant with whom fears, hopes and anxieties are shared. The spouse, therefore, counts on the other spouse to be by his side at all times even when the rest of the world takes the view that this should not be the case. For this reason the law leaves out this person to enjoy the confidence of the other. During their close and intimate friendship, spouses discuss freely with each other, things of an entirely private nature concerning their attitudes, feelings, hopes, aspirations and many other things which one would never have discussed with anyone else. The law relating to mutual confidence between spouses was stated in ARGYLL V. ARGYLL²⁴. The court observed.

"There could hardly be anything more intimate or confidential than is involved in that relationship, or than in the mutual trust and confidences which are shared between husband and wife. The confidential nature of the relationship is of its very essence and so obviously and necessarily implicit in it that there is no need for it to be expressed."

In this case the wife obtained an interlocutory injunction restraining the husband from publishing information communicated to him during marriage. During marriages the spouses naturally discover many things about themselves, which but for their close relationship, they could not have done. Those things they talk and do on the implicit understanding that they are their secrets. A spouse allows the other one to discover them only because of the complete trust which obtains. This allows full development of their personalities without repression. The law protects the confidential life of the confidants and refrains from injecting any fear or ^{supicion} suspicion that things said in confidence might later become the material of legal evidence. S.127 of Kenya Evidence Act²⁵, shows the limitation imposed in calling a spouse to be a witness against the other spouse. S.130 Kenya Evidence Act *Supra*, protects communications made during the marriage. Protection of confidential communications covers all marriages in Kenya either statutory or customary marriages²⁷.

The marriage institution ensures that men and women prevent themselves as individuals and as a society from total extinction. The institution provides this assurance that humanity will never die completely. The courts have recognized that, one of the most crucial expectations from the marriage institution is children. The importance of procreation was demonstrated in the justly celebrated case of RE'D (AMINOR)²⁸. A mother wanted her mentally retarded daughter to be sterilised. The court found that the purpose of performing the operation on her was to prevent the possibility of reproduction. The court held that this was a fundamental human right which could not be denied her. Procreation can be explained on many grounds. It is a biological factor that when men and women meet sexually, there is a high possibility of procreation taking place. It is also an accepted fact that procreation provides human beings with identity. Through this process an individual can identify himself and be able to relate himself to the world in general. Procreation brings about personal immortality, which is especially important to the African for it enables him to defeat death. This is well stated by prof. Mbiti John S;²⁹.

"For African peoples, marriage is the focus of existence. It is the point where all the members of a given community meet; the departed the living and those yet to be born failure to get married under normal circumstances means that the person concerned has rejected society and society rejects him in return without procreation marriage is incomplete³⁰.

To the African, it is very important that one gets children. To die without getting married and without children is to be completely cut-off from the human society, to become disconnected, to become an outcast and to lose all links with mankind. Procreation explains why there is polygamy, widow inheritance, levirate unions, sororate unions and even forced marriages. Marriage and procreation aid towards the partial recapture or attainment of the lost immortality. The more wives a man has the more children he is likely to have, and the more children, the stronger the power of immortality in the family. To the Africans, children are the glory of marriage and the more there are of them the greater the glory. On the importance of procreation to the Africans, the late Jomo Kenyatta wrote³¹:-

"..... It becomes a duty to produce children and intercourse is looked upon as an act of production and not merely as the gratification of a bodily desire.... The desire to have children is deep-rooted in the hearts, and on entering into matrimonial union they regard the procreation of children as their first and most sacred duty. A childless marriage in Gikuyu community is a failure"

The underlying factor on the reasons discussed that necessitates marriage is the fact that the institution enables men and women to lead the good life as they see it fit. The principal reasons that necessitates marriage are based on a sound view of human nature and the same recognizes human dignity and equal worth of spouses. It would, therefore, be expected that acquisition of property and the laws governing matrimonial property should reflect human dignity and equal worth of the spouses. This can only be achieved where property law recognize the humanity of a woman and respects her role as a wife and mother even where she has made no monetary contribution.

Nowhere is this realised than in the system of community of property which recognizes the respective rights of the spouses to share equally in the property acquired during marriage. Communal holding of property also honours human dignity and equal worth of spouses. It is only under these two systems that the expectations created by the marriage will be met in the best way.

In this chapter, the writer will attempt to examine the effect that different ideologies have on the institution of the marriage. The writer is to examine the institution in three different ideologies; firstly in a free enterprise society because the statute law has origin in the English law, law of a Western free enterprise society; secondly in an African society because majority of the Africans are Africans and thirdly in a socialist society because of the reason; first, Engels has stated that it is goal to create a socialist state¹, and for the purpose of cooperation, so as to see what is the best system of the three.

THE FREE ENTERPRISE ECONOMY AND THE STATUTE OR WESTERN TYPE OF MARRIAGE

The marriage institution the world over seeks to serve basically identical purposes, but it is influenced considerably by the mode of production that exists in a particular country. The western capitalism especially gives the marriage institution a distinct character. The free enterprise economy there creates a situation where the spouses are more worried about the physical survival, than survival as human beings with dignity, hence the importance attached to material conditions².

The effect of economic forces on the marriage institution in a free enterprise society was described accurately by Engels who observed that-

CHAPTER II

THE MARRIAGE INSTITUTION AND THE IDEOLOGICAL SETTING.

The origins of the marriage institution have been discussed in chapter one. In this chapter, the writer will attempt to examine the effect that different ideologies have on the character of the marriage. The writer is to examine the institution in three different ideologies; firstly in a free enterprise society because the statute law has origin in the English law, law of a Western free enterprise society; secondly in an African society because majority of the Kenyans are Africans and thirdly in a socialist society because of two reasons; first, Kenya has stated that it is going to create a socialist state¹, and for the purpose of comparison, so as to see what is the best system of the three.

THE FREE ENTERPRISE ECONOMY AND THE STATUTE OR WESTERN TYPE OF MARRIAGE:

The marriage institution the world over seeks to serve basically identical purposes, but it is influenced considerably by the mode of production that exists in a particular community. The western capitalism necessarily gives the marriage institution a distinct character. The free enterprise economy there creates a situation where the spouses are more worried about the physical survival, than survival as human beings with dignity, hence the importance attached to material conditions².

The effect of economic forces on the marriage institution in a free enterprise society was described accurately by Engels who observed that:-

"With the predominance of private property over common property Marriage becomes more than ever dependent on economic considerations. The transaction itself is to an ever increasing degree carried out in such a way that not only the woman but the man also is appraised, not by his own personal qualities but by his possessions³".

This marriage was defined in Hyde V. Hyde⁴, as the voluntary union of one man and one woman for life to the exclusion of all others. This definition was incorporated in S.2 matrimonial cause⁵ Act⁵, which it is submitted, had the effect of typing the moral philosophy of the Kenyan people to capitalism. This definition reflects the western nuclear family concept and the individualism¹⁰¹ that goes with the free enterprise economy. The marriage is supposed to be an agreement voluntarily entered into by both parties. It implies that it is based on consent. However, it is taken to be voluntarily entered into as soon as the law has put both parties on an equal footing on paper. One wonders whether there is genuine consent in any transaction, in the free enterprise society. As Engels further observed:-

".... The power given to one party (by property) by its different class positions, the pressure it exercises on the other and the real economic position of both is very important⁶".

From a strict ethical view point, voluntary unions do not exist in a free enterprise society. In law, this union is supposed to be a contract very much like any other commercial contract. In the western society, the marriage contract is the most important of all contracts since it disposes of the body and mind of two persons for life. The bargain, it is usually contended, is struck voluntarily and with the parties consent. Full freedom in marriage can become generally operative only after the capitalist mode of production, property relations created by it, and all those secondary^{Economic} considerations which still exert so powerful an influence on the choice of a partner have been abolished. As Engels wrote:-

".... That will be settled after a new generation has grown up. A generation of men who never in all their lives had occasion to purchase a woman's surrender either with money or with any other means of social power, and of woman who have never been obliged to surrender to any man out of any consideration other than that of real love or to refrain from giving themselves to their beloved for fear of the economic consequences⁷.

The western capitalist societies accept the family as an economic institution. This leads to the exploitation of the physically weak member of the family, the woman. This marriage is monogamous in character⁸. This is based on the idea of perfection of human nature which does not exist especially in capitalist societies due to corruption brought about by property relations. The monogamous nature reflects the nuclear family concept and the individualism that goes with the free enterprise economy. The marriage is intended to last for life⁹.

In the free enterprise systems the means of production are in hands of a few people. This fact institutionalises exploitation. The woman can acquire property so long as she contributes in monetary terms. Her special contribution through reproduction is ignored. However, the law in an effort to emancipate the wife from her husband's control make the spouses complete strangers as far as property relations are concerned. This necessarily undermines the marriage institution in capitalist systems.

MARRIAGES IN SOCIALIST SOCIETIES

In socialist communities the basic purpose is the well being of the people, and enforcement of human equality. The essence of socialism is that every individual man and woman, is an equal member of society, with equal rights in the society and equal duties¹⁰. Socialism is in essence, the application of the principle of equality to the social economic and partial organization of society.

The socialist states believe that the basis of society is the family rather than the individual. The way in which property is held reflects this view. The family code of Cuba indicates this equality. Article 24 provides:-

COMMUNALISM AND THE CAPITALIST MARRIAGE
"Marriage is established with equal rights and duties for both parties. Spouses must live together, be loyal, considerate, respectful, and naturally helpful to each other".

It is because of this socialist morality and the non-existence of private ownership of property, that the institution of marriage in socialist states is fundamentally different from its counterpart in the free enterprise societies. In socialist states both parties must help in the needs of the family they have created, each according to his or her ability and financial status. In Cuba both parties must co-operate in the education, upbringing and guidance of the children according to the principles of socialist morality¹¹. The fulfilment of this task does not conflict with the acquisition of private property, since the economic basis of the marriage is joint ownership of property contribution is not based on monetary terms as in capitalist states. Although both parties have a right to practice their profession or skill, this must not be to the prejudice of the family¹². Socialist states recognized that a formal or mechanical equality of the spouses, may in practice, deprive the woman of certain rights which by her nature, ought not to be enforced in disregard of the welfare of the family. It is recognised that there are physiological and physical reasons which require that the principle of equality of the spouses within a socialist society, must be related to the nature of the spouses¹³.

A woman need not contribute in monetary terms for her to enjoy the benefits of the economic equality of the spouses. The class societies exploit women, discriminate against them, and make them victims of the system.

In socialist societies, where such exploitation and injustice is in non-existence women are given all the respect and the consideration they deserve in society¹⁴.

COMMUNALISM AND THE CUSTOMARY MARRIAGE

The majority of the African people take the view that all human beings are of equal worth. This goes with the African philosophy of life which is given effect by communal life. The customary marriage that enables the African to give meaning to life is a communal institution like other aspects of his life.

The African believe that the good life as he sees it can only be realised if the life is communal. The means of production have to be held by whole society or family, and that the family, the extended family is the best institution of enabling him to lead the good life¹⁵. The communal life enables him, not only to live but also to live with human dignity.

For African peoples the family has a much wider circle of members than its western counterpart amongs them, the term family may connate any group from the smallest nuclear family of man, wife and child to several thousand persons tracing descent from a common ancestor through many generations¹⁶. It is through this extended family that the deep sense of kinship, with all its implications, is deep-rooted in traditional African life. The African family, is the foundation of African socialism (Communalism) as Mwalimu Nyerere correctly pointed out¹⁷:-

"The foundation, and the objective of African socialism is the extended family. The true African socialist does not look on one class of men and his brother and another as his natural enemies. He rather regards all men as his brothers as members of his ever extending family".

This deep sense of kinship makes possible human co-operation, especially in terms of need. If a person finds himself in difficulties, it is not unusual for him to call for help from his clan members and other relatives. For this reason:-

"..... The individual does not and cannot exist alone except corporately. He owes his existence to other people including those of past generations and contemporaries. He is simply part of the whole. The community must therefore make create or produce the individual; for the individual depends on the corporate group¹⁸."

The African family also includes the departed who are alive in the memories of their surviving families, and the unborn who are still in the loins of the living¹⁹. Unlike the free enterprise societies, the Africans are very reluctant to employ terms which might indicate remoteness in their blood ties with kinsmen. Only in terms of other people does the individual become conscious of his own being. When he suffers, he does not suffer alone but with the corporate group. When he gets married, he is not alone neither does the wife belong to him alone. The children belong to the corporate body of kinsmen. To maintain this strong kinship, communal holdings have been seen as an indispensable means of providing successive generations of households, with the basic necessities of life. The African views the land as simply God's gift to his living creation, and for this reason he knows the land belongs to his tribe and that he has traditional rights over that land²⁰. In Africa land was recognized as always belonging to the community. Each individual within a society had a right to the use of land because otherwise he could not earn his living, and one cannot have the right to life without also having the right to some means. Individual ownership of some beings existed, but the vital means of production like land were communally held. Writing on the rights to land, Max Gluckman stated²¹:-

"Land is not owned in any absolute sense either by the man and his household who live on and cultivate it, or by the village group, or by the chief, but by all of them together....."

By virtue of membership in the tribe, every one was entitled to attain some land. The African marriage is an alliance of the family of the man, and of the woman. In addition to the parties' own consent to the marriage, parental consent is necessary for a valid marriage²². The payment of dowry, which is essential to a valid customary marriage²³, is an expression of the communal way of life of the African. Members of the man's clan contribute towards the payment of dowry to the extent they are able, and on the woman's side they are entitled to a share of the dowry paid. Among the Taita community, the clan helps the young husband to pay the bride wealth, which is shared between the wife's father, brothers and uncles who receives a portion of their own and not merely what is given to the brides father²⁴.

Communalism which respects human dignity and equal worth of all seems to be deeply rooted among the Africans. It is an attitude which ensures that the people care for each other's welfare. Both the rich and the poor (including women) individuals were completely secure in African society property wise. No body starved, either of food or of human dignity because he lacked personal dignity. As Nyerere puts it²⁵:-

"..... When a society is so organised that it cares about its individuals, then provided he is willing to work, no individual within that society should worry about what will happen to him tomorrow if he does not hoard wealth today. Society itself should look after him, or his window or his orphans"

CHAPTER THREE

THE LEGAL BASIS OF THE APPLICATION
OF CUSTOMARY AND STATUTE MARRIAGES
IN KENYA.

Prior to the scramble and partition the interior of East Africa was inhabited by various communities or tribes which existed as states. Some tribes were well organized kingdoms but the acephalous tribes had a different state organisation. The coastal area was occupied by indigenous Africans and some foreigners, mainly Arabs, who had come there for purposes of trading¹. The coastal strip and the islands were considered to be part of the dominions of the Sultan of Zanzibar. For purposes of Law, Kenya was born in 1886, when the British and the Germans divided between themselves territories of Kenya and Tanganyika under the 1886 Anglo-German agreement. The agreement was preceded by the Berlin Conference of 1885 at which the European powers agreed upon the principles they were to use in dividing Africa's natural and human resources². This conference made it clear that the main motive behind Partition was exploitation.

From 1886 to 1895 the Imperial British East Africa Company, hereinafter referred to as I.B.E.A. Co., which had started as the British East Africa Association in 1886 ruled the British sphere of influence on behalf of Britain. After receiving a concession from the Sultan of Zanzibar in 1887, this company ruled the Sultan's dominions during the same period. In 1895 the I.B.E.A. Co. failed commercially and handed over the direct administration of Kenya to Britain. The British

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government agreed to rule the Sultan's dominions on behalf of the Sultan. The British sphere of influence and the Sultan's dominions were declared a protectorate in 1895. In 1920, the British Sphere under the 1886 Anglo-German agreement was declared a colony⁴ whereas the Sultan's former dominions remained a protectorate⁵. The two spheres gained their Political Independence in 1963.

The colonial political or constitutional theory is important in that it provides the legal validity of law marriage and succession laws which the Kenya Independence order in council 1963⁶, retained as they had operated during the colonial rule. The British constitutional theory which was imported to Kenya reflects the capitalist mode of production which implies that man has to live in great material comfort. The value of foreign territories had already been made clear by Britain's long experience in the race for foreign territories. Before 1843, there was in Britain no legislation that governed the exercise of crown's power in foreign territories. In 1843 the Foreign Jurisdiction Act was passed, and at the time Kenya was born in 1886, there was already in force in Zanzibar an order in council made under it⁷. The significance of this fact is that, in 1886 the Foreign Jurisdiction Act 1843, applied to a small part of Kenya. In 1887 two important constitutional events happened. The Sultan gave the British East Africa Association a concession over the mainland port of his dominions. In England, the British Settlements Act 1887 was enacted⁸. This Act applied to those areas where the British subjects had settled in great numbers. In such territories an English life was ^{Followed} ~~had~~ since they were viewed as parts of England. In 1920, Kenya as defined in the Anglo-German agreement 1886, was annexed to Britain as a

Colony under ^{Settlement} treat Act of 1887. From 1920 then all orders in ^{Council} court applying to the colony were made under the British Settlements Act 1887.⁸ In 1890 the Foreign jurisdiction Act was passed to consolidate the Acts relating to Her Majesty's jurisdiction in foreign territories. This Act applied to those protected territories known as protectorates. Such territories were not viewed as part of Britain. In 1890, Kenya was declared a protectorate and laws were henceforth made under the foreign jurisdiction Act 1890. In 1920, a part of Kenya was declared a colony, but the former Sultan's dominions remained a protectorate⁹. Both were to be ruled under the settlements Act 1887 and Foreign jurisdiction Act 1890 respectively. It is submitted, however, that in constitutional practice, the distinction between a protectorate and a colony did not exist¹⁰. In 1963, the need for a new constitution arose since the majority of Kenyans needed to create a just Society. Kenya obtained her Independence in 1963 and the Kenya Independence order in Council 1963¹¹ retained colonial laws. Henceforth, the marriage and succession Laws ^{owed} derived their legal basis from this order in Council.

The present legal system dates back to 1897 when the East African order in Council, made under the 1890 Foreign jurisdiction Act, was passed and indicated the Laws that were to apply. This order in Council provides the legal basis of application of Laws in Kenya. It is probably the most significant piece of legislation through which the English legal philosophy was introduced into Kenya. Native Courts Regulations 1897 were made under the 1897 East Africa Order in Council.

This resignation clause remained part of the Laws of Kenya onwards. A legislative council was established in 1906. Before 1907, there were two

The Regulations established two systems of courts, one for Natives¹² and the other for non-Natives¹³. According to the order in council Natives were to be governed by "Native Law and Custom"¹⁴. This meant that from 1897, Customary Law of the Africans was to apply to their marriages. However the commissioner of the protectorate was given power to make rules and orders for the administration of justice in native courts and in particular might "alter or modify the operation of any Native Law or custom in so far as may be necessary in the interests of humanity and justice"¹⁵. This implied that the Africans were not quite human and had Laws to be changed to conform with humanity and justice. This legal framework within African Customary Marriage Law was applied without any significant change until 1902 when the 1902 order in Council was passed. Article 28 of the 1902 Order in Council repeated the 1897 order and made it clear that where no provision was made to cover a subject, the Regulations made under the 1897 Order in Council were to remain. The mode of applying customary law was changed by legislation. The 1902 East African Order in Council contained the new legal basis of the application of customary law. Article 20 read as follows:

"In all cases civil and criminal to which natives are parties, every court:
(a) shall be guided by Native Law so far as it is applicable and is not refrignant to justice and morality or inconsistent with any order in council or ordinance or any regulation or rule made under any order in Council or ordinance; and
(b) shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."

This refrignancy clause remained part of the Laws of Kenya onwards. A legislative council was established in 1906. Before 1907, there were two

High Courts¹⁶; one for the natives and the other for non-natives. The 1907 Court ordinance established one High Court. It is basically this Court structure that remained in force until 1930 when the native Tribunal's ordinance was passed. This ordinance, inter alia, removed the Africans from the general jurisdiction of the High Court. The structure was retained until 1951¹⁷, when an African High Court that called the court of Review was established. In 1962, New African Courts (amendment) ordinance¹⁸ retained the refr^{ry}gnancy clause¹⁸. changes that had

taken place in English Marriage Laws. No further significant changes have taken place since 1962 in the Marriage Laws of the Europeans.

From 1897, the marriage Laws of the Europeans have reflected the endeavour to enable the "white" in Kenya who was represented by the Englishmen to live as identical a life to English life as the possible. The 1897 order in council provides the legal basis of the application of English type of marriages. It provided that English common law, doctrines of equity and statutes of general tract application were to apply. These were, however, to apply as far as local circumstances permitted. This was the residual clause which was to supplement the local laws whenever there was a gap. Some specific Indian Acts were applied by the same order in Council. The India Divorce Act 1869 was to govern these marriages. The 1911 order in Council made the English Law residual law of Kenya by an amendment of s. 15, (2) of the 1902 order in Council which had omitted the residual clause. The residual law clause appeared as article 4 (2) of the Kenya Colony order in Council 1921 and remained like that until 1967 when it was retained substantially as it had been.

applied the English Law of succession to them.

The 1902 East African Marriage ordinance was enacted for those who led the English way of life in Kenya. In 1904, the Divorce ordinance was Christian was to be the customary law that

enacted to govern marriages that came into existence under the 1902 East African Marriage Ordinance. The 1902, East African Marriage Ordinance is the present Marriage Act¹⁹. In 1939, there was enacted Matrimonial Causes Ordinance²⁰ which came into operation in 1941. Section 37 of this Ordinance repeated the 1904 Divorce Ordinance which governed marriages under the marriage ordinance of 1902. That Matrimonial causes ordinance is the present Matrimonial Causes Act²¹. It was amended in 1941 1948 and 1961 so as to incorporate changes that had taken place in English Marriage Laws. No further significant changes have taken place since 1963 in the Marriage Laws of the Europeans.

From 1897, those Africans who took up the whiteman's religion, christianity, were believed by the colonial government to have ceased to be natives and to have removed themselves from the operation of customary law. They had to contract statutory marriages and those who were already married were expected to ~~convert~~^{convert} customary or moslem marriages into the statutory or English type. The 1897 Native Courts Regulations provided that the law for the time being applied to British India in matters affecting personal status were to apply to Native Christians²². The Native Christian celebrated marriages in accordance with the East African Marriage Ordinance 1902 which contained English Law. In 1904 the Native Christian Marriage Ordinance²³ was enacted to introduce flexibility in the formalities to govern the marriages of Native Christians, and to repeal the section that applied the English Law of succession to them. The law that was to govern the marriage was English Law contained in the Divorce Ordinance 1904. The Law of succession of the African Christian was to be the customary law that

governed his brothers and sisters who had remained ~~native~~ ^{Native} native in outlook.²⁴ In 1931, the 1904 Native Christian marriage ordinance was replaced by the Native Christian Marriage and Divorce Ordinance,²⁵ which is the present African Christian Marriage and Divorce Act.^{25a} In 1941, the Divorce Ordinance 1904 was replaced by the present matrimonial causes Act, which makes applicable English Law to such statutory marriages whenever there is a gap in Kenya's marriage Laws.²⁶

After 1963, the ~~constitution~~ ^{constitution} guaranteed the application of one's personal Laws, making it a constitutional right²⁷ Recognition in legal theory of the equality of all people is not reflected in the development of marriage Laws after 1963. This is ensured by the Judicature Act 1967, which retained the repugnancy clause²⁸ and abolition of the African courts that applied the customary Law. ~~customary~~ customary criminal Law was also abolished,^{28a} and customary Law was to be applied in civil matters only. The Picture that emerges is one where the African is being 'uncivilized' through the gradual replacement of his customary Law, which was taken to be primitive, with English, the civilized man's Law.

It is evident from my discussion of statutory marriages that all local statutes relevant to the statute marriages have not been discussed.²⁹ Relevant statutes left out includes ~~the~~ the subordinate courts (Separation and Maintenance) Act, Guardianship of Infants Act³¹ and Legitimacy Act.³² The writer was of the opinion that, the discussion of these statutes would be outside the scope of this paper.

Legislation by reference is important as far as the Spouses' rights to property are concerned. Here "Legislation by reference" refers to a situation where Kenya Legislation makes English Law which ^{is} not specified Law of Kenya. It is found in the Judicature Act S. 3 (1)³³ and the matrimonial causes Act, S. 3. English Law, imported through these sections has caused a number of problems. It is not certain which English Law is applicable to Kenya.³⁴ This has resulted in great uncertainty in the law governing matrimonial ^{cases} and especially the Law governing the Spouses rights to property.³⁵

Firstly, tension in the family may lead to break down of the marriage - during the marriage itself, after judicial separation or divorce, it becomes difficult for the spouses to know their precise rights to property. Secondly, the rights may become relevant when the matrimonial assets devolve due to the death of one of the spouses. In such a situation, a dispute may arise between the survivor and the deceased's personal representatives over the ownership of a particular piece of property. Thirdly, some problems may arise if one spouse becomes insolvent and is declared a bankrupt. If a particular piece of property belongs to the solvent spouse, it will not vest in the trustee in bankruptcy.

There is no specific local legislation which attempts to deal with the rights of spouses to property. However, the married woman's property Act, an English piece of legislation has been held to be an Act of general application, applicable in Kenya through the reception clause in Judicature Act S. 3 (1) (c).

CHAPTER FOUR

THE RIGHTS OF SPOUSES TO PROPERTY

UNDER THE STATUTE LAW:

As long as the marriage remains 'healthy' issues relating to property rights of the spouses will not arise and are largely of academic interest. So long as they are living together amicably these questions never have to be answered since the spouses would rather talk in terms of 'ours' rather than 'mine' and 'yours'. This ceases to be true however, when marital disputes in a society become common, a need arises for precise determination of Spouses property rights as they can no longer use their property jointly any longer. This need normally arises in three situations; Firstly, tension in the family may lead to the break down of the marriage - during the parties lifetime. After judicial separation or divorce, it becomes important for the spouses to know their precise rights to property. Secondly, the rights may become relevant ^{when} the marriage breaks down due to the death of one of the spouses. In such a situation, a dispute may arise between the survivor and the deceased's personal representatives over the ownership of a particular piece of property. Finally, some problems may arise if one spouse becomes insolvent and is declared a bankrupt. If a particular piece of property belongs to the solvent spouse, it will not rest in the trustee in bankruptcy.

There is no specific local legislation which attempts to deal with the rights of spouses to property. However, the married woman's property Act,¹ an English piece of regulation has been held to be an Act of general application,² applicable in Kenya through the reception clause in Judicature Act S. 3 (1) (C)

The Act applies to statute marriages⁴ contracted under the marriage Act⁵ and the African Christian Marriage Act⁶. The historical development of the married women's property Act 1882 is important for determining whether or not it should be applicable to all Kenyan Communities in present circumstances which are different from those under which the Act developed. A study of the Act is also important since if the past⁷ is anything to go by, chances are that our judiciary ~~is~~^{is} likely to apply the Law as it develops in England.

THE MARRIED WOMEN'S PROPERTY ACT 1882:⁸

It has been argued that the ~~enactment~~^{enact} of this Act shows the development of the status of the wife ~~from~~^{from} a subservient member of the family to the co-equal status.⁹ At common Law, by marriage a husband gained seisin^h of all freehold lands which his wife held at the time of the marriage ~~and~~ or acquired during coverture and was entitled to the rents and profits on them.¹⁰ The wife had no power to dispose her reality at all during coverture.¹¹ During coverture the wife took no interest in her husband's reality at all, but if she survived him she became entitled by virtue of her dower to an estate for ~~a~~ her life in a one third of all her husband's freeholds.¹² All pure personality belonging to the wife at her time of marriage or acquired by her during coverture resided absolutely in the husband who, therefore, ^{had} the power to dispose of their ~~interviews~~^{interviews} or by will¹³ such property did not revert to the wife even if the husband predeceased her. The spouses were actually regarded as ^{one} person.¹⁴

A contract to marry clearly gave the prospective husband an expectant interest in all his wife's property, hence a rule developed that any disposition made by an engaged woman without her fiancé's consent was voidable by him as a fraud on his marital rights.¹⁵

In equity, rules were developed to minimise this injustice. As far as the married woman was concerned, equity developed the concept of the "separate estate". If property was conveyed to trustees to the separate use of a married woman, she retained in equity the same right of holding and disposing of it as if she were a "^wfe^u sole". Being a beneficiary she could dispose of it ^{later} ~~inter vivos~~ or by will.¹⁶

By the mid 19th century, it was clear that old rules would have to be reformed. The industrial revolution and the free enterprise economy ensured that more and more women were earning incomes of their own. ^{Wife's Income} O. Kahn Freund describes the true position.

"With some exaggeration it may be said that the 19th Century matrimonial property legislation was mainly the result of the spread of gainful occupation outside the home among a large number of women as a result of the Industrial revolution and of the disappearance of the household as a unit of production. The married woman's property legislation of a century ago was a response to a revolution in production....."

There were a number of scandalous cases of husbands impounding their wives' earnings for the benefit of their own creditors or even mistresses. ^{No} ~~the~~ relief could be obtained by the woman whose husband deserted her and took no account of the needs of married women who were gainfully employed outside the house, and who through their own earnings contributed to the maintenance of the family. In 1870, the first married women's property Act was enacted and was seen as a means of protecting

against the effect of the common Law those married women who were gainfully employed or enjoying some inherited property.¹⁸

It provided a number of exceptions in a number of specified cases that property acquired by the wife should be deemed to be held for her separate use. The whole Act was repealed by the married women's property Act of 1882. The Act provided that any woman marrying after 1882 should be entitled to retain all property owned by her at the time of the marriage as her separate property and that whenever she was married any property acquired should be held by her in the same way,¹⁹ it further provided that;

"A married woman shall be capable of acquiring, holding and disposing by will or otherwise, of any real or or personal property as her separate property, in the same manner as if she were a ~~female~~ sole, without the intervention of any trustee."²⁰

This Act replaced the total incapacity of a married woman to hold property, by a rigid doctrine of separate property. The Act made impossible for a married man to acquire any further interest in the property of his wife. After the marriage is broken or is faced with problems, the court is faced with the task of defining the spouses' rights to property. The court is however, given wide powers and discretion under S. 17 of the married women's property Act 1882 which provides;

"In any question between husband and wife as to the title ~~title~~ or possession of property, either of them may apply to the high court or a County Court and the Judge may make such order with respect to the property in dispute.....
..... as he thinks fit."

Under the Act, the judge has a free hand to do what is just.²¹ Any property purchased by one spouse with his or her own money will ~~presumptively~~ ^{Presumably} belong exclusively to the purchaser.²²

From the very start, ownership of property presupposed positive and active participation in the economy. This means that one engages in some form of paid employment or enters into other contractual relations that facilitate acquisition of property through purchase. This requirement of monetary contribution so as to acquire property was bound to work injustice especially for those housewives who are never engaged in wage labour. If a husband supplied his wife with a housekeeping allowance ^{any property purchased} ~~prima~~ facie remained his property. This might well work an injustice for it took no account of the fact that any savings from housekeeping, money & were as much due to the wife's skill and economy as a housewife as to her husband's earning capacity. This was remedied by married women's property Act 1964, S. 1 provided that;

"Such savings out of allowances made by the husband for expenses of the matrimonial house (in absence of any agreement between them) would be regarded and treated as belonging to the husband and wife in equal shares".

Thus the legislature and the British Society are realising that, though ~~their~~ theirs is a free enterprise society, a false start was made in Laws that govern matrimonial property and that intervention was necessary. The work of the courts is ~~not~~ not easy since they are bound to impute or attribute to the spouses an intention which clearly they never had. This is done through the courts discretion under S. 17²³ of the 1882 Act. In PETTIT V. PETTIT²⁴ it was held that S. 17 was a procedural ~~proviace~~ ^{sub} only and did not entitle the court to vary the ~~existing~~ existing proprietary rights of the Spouses. In same case, Lord Morris of Borth - y - Get at P. 798 put it this way;

".....one of the main purposes of the Act of 1882 was to make it fully possible for the property rights of the parties to a marriage to be kept entirely separate. There was no suggestion that the status of marriage was to result in any common ownership of property. All this in my view negatives any idea that S. 17 was designed for the purpose of enabling the ~~court~~ court to pass property rights ~~to~~ from one spouse to another. In a question as to the title to property the ~~ge~~ question for the court was - "whose is this" and not - "To whom shall this be given".

This clearly ties the court's hands in trying to determine justice between spouses themselves. In a series of cases decided from 1950 the court of appeal had in effect established the rule that, if both spouses had made a contribution to the purchase of any property, (Whether directly or indirectly),²⁵ this gave both an interest in the property bought and presumptively they would take equal shares in the proceeds of the sales. In recent years, the whole position has had to be re-examined. The wife is now frequently a wage ~~earner~~ earner making a contribution to the common expenses of buying and running the home and justice demands that, even though property is purchased in the husbands name, with his money, she should be given credit for her help.²⁶ Commenting on the old position and the new developments, in the case of COOKE V. HEAD²⁷ Lord Derrin stated;

"If this case COOKE V. HEAD came up 20 or 30 years ago, I do not suppose that Miss Cooke would have had any claim to a share. It would be said that, when she did all work on the house there was no contract to pay her anything for it But that has all altered now. At first the courts changed the law by giving a wide interpretation to S. 17 of the Married Women's property Act 1882. They took the words of the statute which gave a judge power to make such order ^{as} he thinks fit! That was held, however, to be erroneous because the section did not empower the courts to alter property rights. So the courts had recourse to another way.

They said that shares in the home depended on the common intentions of the parties; and they used considerable freedom to ascertain that common intention. This too has recently come in disfavour, because of the difficulty of ascertaining a common intention. So the courts, under the guidance of the House of Lords, have had recourse to the final way the law of trusts."

The courts are evolving the concept of constructive trust to declare that property acquired by Spouses' joint effort for joint benefit should be shared equally.²⁸

It is clear that courts are trying to minimize the injustice brought about by the married women's property Act 1882, which was based on the Laissez-fair ideals. Though, considerable, the credit given to the wife is not adequate. The courts are still attaching too great an importance to the spouses monetary contribution in the acquisition of the property.²⁹ Where the factors of production are individually owned, as in the free enterprise world, one sees a conflict between the woman's role as a mother and wife and her capacity to acquire property. Her humanity is insulted by this society which is more worried about the physical survival, than survival as human beings with dignity.

APPLICATION OF THE MARRIED WOMEN'S
PROPERTY ACT, 1882 IN KENYA;

As aforesaid, the married women's property Act, 1882 permits the spouses to hold separately the property they own before marriage and also recognizes their rights to acquire and hold property separately during the existence of the marriage. In Kenya the Act is applied as a statute of general application by the Reception Clause, which states;³⁰

"..... Subject there to and so far as the same do not extend or apply, the substance of common Law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897 provided that the said Common Law, doctrines of equity and statutes of general application shall apply so far only as the circumstance of Kenya and its inhabitants permit and subject to such a qualifications as these circumstances may render necessary."

The Act applies to spouses married either under the marriage Act, or the African Christian Marriage and Divorce Act.

Whether or not the married women's property Act 1882, applies to Africans who marry under the English Law depends on how one views the cause of adopting some English aspects of life.

It has been argued that when an African marries under the statute law, he ceases to be an African and become 'White' in his outlook towards life and, therefore, it is only logical that English Law governing property, should apply wholesale to such an African.³¹ Such an African, who becomes a white in all aspects of his life, it is argued, should logically enjoy the "benefit" of English Law. Following this mistaken belief

COLE V. COLE held that, once Africans marry under the English Law, they must be taken to have removed themselves for the operation of customary Law completely. The same attitude has been adopted in Kenya where the European marriage has been held to be a special one and once opted for by anybody, its nature cannot be altered.³² It is submitted that, the courts subconsciously, takes the view that the African is the child Lugard said³³ he was and that on marrying under the statute, he shows that he has been 'Civilized' and therefore, the law of the civilized man applies to him.

It is in this background that the application of the ~~at all~~ ^M married women's property Act 1882, to the Africans must be viewed.

The Act was first held to be an Act of general application in Kenya In 1 V. 1,³⁴ where the parties were Europeans. The parties were divorced and the husband applied under S.17 of the Married women's Act 1882, Supra, for the determination of the parties interests in a home which had been acquired through the parties joint efforts. The court ruled ~~later~~ ^{inter} alia that, the circumstances of Kenya and its inhabitants do not require that married women should not be able to hold property. This decision was followed wa four years later, in K. V. K.³⁵ where the parties were Africans. The plaintiff applied under S. 17 of the 1882 Act, seeking declarations of entitlement to certain property registered in the name of her husband. It was found as a fact that she had contributed financially to the purchase of some of the property. Judgement was ~~entet~~ entered for her on the basis of the monetary contributions she had managed to make. It is clear that ownership of property will depend on monetary contribution hence the woman has to engage in positive and active participation in paid employment. Matrimonial property Law under English Law ^einvolved in socio-economic factors different from our own and a strange view of life: that no duties making the wife incapable of acumulating property wealth ^{were} imposed by marriage. It embodies capitalist nations of property which give a woman equal participation in the economy. The above decisions assumes that the conditions of Kenya will enable a woman to acquire separate property.

The Act gives the rural women little or no protection at all. The above Kenyan decisions and the Act seem³⁶ to suggest that there is no regard for "indirect" contributions made by the wife. Instead there are attempts towards identifying direct contributions. The Act ignores the fact that during the subsistence of the marriage spouses will be interested in sharing than in identifying specific property interests. It also assumes that the wife will make monetary contributions. This is unrealistic since the majority of women in Kenya are housewives and peasants and their contribution will not take this contemplated form.

The Application of the married women's property Act, 1882 to the African is based on the assumption that in his outlook to life, the African who has married under the European Law has become a European. Such Africans who marry under the statute Law never replace their philosophy of life with the English philosophy of life, hence there is no justification of applying English Law to them. They do not necessarily change their personal Law, but normally they will continue to use customary Law as their personal Law.³⁷ In

OMWOYO MAIRURA V. BOSIRE ANGIDA,³⁸ the parties were married under the African Christian Marriage and Divorce Act, but subsequently they regulated their affairs in accordance with customary Law. The court applied customary Law and the Judge said; characterized the colonial regime and countries to be dominant in Independent Kenya. The extent to which an African becomes a European on marrying under the...../33 is debatable. His law of succession is Africa customary Law,

"It is quite clear neither the applicant ~~not~~ nor Paulin~~x~~ intended to or did observe the obligations ~~im~~ imposed upon them by the Christian marriage, but preferred to conduct their domestic lives according to customary Law. Since that is so, this court will deal with the present application according to that law

The court realised that the parties although married under civil Law could not have necessarily accepted Western way of life. There is no Justification of applying the married women's property Act, 1882 to the Africans simply because they have married under the English Law, hence it is assumed, they Law removed themselves form the operation of any other Law. In COLEMAN V. SHANG³⁹ it was indicated that an African does not ~~s~~ cease to be one simply because he has married under the English Law. The court said at P. 400;

"We are of the opinion that a person subject to the customary law who marries under the marriage ordinance, does not cease to be a native subject to customary Law by reason only of his contracting that marriage. The customary Law will be applied to him in all matters consequently, when such a person has a case in court, native law and custom would be deemed to be the Law applicable to that case We think that it would be unreasonable and repugnant to natural justice to hold otherwise"

This position has been followed in Gambia,⁴⁰ Malawi,⁴¹ and Lesotho⁴² where the African is portrayed as a human being ~~until~~^{wife} a philosophy to be respected.⁴³ It is then clear that the application of the married women's property Act, 1882 to the Africans reflects cultural arrogance, ~~injustice~~^{unjustifiable} paternalism and racism^s which characterised the colonial ~~require~~^{are} and ~~countries~~^{continues} to be dominant in Independent Kenya. The extent to which an African becomes a European on marrying under the statute Law is debatable. His law of succession is Africa customary Law,⁴⁴

and there is no need of applying English Law when he is alive which will be unapplicable when he is gone.

The mode of production determines all aspects of social life and reveals the link between the social - economic relations and all other relations of a given society. In the African society, where the major factors of production are communally held, the woman has great protection. Her right to property is not determined by the monetary contribution she manages to make. The application of the married women's property Act 1882 to the Africans, frustrates their belief that, by its very nature, marriage is of two people of different sexes with identical and equal worths.

The air of mystery and confusion which surrounds the question whether and when have legal capacity to acquire and own property under customary law is demonstrated by Keith-Rose, who while writing on the 150 said,

"The question of a married woman's or widow's property is a nebulous one. One is constantly being told a woman has no property, yet one is equally constantly being shown 'her' farm or hearing of a woman who has gone to court about 'her' oil palms or 'her' share of 'dowry'.

Keith-Rose contended that a married woman has legal capacity to acquire, own and dispose of property in her own right and in her own name, under customary law.

However, there are certain limitations on this, but this is due to whole concept of property ownership amongst the Africans. This is because the major means of productions like land, and livestock the most important means of supporting life were community not held. The land was recognized as always belonging to the community and the husband or his wife within a particular community had a right to the use of land. The African's right to land was simply the right to use it, and individual ownership of property among the spouses was not very important.

SPOUSES' PROPERTY RIGHTS UNDER CUSTOMARY LAW.

Laws relating to property rights of the spouses are intended to enable men and women to live happily within the institution of marriage. The holding of property under customary law which enables the African to give meaning to life is communal like other aspects of his life. The indigenous people of Africa take the view that every human being man or woman has an equal worth. This equal worth of the individual is incorporated in the twin ideas of human dignity and human equality that can only be realised if property, and the means of supporting life are held communally,²

This communal holding of property protects a husband's and the wife's right to life. Individual ownership of somethings was recognized, however. Individual ownership of major means of production like land was not important in customary property relations and ~~what~~ really mattered was a person's right to use property. The rights of spouses under customary law to property should be viewed against this background.

The air of mystery and confusion which surrounds the question whether or not women have legal capacity to acquire and own property under customary law is demonstrated by Leith-Ross,³ who while writing on the 160 said,.

"The question of a married woman's or widow's property is a nebulous one. One is constantly being told a woman has no property, yet one is equally constantly being shown 'my' form or hearing of a woman who has gone to court about 'her' oil palms or 'her' share of 'dowry'.

Leith-Ross contended that a married woman has legal capacity to acquire, own and dispose of property in her own right and in her own name, under customary law.⁴

However, there are certain limitations on this, but this is due to the whole concept of property ownership amongst the Africans. This is because the major means of productions like land and livestock, the most important means of supporting life were ~~community and~~ held. ^{held by me} The land was recognized as always belonging to the community and the husband or his wife within a particular community had a right to the use of land.⁵ The African's right to land was simply the right to use it, and individual ownership of property among the spouses was not very important.⁶

Among the Basal, during the subsistence of the marriage, In most tribes a married woman does not own the major means of production like land during marriage.⁷ In those tribes all the wives property whether acquired before or during marriage is in the sole control of the husband during the subsistence of the marriage.⁸ Among the Kikuyu, although all the wives property, whether acquired before or after marriage is in the sole control of the husband, it is, however, customary for the husband to consult the wife before he disposes of the wife's property.⁹ The wife has control and power of use over some property like personal effects and individually acquired property. The wife has power of use and cultivation rights of lands assigned to her but such power of control and use is exercised with the consent, express or implied of the husband.¹⁰ Among the Nyika, a woman has the sole control over property given to her by her family, either before or after marriage.¹¹ Although it is customary for a wife to consult her husband, she may if she wishes sell or in any way dispose of such property even among the Nyika,¹² property acquired by the wife after the marriage either through her own efforts or given to her by her husband, is in the sole control of the husband, who may deal with it in any way without the wife's consent.¹³ Among the Taita the wife can dispose of or in any way deal with property acquired by her during the subsistence of the marriage without the consent of the husband.¹⁴

to the wife remained under the husband's control. Among the Luhya, Kisii, Kassei and Kavata the wife is not allowed to take anything from the matrimonial home even though acquired through her own personal efforts. In some tribes, in the event

Among the Masai, during the subsistence of the marriage, a wife exercises control over property given to her by her own family and also property given to her by her husband at the time of the marriage. The husband must not interfere with ^{her} ~~his~~ property in any way and it is a ground for divorce by the wife if he should do so.¹⁵ Under Elgeyo, Marakwet and Tugen customary Law the husband has no power to sell or in any way dispose of ~~his~~ wife's property without her consent.¹⁶ This applies to property obtained before and after marriage. However, a wife may not dispose of cattle and land without her husband's consent.

On the whole most tribes vest the rights of use rather than ownership on women. This is in line with the African concept of proerty ownership, at least of land, which was communally held and all members of the community, including men and women had powers of use only.

In the African society, there were very few divorce cases. The reason for this was probably the great protection and reconciliation facilities that the community provided. Marriage was a communal affair and it involved the two families of the man and wife.¹⁷ The Elders were rarely called to define the rights of spouses to property at dissolution of the marriage. Gen^erally, speaking a divorced wife has a right - to take her ~~and~~ personal effects, presents given to her by her husband and gifts given to her by her family.¹⁸ All the other property, especially land given by the husband or by husband's family to the wife remained under the husband's control. Among the Luhya, Kisii, Masai and Taveta the wife is not allowed to take anything from the matrimonial home even though acquired thr ough her personal efforts. In some tribes,¹⁹ in the event

of a dissolution of the marriage, the wife is entitled to take all her property, whether acquired before or after the marriage.

In Kenya, the Western feudal Land tenure which rejects the humanity of the landless was introduced in Kenya during the colonial era.²⁰ This has made it possible for Africans to own and hold land individually. The free enterprise economy has forced the African tenure to recognise individual holding of land. This might have far reaching effects on the rights of spouses to property, since their right of use to the family land might be extinguished. However, cases decided²¹ show that in the minds of the Africans, even after registration of ~~like~~ land in Kenya, land continues to be family property. This is because, basic institutions like communalism rooted in tradition and values seem to be extremely resistant to changes imposed by law.²² Where the economy of an African state allows people to acquire property, women, married and unmarried have equal rights to acquire and hold property.²³ The money economy in force makes it possible for spouses to get money which can be used by either of them or both to acquire property. This is not only possible in the urban economy, but is also possible in the Kenya peasant economy. Unfortunately there are no decided cases involving this issue under the customary Law. Uncertainty in this area created a situation whereby the writer can only predict what is likely to happen but without certainty. It is not clear how the property will be divided between the two where the two have made unequal monetary contributions. Since the money economy has made it possible for the spouses to acquire property, the writer is

at her late husband's home. Again if she elects to enter into a levirate union, she will be able to retain interests in her deceased husband's property, where she enters into a widow.

Inheritance with the brother of the deceased, she is entitled of the view that any of the wife's self acquired property to a share of the deceased husband's property. Where she which she acquires during the marriage though her own efforts, remains with her upon divorce. It could be argued that this is a modern development in customary Law. Cases may exist, where a married woman living with her husband has come from a family that does not own land that she can fall back on in the event of divorce. It would be unfair to send such a woman with empty hands, yet she may have been expending her labour to the husband's shamba. It could be argued that she has a kind of charge on the husband's land to the extent of the Labour, she has expended. This should be the position, even where the Land has been registered in the name of the husband alone. If she has been working in the shamba, which is usually the case in rural areas, she should have compensation for her labour or a kind of charge in the event of divorce.²⁴ In the pastoral communities the divorced woman should be able to get some animals from the husband. This is mere speculation as to the course which the courts might take if such a case came to court. This is because in the past, divorce has been rare and is still rare in rural areas and therefore, the question of determining the spouses rights to property have not arisen.²⁵

After the death of the husband a widow inherits some of her husband's property.²⁶ However, a widow has a right to retain the use and possession of the matrimonial house and she is entitled to make use of as much portion of her late husband's farm land as she ordinarily requires.²⁷ She has the right of use of her husband's property, if she chooses to remain at her late husband's home. Again if she elects to enter into a levirate union, the widow can retain interests in her deceased husband's property. Where she enters into a widow

inheritance with the brother of the deceased, she is entitled to a share of the deceased husband's property. Where she chooses to go back to her father or to remarry, she is entitled only to her individually acquired property but cannot have a claim on the deceased husband's family property. If she goes back to her father, she will have a right of use over his property and where she remarries, the new husband will be under a duty to maintain her.²⁸

The majority of indigenous people live traditional lives in the rural areas where the major means of production are communally held. The African mode of production has not yet been dismantled by the free enterprise economy and this continues to protect the rights of spouses to property.²⁹ It is only in urban areas where Africans in the free enterprise economy emphasis private property.³⁰

It did not extend to the family's well being as a housewife and mother. It has been recognized that, as regards the principles of equality of the spouses, a formal or mechanical equality way, in practice deprive the woman of certain rights which by her nature as a mother, she does not exercise. Criticising the mechanical equality, in the married women's property Act, 1982, Kahn - Freund O. Said;

..... The conception of equality underlying the principle of separation was based more on deductive reasoning than on sociological insight. It ignored the diversity of normal economic functions of husband and wife, and was in a sense, as mechanical as the crude idea of freedom of contract which insists on treating as 'equals', Land Lord and tenant, employer and employee.

This has created a serious problem. The Law in an effort to emancipate the wife from her husband's control made the spouses complete strangers to each other property wise.

The policy and the broad effect of the married women's property Act 1882 is that, neither spouse acquires by virtue of marriage any right in the other spouses property. The Act is not only unrealistic, but also unjust in insisting on an uncompromising enforcement of the separate property norm between husband and wife. Husband and wife normally enjoy and use much of their property together and very frequently their money and goods are mingled together. The married women's property Act 1882, enables a wife to preserve to manage and dispose of her property, whether owned by her at the time of marriage or acquired later, and so it puts the spouses at least legally on an equal footing. However equality of treatment of husband and wife is restricted to those cases in which they exercise equal economic functions. Equality ^{does} did not extend to the ^{woman's} family's well being as a housewife and mother. It has been recognized that, as regards the principles of equality of the spouses, a formal or mechanical equality may, in practice deprive the woman of certain rights which by her nature as a mother, she does not exercise.¹ Criticising the mechanical equality, in the married women's property Act, 1882, Kahn - Freund O² Said;

"..... The conception of equality underlying the principle of separation was based more on deductive reasoning than on sociological insight. It ignored the divorcity of normal economic functions of husband and wife, and was in a sense, as mechanical as the crude idea of freedom of contract' which insists on treating as 'equals', Land Lord and tenant, employer and employee!"

This has created a serious problem. The Law in an effort to emancipate the wife from her husband's control made the spouses complete strangers to each other property wise.³

The monetary contribution⁴ which is necessary before such a wife can acquire her property disregards the fact that, though not engaged in productive employment, she contributes alot to a man's productivity indirectly by giving him emotional and ~~psychological~~ psychological contentment. Community of property is the only solution to the intial weakness of the woman, which is not protected at all under the married woman's property Act⁵ community of property will ensure that, the humanity of the spouses, and especially that of the wife, is not insulted.

Community of property means property owned in common by husband and wife during marriage⁶. It may arise; Firstly, through a conventional community of property between spouses arising from an agreement between them that the marital property shall be held in some form of community. The agreement is usually contained in the marriage contract although it may be made during the marriage. Secondly, there may be legal community which arises by operation of Law upon the marriage of the parties. This may be arbitrarily imposed by law or if the law allows the parties ^{to} ~~to~~ agree to some other arrangement or to some modified form of community of property and they do not do so, the legal community is not ~~not to become~~ ^{to} become effective by the implied consent of the parties. This situation exists in some states in the U.S.A. like; California Arizona, Nevada, Washington, texas etc.?

Community of property is like a partnership in that some property coming from or through one or other or both of the individuals forms a common stock. But it is unlike partnership in that, there is no regard paid to propotionate contribution. unlike the position that prevailed under the common law, the legal system that developed over a large part of continental

Europe did not dictate the submersion of the wife's legal personality into that of her husband at the time of marriage. ^{under} The Fiction of the "Unity of husband and Wife." ^{is} found in continental Law. Under this system the marriage institution is regarded as a partnership. Each Spouse is regarded as contributing his or her efforts, either within the home or outside, or by a contribution of both, to the economic and financial well being of the marital enterprise.⁸ The system emphasises, the respective rights of the spouses to share equally in the property acquired by their joint efforts. Community of property does not concern itself with whether the property consitituted came form the wife or not. The proportion, if any, to which she contributed to it is of no importance. The wife's right to the property depends in no way on the amounts of her contribution.

A wife has extensive rights under the community of property, unlike her counterpart in the seperate property system.⁹ Inspite of all its advantages, separation of property encroaches upon the principle of equality in those numerous cases in which one of the spouses, usually the husband, earns an Income through being employed, or exercising a profession and other one, usually the wife, is occupied in the household and brings up children. The wife even though working at home no less than the husband as an income earner does not participate in his gains either during the marriage or after its termination.¹⁰ As was ^{Pounded} ~~promoted~~ out by the Royal Commission which recommended community of property in Britain;¹¹

"A married woman may spend years of her life looking after and improving the home, she may on marriage have to give up her paid work in order to devote herself to caring for her husband and children. Nevertheless, often the house

and its furniture are the sole property of the husband and he may dispose of them without her consent or he may leave them by will to someone else It is unwarrantable hardship when in consequence she finds herself in the end with nothing she can call her own."

The free - enterprise society of Britain rejected this recommendation thereby ~~rejed~~ rejecting the humanity of a woman, and refusing to respect her role as a mother and wife even where she has made no monetary contribution.

Community of goods when once constituted between husband and wife raises a rebuttable presumption that it is community property. The ~~owner~~ ^{onus} of proving that such property lies on the spouse asserting that it is separate property.¹² Virtually

all property acquired by the joint efforts of the spouses during marriage ^{is} deemed to be community property. In France, any real property is deemed to be community property unless it is clearly proved that either husband or wife possessed the same previous to the marriage or became entitled to it during coverture by way of inheritance, gift ^{or} will.¹³

In continental Europe, south Africa and the states in the U.S.A. where community exists, the management, control and administration is vested in the husband. The management and control of the community property is vested in him, not for himself but the community and the husband is in a position of a trustee in respect of that property.¹⁴ However, within the scope of their joint trust neither can act without the other.

Perhaps the administration is vested in the husband because in relation to two persons there cannot be majority rule.

There must be lodged somewhere a power, of decision to avoid an ~~Impasse~~ 'Impasse' The frustrations of an 'Impasse' may well be more disruptive of harmony than management by one, and

CONCLUSION

efficiency may be reduced. However, equality of management powers over marital property prevails in the communist countries of Eastern Europe where it does not lead to conflict between the spouses.¹⁵ This is because the communist countries not only accept the principle of equality of the sexes, but treat it as one of the basic rules of socialism.

Once constituted, community of property cannot cease to exist or be determined by mutual consent or by any cause or event except by death, Divorce, judicial separation or separation of estates decreed by a competent court of justice.¹⁶

Community of property recognizes that marriage should be regarded as an institution of equal partners, in which husband and wife work together as equals, and that the wife's contribution to the joint undertaking, in running the home and looking after the children, is just as valuable as that of the husband in providing the income and supporting the family.¹⁷ By enabling the spouses to share equally all property acquired during the marriage, community avoids the conflict between the role of a woman as a mother and wife and her capacity to acquire property. Community has the merit that it eliminates complicated problems as to the contribution either spouse happened to have made to the acquisition of wealth during marriages. It thus protects the wife whose contribution can often not be attested in monetary terms.

As it has been shown in Chapter four that this Act has many defects, especially as it applies to the Kenyan situation. In its application to the Africans it fails to realise that there is a choice of value philosophies embodied by property laws. By applying this English Act to the Africans, it assumes that, the non-white

CONCLUSION

At Independence, Kenya found herself with people who had lived for over sixty years as separate nations.¹ There were different marriage Laws applying to the Europeans, Africans Muslims and Hindus. This sort of separate development of marriage and property Laws could be explained philosophically and historically. Throughout its colonial history, the Kenyan populace was an apartheid society and every community kept to itself. The four communities had different philosophies of life, and it was only logical that each community should have marriage and property Laws respecting its philosophy of life.

The married women's property Act, 1882 applies to those people who contracts statutory marriages under either the marriage Act or the African Christian marriage and divorce Act. These are Europeans and those Africans who accepts the Western way of life, thereby removing themselves from the operation of customary Law. The latter it is argued², in effect cease to be Africans. According to the Act, anybody male or female can own any kind of property. Where a wife remains a housewife, while the husband works, the property acquired with the help of the earnings of the husband belongs to the husband alone. The wife will get a share in it only if she makes a financial contribution to its acquisition. This is clear from this paper. As it has been shown in Chapter four that this Act has many defects, especially as it applies to the Kenyan situation. In its application to the Africans³ it fails to realise that there is a choice of value or philosophies embodied by property Laws.⁴ By applying this English Act to the Africans, it assumes that, the non - white are

primitive or sub-human, that their institutions too are an expression of this primitivity and consequently, the movement of this non - white is from his philosophy of life to the English philosophy of life.⁵ By demanding financial contribution before a wife can acquire property, it denies her human dignity and ignores her contributions as a Mother and wife.

Property amongst the Africans is to be seen against the mode of production of Africans and their philosophy of life. As chapter five has shown, Land which is the major means of production is held communally. Even after registration under the Registered Land Act,⁶ it^{is} clear that Land is not entirely individually owned.⁷ The clan and family are still strong groups. During the subsistence of the marriage, the spouses' rights to property is well protected and safe guarded by the communal ownership. It has been shown that in the past, divorce was very rare and is still rare in the rural areas and therefore the issue of determining the spouses rights to property has not arisen.⁸ A widow is entitled to live in her late husband's land where she chooses not to leave her husband's family. Under customary Law, a woman has a right to use land either as an unmarried, married woman or as a widow. This is either her father's family land or her husband's family land. The money economy was introduced together with the free enterprise economy during the colonial era. This has made it possible for spouses, even under customary Law to acquire property either jointly or individually. There are no specific cases dealing with this situation and it is impossible for one to state the Law.

The independent government, unlike the colonial ^{government} adopted the policy of direct interference in matters of family law, affecting all the Kenya communities.⁹ The late president appointed a commission on the Law of marriage and Divorce on 6th April, 1967,

"To consider the existing Laws relating to marriage, Divorce and matters related thereto; to make recommendations for a new Law, so far as may be practicable, uniform Law of marriage and Divorce applicable to all persons in Kenya..... and to pay particular attention to the status of women in relation to marriage and divorce in a free democratic society."

The commission presented its report in 1968.¹⁰ The commission considered matters related to spouse's rights to property. The commission was of the opinion that, the married women's property Act, 1882, applied to Kenya as a statute of general application;

"So far only the circumstances of Kenya and its inhabitants permit."

The commission recommended that in the ~~newland~~ new law married women are to be exactly in the same position as unmarried women and men as regards the right to acquire and hold property.¹² In recommending that parties to a marriage should be free to obtain and retain separate property, the commission stated;¹³

"In absence of any agreement to the contrary between husband and wife, each should retain as his or her separate property whatever he or she owned before marriage or acquires after marriage.....;"

The commission seemed to realise the difficulties the married women's property Act, 1882 would bring to those urban and rural married women who are incapable of making financial contributions when it reasoned;¹⁴

any consent on the bill is essentially a consent on the
suite ".....In urban society, both wife and husband may
be wage earners and even where the husband is the sole
wage earner, any savings may be largely attributable
to the industry and prudence of the wife in running the
household. In rural society, the wife usually does
much work in the shamba. It seems fair, therefore, that
the wife should share in the fruits."

But despite this reasoning, the commission did not
favour community of property. It rejected community¹⁵ of
property and recommended that the spouse should retain as his
or her separate property, whatever he or she owned at the
time of the marriage or may acquire thereafter. At divorce
the commission recommended further;¹⁶

"That the court be given power in the discretion to
order the division between husband and wife.....
of any assets acquired during marriage by their joint
efforts".

It is very clear that these recommendations of the
commission reflect an endeavour on the part of the commissioners
to introduce in Kenya English concepts of family and
property.

From the recommendations of the commission a
marriage Bill¹⁷, which made provisions relating to matrimonial
property was prepared. Part IV of the Bill deals with
property rights of the spouses. The bill made it
clear that a married woman shall have the same right as has a
man to acquire, hold and dispose of property, whether movable or
unmovable.¹⁸ The relevant section reads as follows;¹⁹

"Subject.....to any agreement to the contrary
that the parties make, a marriage shall not operate to
change the ownership of any property to which either
husband or the wife from acquiring, holding and
disposing of any property."

Any comment on the bill is ~~essentially~~^{to be} a comment on the suitability of the recommendations of the commission since the bill follows the recommendations very religiously.²⁰ It is clear that a false start was made in our property and marriage Laws. The commission appears to have misinterpreted the ~~term~~^{terms} of reference which the president gave them.²¹ Uniform Law of marriage was to be recommended; ~~it is not possible to have~~ "So far as may be practicable"²² The commission appears to have thought that it was required to produce a bill like the one it produced. Soon after independence, the Kenya government stated that the Nations political philosophy was African socialism embodied in sessional paper 10 of 1965.²³ It in effect assumed that Kenya wanted to create a capitalist society, with capitalist ideals which are embodied in the married women's property Act, a 1882,²⁴ which it recommended. The commission was convinced that Kenya wanted to create an English Society. This was a wrong view. The commission's recommendations reflects cultural arrogance, unjustifiable paternalism and racism which has viewed the African as ^{an} infant who would mature to an adult as he adopts the English way of life.²⁵ The commission was agreeing with Lord Lugard's analysis of the African. Describing the African, Lord Lugard stated;²⁶

"In character and temperament the typical African of this race type is a happy, thrifless, excitable person, lacking in self - control, discipline and foresight, naturally court courageous and naur naturally courteous and polite, full personal vanity, with little sense of veracity, fond of music, and loving weapons as of oriental loves jewellery."

concept of constructive trust to declare that property acquired by spouses' joint effort for joint benefit should be shared equally.²⁷ It is likely that courts in Kenya will follow the English Courts.²⁸ This is because

Sections 78 and 82 of the constitution²⁷ guarantee equality of all marriage laws and make it clear that the marriage and the philosophies they give effect to are of equal standing.

Paternalism is seen where the commission tried to impose its English views of life upon Africans, who have five different philosophies.²⁸ ^{to his personal law is a constitutional right} Since one's right²⁹ its not possible to have a uniform law without infringing people's fundamental rights. The bill sought to alter the constitution without following the procedure laid down in section 47 of the same. In this respect, the bill can be termed unconstitutional in so far as it seeks to introduce a uniform law for all people.³⁰

Section 65 of the marriage bill introduces the married women's property Act, 1882 to all people in Kenya. In rural areas ~~where~~ ^{where} the majority of the women live, this will be impossible to implement. The majority of women in Kenya live in rural areas where land and livestock are still the common forms of property and the opportunity of their owning separate property does not arise.³¹ Even in urban areas, women would have to make financial contributions before they acquire property. This section embodies foreign value that do not do justice even where it came from. It assumes that many married women will be able to acquire property like men.

Beside the attempts on the part of the government to reform the Law, there have been attempts by the judiciary to minimize the short comings of the married women's property Act. The English courts are evolving the concept of constructive trust to declare that property acquired by spouses' joint effort for joint benefit should be shared equally.³² It is likely that courts in Kenya will follow the ~~EN~~ English Courts.³³ This is because

the wife is often a wage earner making contribution to the common expenses of buying and running the home and justice demands that, even though property is purchased in the husband's name, with his money, she should be given credit for her help.³⁴ However, the judicial attempt to reform the married women's property Act, 1882 is not without its shortcomings. Though considerable, the credit given to the wife is not adequate. The courts are still attaching too great an importance to the spouses' monetary contribution in the acquisition of property.³⁵

It is evident ^{From} ~~form~~ the above discussion that legislative and judicial attempts to reform the ~~injust~~ ^{remove} injustices of the married women's property Act have been a fiasco. The Act is still applicable to Kenya as an Act of general application with all its injustices. It is usually applied wholesale without any regard to the local circumstances.³⁶ The Act, and indeed the commission on the law of marriage and Divorce which followed it religiously, did not realise that legal rules do not of themselves change the society and in giving women the right to acquire and hold property, the Act has not necessarily changed the position of women. A law that states that a married woman can own property is in itself a dead letter in a community where such a woman cannot own property.³⁷ A Law that ignores the social values of a society for whom it is meant to apply is likely to be ignored. The Act, which would apply to all people in Kenya, if marriage bill came into effect is opposed to the customary structure and this robs women of the security of rights in family property, which they enjoy under the customary Law.

The married women's property Act, 1882 creates an atmosphere of women wanting to become "female Males",³⁸ where as most women had rather remain female but receive some attention attention that recognizes the fact that they are human beings entitled to live in dignity. Sex itself dictates that a woman who wants to lead a meaningful life must devote a part of her life to looking after her husband and children.³⁹ The housewife who gives contentement to the husband contributes indirectly to the husband's productivity. My view is that everything the parties own during the marriage should be shared equally in the event of divorce not withstanding the monetary contribution made. The courts in this country should make sure that both customary Law and statute law rewards people for what they have done, all the time considering the philosophy of each community. This could only be achieved if community of property is adopted, in which husband and wife work together as equals. Localisation of the judiciary, may be the only real solution in order to achieve this. In community of property, the wife's contribution to the joint undertaking in running the home and looking after the children, is just as valuable as that of the husband in providing the income and supporting the family. Community avoids the conflict between the role of a woman as a good mother and wife and her capacity to acquire property since property is shared equally. It respects her humanity.

If community of property is unacceptable to the system, then it is only fair that Kenya should retain the four marriage and property systems, respecting the different philosophies of the different communities as enshrined in section 82 of our constitution.

CHAPTER ONE

FOOTNOTES

1. See: "The role of law in African and Christian, marriages in Kenya".

Article by G.K. Kamau, Lecturer faculty of Law: A lecture delivered to the Catholic society university of Nairobi at Christian Leadership Centre on 23rd November, 1977 . The various objectives of the marriage institution are very well analysed in this article:

2. Read Generally: ENGELS. "THE ORIGIN OF FAMILY PRIVATE PROPERTY AND THE STATE." People's publishing house, Bombay 1944.
3. (1970) 2 W. L. R. 1306
4. For more information see: Wolfendein Committee
"Report of the committee on Homosexual offences and prostitution"
The committee recommended inter alia, that homosexuality should be allowed between two consenting adults.
5. 1975 52 D. L. R. 280
6. (1970) 2 W.L.R. 1306 at Page 1324.
7. SEE: Mailbox of Daily Nation: Friday 2nd February, 1979:
The article entitled:
"THE HORROR OF RAPE."
8. The 22nd December, issue of the Daily Nation, where the President of the Republic of Kenya had expressed concern over the problem of the "Parking Boys" The President made clear that they are to be repatriated so as to be able to lead a meaningful life.

- These are abandoned kids who turn to the street to solicit for money by showing the motorists where to park their cars. They are usually found in the streets begging and occasionally are involved in petty crimes.
9. It is not clear what a reasonable demand amounts to. However in A - B V. C. D 28 K.L.R. 210 it was held that demanding sexual intercourse three or four times a night is not unreasonable and subsequently the marriage could not be dissolved on this ground.
 10. In Rv. CLARKE (1949) 2 All E.R 448. It was argued that by marriage a wife consents to intercourse with her husband during coverture and she thus confers on him a privilege which she is not entitled to withdraw whenever she pleases, consequently, it was held that, as a general rule, a husband cannot commit rape on his wife; however, GILBERT GE is "RAPE IN MARRIAGE." 1972 Adelaide Law Review 233, advances a contrary argument. Gilbert argues, that rape in marriage is possible and the law relating to rape should focus on the consequences of the criminal act and not on the status or the intimacy of the relationship of the parties. He concludes at page 303 that, the idea of exempting husbands from rape charges by their wives is only anachronistic and unjustifiable.
 11. (1966) 2 All E.R. 257.
 12. In CORBETT V. CORBETT Supra; The court indicated that the marriage would have been voidable for want of consummation.
 13. The case of DREDGE V. DREDGE. (1947) 1 ALL E.R. 29 established that the marriage is not automatically consummated by reason of the fact that the parties have had pre-marital intercourse.

14. 163 E.R. 1039. In this case a suit was brought by the husband for a declaration that the marriage was null and void on the ground of impossibility of consummation. The wife had a defective vagina which prevented conception and enabled only partial penetration of two inches as against the normal four to four and half inches; Dr. Lushington J. giving judgement pronounced at the marriage null and void for lack of consummation.
15. (1960) E.A. 77
16. CAP. 152 Laws of Kenya:
17. In Rv. R. (1952) I ALL E. R. 1194. It was held that the marriage had been consummated where the husband had been physically incapable of ejaculation after penetration.
18. S. 25 of CAP. 152 (MCA) Supra, and CAP. 153: Subordinate courts (seperation and maintenance) Act.
19. COTRAN: Restatement of African Law; The Law of marriage and divorce - London, Sweet and Maxwell 1968. Virtually in all tribes the husband has a duty to assign to his wife's house land and cattle for her use.
20. Footnote 16: Supra.
21. MARY WANJIKU V. PETER HINGA. Maintenance Cause No. 2 of 1976.
22. The law of marriage Act Tanzania 1971: Act No. 5 of 1971: S. 115 (2) which states that the court shall have corresponding power to order a woman to pay maintenance to her husband or former husband.

23. **"Sex Discrimination in W. Germany"** By Dieter Giesen: Vol.41 No. 5 MLR 1978 (Sep) "The equality Act" 1957 (As embodied in the new marriage law of 1976) provides that each spouse had a duty to maintain the other spouse.
24. (1965) L. ALL. E. R. 611.
25. CAP 80 Kenya Evidence Act.
26. (1966) L. R. I. P. 9. 130.
27. S. 130 (2) CAP. 80 (Supra)
28. (1976) 2 W.L.R. 271.
29. Prof: Mbiti John 5. **"African Religious and Philosophy"** Heinemann 1969 chapter 13 "Marriage and procreation."
30. Footnote 22 Supra.
31. **Facing Mount Kenya.** By Jomo Kenyatta Heinman educational books Chapter entitled "Marriage System".
11. Family code of Cuba article 24.
12. The family code of Cuba article 28.
13. See Kenyan Law Civil Law; By Gilmore: Oxford University press 1970.
14. Speech by Fidel Castro at the closing session of the 2nd Congress of the Federation of Cuban Women: Havana, Nov. 22nd 1974.
15. N. Sanguera "Social Security in Africa", East African Journal; May, 1963 PP.13 - 15.
16. S.N. 001; Modern Family Law in Southern Nigeria; Lagos African University Press 1966
17. Julius K. Nyerere: Freedom and Unity (Ujamaa in Ujama) A selection from writings and speeches. 1962 - 1964. Dar es Salaam Oxford University Press 1967, page 170.

CHAPTER II FOOT NOTES

1. Sessional paper No. 10, 1965; Government Printer 1965.
2. See H. L. A. Hart, The concept of law, Oxford University Press 1961.
Chapter 9: "Laws and Morals" PP. 131 - 207.
3. Engels Fredrick, the origin of family private property and the State, Peoples Publishing house. Bombay 1944.
4. (1866) L. R. I. P. D. 130.
5. CAP. 152 Laws of Kenya: S 2 defines marriage as
The voluntary union of one man and one woman for life to the exclusion of all others".
6. Engels Fredrick; Footnote 3: Supra.
7. Engels Fredrick; Supra: Footnote 3.
8. Hyde V. Hyde - Footnote 4 Supra
9. Nachimson V. Nachimson (1930) P.D. 213: The expression for life was interpreted to mean "Intended to be for life".
10. Julius Nyerere: Freedom and Unity: Uhuru na Kazi.
A selection from writings and speeches; 1952-1965 Dar es salaam
Oxford University Press published in 1967.
11. Family code of Cuba article 26.
12. The family code of Cuba article 28.
13. See Yugoslav Law Civil Law: By Chlores: Oxford University
press 1970.
14. Speech by Fidel Castro at the closing session of the 2nd
Congress of the Federation of Cuban Women: Havana Nov. 29th
1974.
15. N. Songuemas "Social Security in Africa". East African
Journal; May, 1968 PP.13 - 18.
16. S.N. Ogi; Modern Family Law in Southern Nigeria; Lagos
African University Press 1966
17. Julius K. Nyerere: Freedom and Unity (Uhuru na Umoja) A
selection from writings and speeches. 1952 - 1965.
Dar es salaam Exford University Press 1967, page 170.

18. Professor Mbiti J.S.: African Religious and Philosophy. Heinmann Published 1969, chapter 10 "Ethnic groups, kinship and the individual.
19. AMODU Tijani V. Secretary Southern Nigeria (1921) 2 A. C.399 Membership of the family (as a land owning corporate entity) was held for comprise the living, the dead and the unborn.
20. Julius K. Nyerere: Freedom and Unity. Supra: chapter 7 "National Property".
21. Max Gluckman: The ideas in Barotse Jurisprudence; institute for African Studies University of Zambia 1967; Yale University Press.
22. Mvagiru V. Mumbi (1967) E.A. 39; parental consent is not necessary for a valid customary marriage by elopment. However, the parents have to give consent later.
23. See S.N.C. Obi Modern Family Law in Southern Nigeria; (Supra: Footnote 16) It is submitted that, part payment or a promise to pay dowry is enough to make the transection valid.
24. Robert F. wray and P. H. Gulliver; The family estate in Africa; Studies in the role of property in family, structure and lineage continuity; 1964 PP. - 117 - 153.
25. Julius K. Nyerere: Freedom and Unity Supra.

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CHAPTER THREE

FOOTNOTES

1. John Flint, For a wider background to the period Prior to partition and colonial occupation in HISTORY OF EAST AFRICA, edited by R. Oliver and G. Mathew, O.U.P. Volume 1;
2. Lord Lugard, Dual mandate in British Tropical Africa, Frank and cases Limited 1923: Chapter 31.
3. For more information about this period of Kenya's history see I.P. Ghai and J.B.W.B. Mc Aslam, Public Law and Political change in Kenya: (Chapter One) O.U.P. 1970.
4. Kenya (annexation) order in council 1920.
5. The Kenya Protectorate order in Council 1920.
6. Legal Notice 718 of 1963:s 4 (1) retained the colonial Laws which included marriage and succession Laws.
7. The 1884 order in council which applied to all the sultans dominion at the Kenya coast.
8. The effects of the settlements Act was discussed in Earl of Erroll V. C.I.T. (1940) F.E.A. C.A.F, and Hakan Hakam Bibi V.Mistry Fateh Mohamed (1955) 28 K.L. R. 91.
9. Kenya (annexation order in council 1920, supra, and Kenya protectorate order in council supra.
10. The Kenya protectorate order in council provided Inter alia;
 - (a) Per article 5: The governor of the Colony was to remain governor of the protectorate.
 - (b) Articles 6 and 7: Both the colony and the protectorate were to have one executive and one legislature.
11. L. N. MO 718 of 1963: s3.4 (1) Supra: Footnote 6:
12. S. 3 of the East African order in Council 1997 1897, the term 'Native' was defined broadly to include Africans and Muslims.
13. Sections 7 and 8 of the 1897 order in council supra, established

courts for Natives and Non-Natives.

14. S. 52 of the 1897 East Africans order in Council, Supra.
15. S. 9 of the 1899 East African Order in council: No. 757 of 1899.
16. Article 15 of the East African order in council, established a High Court with "full jurisdiction, civil and criminal over all persons and over all persons and over all matters in East Africa."
17. Africans court's ordinance 1951: No. 65 of 1951.
18. Article 7 of the 1921 Kenya Colony order -in council had also retained the repugnancy clause.
19. CAP. 150 Laws of Kenya:
20. Ordinance Ref. 33 of 1939:
21. CAP. 152 Laws of Kenya.
22. Regulation No. 64 of the 1897 Native Courts Regulations.
23. No. 9 of 1904:
24. Priscilla Nyondo and Benjawa Jembe
4 E.A.C.R. 160.
25. Ordinance No. 51 of 1931.
- 25a CAP. 151 Laws of Kenya.
26. CARNIE V. CARNIE (1966) E.A. 233 and also see S. 3 of the matrimonial causes Act CAP. 152.
27. CAP. 5 Laws of Kenya (Kenya contribution) S. '82 (4) (6)..
28. Judicature Act CAP: S. 3. (2): "The High court and all subordinate courts shall be guided by African customary Law in Civil cases in which one or more of the Parties is subject to it or affected bu by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard

~~to substantial~~
to technicalities of procedure and without undue delay."

28a See footnote 28 supra:

29. This discussed in the chapter includes; The Act CAP. 150, The matrimonial causes Act CAP 152 and the African Christian marriage and divorce Act, CAP. 151.

30. CAP. 153 Laws of Kenya

31. CAP. 144 Laws of Kenya.

32. CAP. 145 Laws of Kenya.

33. Judicature Act, S. 3 (1) States "The Jurisdiction of the High court and of all subordinate courts shall be exercised in conformity with the substance of the common Law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897"

These are to be applied subject to the local circumstances.

34. K. V. K. H.C.D. Case No. L13 of 1966 which held that S.3 CAP. 152 indicates that jurisdiction must be exercised in accordance with the Law applied from "time to time" in the high court of justice in England. Mr. Le Polley (Advocate) in Vol. 3 East African Law Journal 145, Supports this view.

CARNIE V. CARNIE (1966) E.A. 233 stated a contrary view:

35. 1 v. 1 (1971) E.A. 228 - which held that the married women's property Act 1882 is applicable to all inhabitants in Kenya not withstanding the type of marriage one contracted: Another problem is that, it is not clear when a statute of general application in England is applicable in Kenya.

11. P.N. Broxley, supra P. 420

12. P.N. Broxley, supra P. 421

13. P.N. Broxley, supra. P. 422

14. P.N. Broxley, supra P. 420

CHAPTER FOUR

FOOTNOTES:

1. The Laws of England: The Earl of Halsbury: Vol 16: Butterworth and Co. P. 321.
2. See 1 v. 1 (1971) E.A. 228 and K v. K civil case No. 123 of 1975:
33. Judicature Act CAP. 8 S. 3(1) (C) states;
 ".....Subject thereto and so far as the same do not extend or apply the substance of Common Law, the doctrines of equity and statutes of general application in force in England on the 12th August, 1897
 Provided that the said common Law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary."
4. In 1 v. 1 supra, Trevelyan J. expressed the opinion that (in a dicta), the Act is applicable to any marriage notwithstanding the way it was contracted.
5. CAP. 150 Laws of Kenya.
6. CAP. 151 Laws of Kenya.
77. K.V.K H.C.D. case No. 43 of 1966: Also see Le Pelley's comments in Vol. 3 E.A.L.J. 145.
8. For a belief historical background to the married women's Property Act 1882, see P.M. Bromley, Family Law: London, Butterworths 1966 PP. 420 - 426.
9. Kahn - Freund: Recent Legislation on matrimonial property 33 M L R 601 at P. 601: Also P.M. Bromley, Supra, P. 420.
10. P.M. Bromley, Family Law, supra, P. 420
11. P.M. Bromley, supra P. 420
12. P.M. Bromley, supra P. 421
13. P.M. Bromley, supra, P.422
14. P.M. Bromley, supra P. 420

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15. P.M. Bromley P. 422.
16. P.M. Bromley, Supra, P. 423.
17. Kahn - Freund Recent legislation on matrimonial property, supra.
18. P.M. Bromley P. 426 Also see: Kahn - Freund. Recent Legislation on matrimonial property; supra.
19. Sections 2 and 5 of the married women's property Act 1882.
20. S. 1. (1) of the 1882 Act, supra.
21. H v. H 63 T.L.R. 645 at P. 646.
22. Re Sims Question (1946) 2 All E.R. 138.
23. Re Rogers Question (1948) 1 All E.R. 328 commenting on the discretion under S. 17, Evershed M.R. said;

"What the judge must try to do, is..... to conclude what at the time was in the Parties' minds and then to make an order which, in the changed conditions now fairly gives effect in law to what the parties in the judges finding must be taken to have intended at the time of the transaction itself."
24. (1969) 2 W.L.R 966.
25. NIXON v. NIXON (1969) 3 All E.R 1133: court held that the wife acquired an interest in property by giving unpaid help in the husband's green grocery business (and thus saving the wages he would have had to pay to an assistant.)
26. In Tunmer v. Tunmer (1975) 1 W.L.R 1346 compensation was awarded to the woman for the revocation of a licence to stay in the house which a man acquired so that he, the woman and their two daughters might live in.
27. COOK V. HEAD (1972) 2 All E.R 38 at P. 41.
28. Cook v. Head, supra.
29. G.K. Kamau, Cohabitation outside marriage in some English speaking African countries: A paper to be presented at the world conference on family living in a changing society: UPP Sala June 5 - 9 1979.

30. The Judicature Act (CAP. 8) S. 3 (1) (C).
31. COLE v. COLE 1898 L.R 15.
32. AYOOB V. AYOOB (1968) E.A. 72
33. Lord Lugard: Dual Mandate in British Tropical Africa, Frank Cass Limited 1923.
34. (1971) E.A. 278.
35. Civil case No. 123 of 1975 (High court of Kenya)
36. G.K. Kamau: weekly Reviews Sep. 6 The marriage Bill and September 13th, 1976 Good intentions, bad marriage Law:
37. COLEMAN v. SHANG (1959 G.L.R. 390.
38. 6 C.R.R. 4
39. (1959) S.L.R. 390.
40. HADDY MANJANG v. HADDY N'DONGO 1967 J.A.L.137
41. KAMCACA v. S.K. NK NICHOTA (1968) J.A.L 178.
42. KHATALA v. KHATALA Supra.
43. Kamau G.K: Laws of marriage and property in English speaking Africa; supra.
44. The writer assumes that the law of succession Act, Act No. 4 of 1972, will not have come into operation by the time this thesis is published.

FOOTNOTES.

1. There is very little literature (including decided cases), which attempts to define the rights of spouses to property under customary law. Even the little there is has been written by western scholars who have little cultural connection with Africans. One such literature is C. Conran's restatement of African law. The law of marriage and divorce: Sweet and Maxwell 1968; which the writer, heavily relies on. The restatement illustrates so clearly how western concepts can unconsciously and demagically be imported in interpreting indigenous data. Criticising Conran's restatement, Roberts Simon in Law and the study of social control in small scale societies Vol 39 MLR 1976 stated Conran's reports " consists largely of inventories, of rules purporting to constitute the customary law of each society investigated".

Conran's restatement on the law of marriage leaves the reader with the impression that these rules operate in the same way as rules of English Law. Conran's interest has predictably been centred on Law and he rarely made much effort to adjust his theoretical perspectives when moving outside the systems within which he was trained. Conran treats English Law as customary Law for these reasons, the writer is of the view that caution should be taken in using Conran's restatement of customary Law. The writer is not the first one to echo the inaccuracy in Conran's restatement. In Yawe V. PUBLIC TRUSTEE Supra, the High Court cautioned that Conran's restatements should not be followed like scriptures.

2. On communal holding of property see; 1. MAX GLUCKMAN The ideas in Barotse jurisprudence supra; 2. Robert F. Gray and P. H. Gulliver Family Estate in Africa, Estate in Africa, Supra 2. Julius K. Nyerere Freedom and Unity; Uhuru na Umoja, Supra e.t.c.

3. Leith - Ross - African Women; a study of the 160 of Nigeria: London Faber and Faber 1934, at P. 102.

4. OBI S. N. Modern Family Law in Southern Nigeria, Lagos, African Universities Press 1966, at P. 257

5. MAX GLUCKMAN, The Ideas of Barotse Jurisprudence, Supra.

6. Julius K. Nyerere, Freedom and Unity: Uhuru na Umoja, Supra.

7. E. Conran, Restatement of African Law the Law of marriage and divorce supra, generally.

8. E. Conran Restatement supra - footnote of

9. Jomo Kenyatta (Late), Facing Mount Kenya, Heinmann Educational books 1971 edition.

10. Jomo Kenyatta, Facing Mount Kenya Supra

11. E. Contran; Restatement of African Law; The Law of Marriage and Divorce, Supra.
12. The 'Nyika' consists of the following tribes: The Digo, Duruma, Siriama, Rabai, Chanyi, Jibana, Kambe, Ribe, and Kauma.
13. Contran's Restatement of African Law Spru at P. 89.
14. E. CONTRAN: SUPRA P. 99
15. E. CONTRAN, SUPRA P. 164
16. E. CONTRAN, SUPRA P. 131
17. Prof. John S. Mbiti; African Religion and Philosophy Heinmann educational books; 1969 Chapter 10.
18. See E. Contran's Restatement of Law, Supra generally.
19. This happens among the Kikuyu, Meru, Kamba, Tharaka, Kuria, Taita, Handi, and Kipsingis, Elgoyo, Marakwet and Tugen.
20. Swyanerton R. J. M. A plan to intensify the development of African Agriculture in Kenya 1955 at P. 9
21. Obioro V. Opiyo (1972) E. A. 227
22. Mugutha V. Mugutha (1971) K. H. D. 16
23. Esiroyo V. Esiroyo (1973) E. A. 388
24. Yezekhael Don, Sociology of Law, Penguin 5th Edition, 1969.
25. S. N. C. Cbi; Women's property and Succession thereto P. 10
26. Kamau G.K. Weekly Review 13th September, 1976. Good Intention, bad marriage Law
27. Kamau G. K. article in weekly Review 13th September, 1976, Supra
28. Coker G. B. A., Family property among the Yoruba's; 2nd ed, sweet and Maxwell 1966.
29. G. K. Kamau, Laws of marriage and property in English speaking Africa Lecture delivered at seminar on women and development at Maseru Lesotho; 17th April - 30th April 1977.
30. G.K. Kamau, Laws of marriage and property in English speaking Africa , Supra.
31. Thomas Welsner, "One Family, Two Households" A rural - Urban Network Model of Urbanism; University Social Science Council Conference, NRB. 1969.

CHAPTER SIX

FOOTNOTES.

1. Chloros, Yugoslav Civil Law, Oxford University Press, 1970.
2. Kahn - Freund O., Matrimonial property; Some recent developments, 22MLR at P. 241.
3. GO'RECKI, JAN, Matrimonial property in Poland 26 MLR at P. 156
4. K v. K Civil case No. 123 of 1975.
5. G.K. Kamau, Laws of marriage and property in English speaking Africa. Supra.
6. See William Quinby De Funiak, cases and materials on community of property, the Bobbs - merrill Co. Publishers. 1947.
7. William's cases and materials on community of property supra footnote 6.
8. Leo Kanowitz, Sex Roles in Law and society, university of new Mexico press 1973.
9. De NICOLS v. CURLIER AND OTHERS (1900) A.C. 21.
10. Go'recki Jan, Matrimonial Property in Poland supra.
11. Report of the Royal Commission on marriage and Divorce: 1956, At P. 177.
12. Meyer v. Kinzer (1895) 12 Cal. Rep. 247.
13. De Nicols v. Curlier and others, supra, also see Articles 1402 and 1404 of the code civil of France.
14. Fields v. Michael (1949) 205 Pac Rep. 403 Also see williams cases and materials on community of property, supra.
15. Go'recki, Jan, Matrimonial property in Poland supra.
16. William's cases and materials on community of property, supra
17. See Par. 644 P. 175 of the report of the royal commission on marriage and divorce, where this view was accepted.

FOOTNOTES

CONCLUSION:-

1. For more information on this aspect about different marriage and property Laws among Kenyas, see G.K. Kamau, Marriage Bill, weekly review September 6th, 1976.
2. COLE V. COLE (1898) L. r.R 15.
3. K. v. K. Civil case No. 123 of 1975.
4. Kamau G.K, Good intentions, bad marriage laws weekly review 13th Sep, 1976.
5. Kamau G.K. Trends in marriage and succession Laws.
6. CAP. 300 Laws of Kenya.
7. Obiero v. Opiyo, supra, Esiroyo V. Esiroyo, supra, and Muguthu V. Muguthu, supra.
8. G.K. Kamau, Good intentions, bad marriage laws, supra.
9. This direct policy was shown in the E. Cotran's Restatement of African Law: The Law of marriage and Divorce; Sweet and Maxwell 1968.
10. Report of the commission on the law of marriage and Divorce; Government printer 1968.
12. Rec. No. 60 of the commission's Report supra.
13. Rec. No. 61 of the commission's Report, supra.
14. Par. 179 of the commission's Report, supra.
15. Par. 180 of the commission's Report, supra.
16. Rec. 138 of the commissions Report, supra.
17. The Marriage Bill; 1976 has not yet become Law. It was discussed by parliament on several occasions until it was shelved.
18. Section 64 of the marriage bill, 1976.
19. Section 66 of the marriage bill, 1976.
20. G.K. Kamau, marriage Bill, weekly review supra.
21. G.K. Kamau, Good intentions, bad marriage Laws supra.
22. See footnote 11.

23. African socialism and its application to planning in Kenya, sessional paper No. 10, of 1965. Government printer.
24. G.K. Kamau, Good intentions, bad marriage Law, supra
25. Lord Lugard, Dual mandate in British tropical Africa, supra 1965.
26. Lord Lugard, Dual mandate in British tropical Africa, supra, see also G.K. Kamau, Laws of marriage and property in English speaking Africa, supra.
27. Act No. 5 of 1969.
28. G.K. Kamau, Good intentions, bad marriage law supra.
29. S. 82 of the constitution supra.
30. G.K. Kamau, Good intentions, bad marriage law supra.
31. Footnote 30, supra.
32. COOK v. HEAD (1972) 2 All E.R. 38 at P. 41.
33. K. v. K. supra.
34. TUNNER v. TUNNER (1975) 1 W.L.R 1 346.
35. G.K. Kamau, cohabitation outside marriage in some English speaking African countries: A paper to be presented at the world conference on family living in a changing society Up UPP Sala June 5 - 9, 1979.
36. K. v. K Civil case No. 123 of 1975 and 1 v. 1 (1971) E.A. 228
37. G.K. Kamau, Good intentions, bad marriage laws supra.
38. Uche, U.U, The legal status of the Kenyan woman; The legal aspects of House Keeping money; paper prepared for the conference on assembling and collecting data on the participation of women in Kenyan society: 11th - 15th August 1975, at Nairobi School.
39. - Footnote 37

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