Family Law Notes PDF

Family law (University of Nairobi)



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FAMILY LAW

UNIVESITY OF NAIROBI
SCHOOL OF LAW
PARKLANDS CAMPUS

INTRODUCTION

1. Family as an institution
2. History of the Family as an Institution
3. Historical Backgrounds of Family law in Kenya.

Family as an Institution:

In one social context a family may refer to a man and a woman and their children (if any) who share a common household. In another, it is defined as all persons who share blood relations. In others, it is defined as all persons who share a household. In others still it means all the members of a household, including parents and children with perhaps other relations, lodgers and even servants.

Legally, the term family is a restricted concept. There are certain formal pre-requisites that have to be met and the main one is a marriage ceremony. In law a family is created when persons enter into a legally recognised marriage. The law also restricts the right to terminate that legal status. The family is registered because it serves a number of purposes in society.

1. It is the basic component of a society organisation; Article 16 of the Universal Declaration of Human Rights and Article 45 of our Constitution.

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2. It is the basic economic unit of society that and most productive activities take place within the family set up .
3. The family setup provides for a framework for the parties to have satisfactory sexual expression.
4. It guarantees perpetuation of society through the bearing of offspring.
5. It provides a framework for companionship between the members of that family.

THE OBJECTS OF FAMILY LAW

1. It seeks to define status between the parties in that family i.e. it defines what rights a member of the family can claim over the other or over the other' s property. It' s discusses altering the status of parties in the family.
2. A remedial role; that is it serves to protect certain weaker members of that family e.g. children. On termination of a family relationship there are certain members who may need protection especially economic protection.

   Note. The trend now is that not all family relationships are created by marriage ceremonies; e.g. cohabitation and single parents. The law has developed to recognise some of these relationships.

Major functions of family law

HISTORY OF THE FAMILY AS AN INSTITUTION.

The trend now is that not all family relationships are actually created inside a marriage relationship. Some of the developments in law have been to deal with these issues, under common law and equity there is recognition given to cohabitees. Children born out of marriage also acquire rights.

Family law as an institution also has a history.

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Engels: The origins of the family, Private Property and the state. In this book the author states that the institution of the family has not existed for all times and they say that relating to the institution of the family there was an ancient primitive stage of promiscuity where there were no restrictions as regarding sexual relations and it was a free for all. The authors have met criticism for alleging this fact but this points to an earlier stage when there was no family existing. They then say that the family developed along four main stages

1. Consanguine Family;
2. Punuluan Family
3. Pairing Family; and
4. Monogamous Family

Consanguine and Punuluan Families are based on group marriages. Inpairing and Monogamous families society tries to disassociate itself from group marriages.

Engels says that marriage groups were separated according to generations so that you find that one generation consisted of husbands and wives who could relate so long as they belonged to the same generation. Parents and children could not relate. Remnants of this type of marriage at the time he was writing in the early 19th Century could still be found among some Hawaiian tribes.

In the Punuluan stage brother and sister were excluded from sexual relations. In the consanguine family so long as you belonged to the same generation you could have sexual relations. The Punuluan type of society was found among the Indian tribe called the Punulua.

In these forms of group marriage it was uncertain as to who the father of any particular child was but it was certain who the mother was so that group marriages became the origin of tracing descent through the mother' s line Matriarchy became the form of tracing

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descent. The author states that societies that are matriarchal originated from here.

PAIRING FAMILY

The essence of the pairing family is that one man lives with one woman but the relationship is such that polygamy and occasional infidelity on the part of the man is permissible. However the woman is required to be strictly faithful and adultery on her part is strictly punished. To some people this is where subjugation of women starts.

Restrictions on sexual relations are extended so that there is a progressive stage within which conjugal relations can take place. In the pairing family conjugal relations are more restricted and women are restricted only to their husbands who cannot be their brother.

MONOGAMOUS FAMILY

This is different from the pairing family in two ways

1. There is a much greater stress that is given to the marriage institution, in the pairing family dissolution of marriage is relatively easy but in a monogamous family a marriage cannot be dissolved unless some formalities are followed. The rights to conjugal relations are extended to the wife because it is not only the wife who has to be faithful but the man as well. The authors of this text say that the main purpose of the rise of the monogamous family is to produce children of undisputed paternity and this is important for purposes of inheritance. That is the linkage that the authors make in the rise of family and private property ownership. Those who then own property become the rulers and that is the link between family, property ownership and the state.

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The main reason that this history becomes relevant is when we look at the conflicts that arises, it is argued that when we came into contact with the Europeans, our predominant form of family was the Pairing Family. In some societies we still were in the Punuluan stage. That means that the Europeans found us at the pairing stage and then imposed laws which were applicable to the monogamous family we find tension existing between the two different systems of law right from the very beginning because they were at different levels of development, they reflected different values. Those tensions have existed and that is the reason why harmonisation of the different family law situations appears to be difficult.

HISTORICAL DEVELOPMENT OF FAMILY LAWS IN KENYA

The starting point in statutory family in Kenya law is the 1897 East Africa Order in Council which applied certain Indian and British Acts of Parliament to the East African Protectorate. It also applied the common law of England which was in force at the time. Insofar as the natives were concerned the Order in Council had limited application. It provided that cases against natives would be brought in native courts and a Commissioner was given the power to establish and abolish those Native Courts and to regulate their procedure as well as give directions as to the application of native law and custom.

As a result of this power, the Commissioner made the native court regulations of 1897 and what these regulations provided was that in matters affecting the personal status of natives, then the law of their caste or tribe insofar as it could be ascertained and insofar as it was not repugnant to national morality could be applied. For those natives who were Muslims, Islamic law would apply to them and this was with regard to matters affecting personal status.

This same formulation is what we basically find in our Judicature Act, Cap 8 insofar as the application of customary law is concerned. The

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provisions were further modified but the origins are Native Courts Regulations.

There were also two other communities in Kenya at the time, the British Colonisers and the Indians who had been brought in as labour and the issue here was whether for those groups they applied Indian Act or British Laws and common law rules were to be applied. The Indian Law was basically British law that had been passed in India and there was not much difference between the two, they were obviously geared for application to the British Settler but did they apply to the Hindu? The assumption was that in Kenya, they would apply.

For example the Indian Succession Act of 1865, was one of the Indian applied Acts under the 1897 Order in Council. In India it had been expressly stated that that particular Act did not apply to succession matters of Hindus and their customary succession laws in matters of succession applied. When this particular Act was applied in Kenya there was no such exclusion with regard to the Kenya Hindus. There were also issues as regards marriage and divorce and whether English Marriage Laws applied. There was a bit of problem with regard to the Hindus in Kenya especially between 1897 and 1898 when it was stated that the Indian Succession Act did not apply to Hindus and that they were to be governed by their own customary law. For those Hindus who had converted to Christianity, two Acts were passed to cater for their succession matters, the Hindu Wills Act and the Probate and Administration Act of India, the assumption was that the orthodox Hindus applied their customary law in matters of succession.

As early as 1898 we have different laws governing different peoples. In 1902 we got the East Africa Order in Council of 1902 whose main purpose was to clarify further when customary law applied. It was stated that in all cases whether civil or criminal in which natives were parties, the courts would be guided by native law in so far as it was

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applicable and not repugnant to justice and morality or inconsistent with any law made in the protectorate. This formulation of the Order in Council is the same formulation that we have in Section 3 of our Judicature Act insofar as application of customary law is concerned. In areas of family law those natives who still practice customary law are still governed by African Customary Law. Muslims still continue to be governed by Muslim Law but with Hindus a number of developments occurred which made the Hindus to adopt laws that were similar to those found in the statues.

The 1902 Order in Council gave the Commissioner power to make laws which would apply in the protectorate and one of the first laws that was made in 1902 was the Marriage Ordinance. This Ordinance was a law of general application in the sense that it was not limited by race or religion and was meant to apply to all residents in the protectorate. It provided for basically a Christian form of marriage which was strictly monogamous and made it an offence for a person married under customary law to contract a marriage under the ordinance or vice versa. It was also meant to provide an avenue for the converted natives to contract the Christian type of marriage and for the settlers to contract marriage. What was important is that any African who married under the Marriage Ordinance was supposed to have embraced the Christian way of life and therefore distanced herself from their customary way of life. See e.g. Cole v. Cole (1898) I.N.L.R-15 the ruling in this case exemplified the situation of what happened if one contracted a marriage outside the ordinance. A Nigerian couple got married according to Christian rites under the Nigerian Marriage Ordinance. They had a son who was mentally incapacitated and after a while the husband died. The issue then arose as to who was to succeed the man or who was entitled to the man' s property and the man' s brother argued that under Customary Law he was the one entitled to inherit the man' s property. The wife argued that since they had married under the Marriage Ordinance they had distanced themselves from the African way of life therefore African customary law did not apply and instead

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the English Law of Succession applied and that under that English Law of Succession she was the one entitled to inherit in her own right and as guardian of her son. The court upheld her argument basically stating that since they had married under the marriage ordinance the African customary law no longer applied to them.

This was basically the same approach that was taken by the Kenyan colonial court and you will find this stated in many of the cases that were decided in that period

See for example:-
R v. Amkeyo 67 E.A.R.L. 14
R v. Mwakio(1932) 14 KLR 138
Robin v. Rex (1929-30) 12 KLR 134

Most of these cases were actually dealing with issue of admissibility of evidence given by the wives arguing that they are in a privileged position and therefore could not testify against their husbands in Mwakio the Judge said that " *it is unfortunate that the word wife and marriage have been applied in this connection. If only the woman party had been described as a concubine or something of the sort, the question could never have arisen.*" That illustrated the colonial courts attitude to women who were married according to customary law. They did not deserve to be termed wives as per the colonialists and the wife evidence was going to be admissible because they were married under customary law.

THE NATIVE CHRISTIAN MARRIAGE ORDINANCE OF 1904

The Native Christian Marriage Ordinance applied only to the marriage of nativeChristian applicants. It was supposed to supplement the marriage ordinance and was intended to relieve the Africans of the need to comply with the formalities laid down in the Marriage Ordinance. It only applied to Africans who professed

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Christianity and just like Marriage Ordinance marriage; under this Act was strictly monogamous.

This Act also provided some protection to widows in the sense that widows who had been married under the ordinance were protected from being inherited as was the case in customary law. That is they could refuse to subject themselves to widow inheritance. The marriage had to be celebrated by a church minister and before the church minister did this he had to satisfy himself that the parties were Christians.

The Native Marriage Christian Ordinance was replaced in 1931 with the African Christian Marriage and Divorce Act, Cap 151 of the laws of Kenya.

THE ENACTMENT OF THE DIVORCE ORDINANCE

This was based on the Indian Divorce Act of 1869 which was one of the Acts applied by the 1897 Order in Council. It provided or afforded relief only in respect to monogamous marriages. This is still the position to the present day. It was replaced by the Matrimonial Causes Act in 1941.

In 1928 additional relief was accorded by the separation Courts through the Separation & Maintenance Ordinance of that year which was limited to monogamous marriages. It still exists under the same name in our laws and its Cap 153. The purpose was to provide parties with judicial separation other than divorce and also to enableparties in a monogamous marriage to seek maintenance while the marriage is still subsisting.

In 1906 the Mohammedan Marriage & Divorce Registration Ordinance was enacted to provide for registration of Islamic Marriages and Divorces. It only provides for registration of

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marriage or divorce. The Act is basically procedural and not substantive.

In 1946 the Hindu Marriage Divorce and Succession Ordinance was enacted. This is when Hindus parted way with Hindu Customary Law, the Act provided that in future all Hindu Marriages were required to be monogamous and the Act extended to the Hindus the reliefs that are available under the Matrimonial Act and under the Subordinate Courts Separation and Maintenance Act. Under orthodox Hindus marriages can be polygamous.

THE CONSTITUTIONAL BASIS FOR APPLICATION OF DIFFERENT LAW SYSTEMS.

One of the arguments which was put forward very strongly by Dr. Gibson Kamau Kuria when he was teaching family law was that the Marriage Bill of 1976 was unconstitutional and for that reason could not be upheld. The Bill sought to harmonise different family law systems by introducing one law. He gave two reasons why the bill was unconstitutional

1. Historically it could not stand because it assumed that sociologically and politically the Kenyan people were one entity which they were not and his historical argument is the argument of the different law systems which was along racial lines and Kenya was still a very racially divided society;
2. The Kenyan constitution guarantees a right to freedom of conscience and this includes freedom of religion and worship. Part of that freedom and worship is found in our different family laws. He argues that the statutory law is found on Christian norms and therefore it is the Christian' s choice to marry under Christian law, Muslims choice to marry under the Muslim Law likewise Africans were free to practice their customs under their customs and that to

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legislate under one uniform law for all would be unconstitutional.

Under Article 45 (4) of the Constitution of Kenya 2010, Parliament shall enact registration that recognizes marriages under any tradition or system of religions religious, personal or family law. This then recognizes the existence of multiplicity of family laws in Kenya. This position is now enriched in the Marriage of Act, 2014 and see parts III, IV, V, VI and VII of the Act.

REPORT OF THE COMMISSION ON THE LAW OF MARRIAGE AND DIVORCE

There is an appendix of a Marriage Bill proposed in 1996 which sought to harmonise all family laws in Kenya. The report is also important in the sense that it summarises what the provisions are under the different systems of family law with regard to marriage and divorce and why it was thought necessary to harmonise all the family laws.

SOME PROBLEMS OCCASSIONED BY MULTIPLICITY OF FAMILY LAWS

1. Continued application of English Family Law;
2. Change of Family law;
3. Conflicts – internal conflicts between different family law systems.

CONTINUED APPLICATION OF ENGLISH FAMILY LAW

This is an anomaly given that we are over 50 years into independence and yet we still apply English Laws and English Statutes particular in areas of family law. This is in 3 ways

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a. Continued application of common law in form of common law presumptions which still apply to Kenya, e.g. Common Law Rights of a wife to pledge the husband' s credit. This has been applied in Kenya in a number of cases Patterson v. Nanyuki General Stores, Ramji Dass Co. v. McDonald

The presumption is that when a wife acquires goods on credit, she is deemed to be acting as the husband' s agent and the husband will be liable to pay.

In Ramji Dass it was stated that this presumption existed even when the wife and husband were not living together.

b. Presumption of Advancement: This normally arises in a family relationship when a family member transfers property to another by way of a gift. The issue arises as to whether the beneficial interest in that property has been transferred to the other person which is what is known as advancement when the property has been wholly transferred to the other person or whether that other person holds the property in trust for the person who has given it. The question arises as to whether there is an advancement or a trust? In common law the presumption does is that if it can be shown that the intention was to transfer the beneficial interest then there is advancement.

There is authority to the effect that the presumption applies in Kenya, e.g. Shallo v. Maryam, Bishen Singh v. Mohinder Singh and Sarah Wanjiku Mutiso V. Gideon Mutiso

In the case of Wanjiku v. Mutiso [1988] Wanjiku and Mutiso were husband and wife. In 1967, during the course of their marriage, Mutiso acquired a farm through two loans, both of which were secured by charges on the farm. Mutiso was a Member of Parliament but was jailed for 9 and a half years in 1971 for sedition. Mutiso fell into arrears in mortgage payments. Mutiso made out a power of

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attorney in favour of the wife but he was subsequently obliged to transfer the farm into her sole name. He executed a deed of gift to that effect. Subsequently the parties grew apart and when Mutiso was released they were unable to resume their married life together. Mutiso therefore filed suit claiming that his wife held the property as his trustee and she should transfer the same back. The issues that arose for consideration were (1) whether the deed of gift was void; (2) whether there was an express trust in favour of the husband; (3) whether, in the absence of an express trust, a resulting trust could be applied.

The court ruled in favour of Mutiso and the wife appealed. It was held

1. While the husband did not clearly plead resulting trust, the facts of the case and the plea of □ trust' effectively referred to a resulting trust.
2. There was no express trust in this case because the transfer was specific and expressly by way of gift.
3. where property is transferred to another as a gift with the intention that the latter hold it as trustee for the former, a resulting trust may be implied.
4. The presumption of advancement should only be made so as to accord with the social conditions in Kenya and to conform to the most likely intentions of the spouses. In this case, the strength of the presumption would be much diminished. There was sufficient rebuttal evidence that it was not the husband' s intention to make an absolute gift to the wife. A constructive trust would therefore be imposed to prevent the wife from taking fraudulent advantage of her husband.

The Appeal was dismissed.

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c. Presumption of Marriage: This arises where a man and woman cohabit and hold themselves out as man and wife. Under this presumption they will be deemed to be married even if they have not undergone any formal marriage ceremony. Family law is also trying to incorporate certain situations which do not fall within the formal marraige threshold and this is one of them. This presumption has been applied to the Kenyan situation with regard and the Kenyan courts have stated that this presumption existed under African Customary Law.
Wanjiku Yawe v. Public Trustee,
Peter Hinga v. Mary Wanjiku and
R. V Peter s/o Mikhayo
Charles Manjani v. Rosemary Moraa

In Hottensiah Wanjiku Yawe v. Public Trustee C. A. No. 13 of 1976 the court found that this presumption can also be found under African Customary Law. In R v. Peter s/o Mikhayo the interesting issue was that of the period of cohabitation, for how long should you cohabit for this presumption to come into place? Is it one year or 10 months?

In Peter s/o Mikhayo, the accused cohabited with a lady for a period of between 4 and 8 months, then one day he found his lady performing a sexual act in the bush with a man and proceeded to kill the man. In his defence to the charge of murder, he said that the lady was his wife and he had been provoked to kill the man. The court had to consider whether that period of cohabitation was long enough to trigger a presumption of marriage. The court relied on customary law and it held that under Customary law, that period was enough and in fact stated that under customary law, the moment you start cohabiting the presumption is triggered.

In Charles Manjani v Rosemary Moraa the presumption was said to apply even where the wife had previously been married to another man, it was held that the presumption would apply and the first

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marriage was dissolved during cohabitation but by the time cohabitation started it had not been legally dissolved.

MARRIED WOMEN S PROPERTY ACT OF 1882

An English Act that until recently still applied in Kenya and was the principle law that applied when apportioning matrimonial property. E.G. I v. I and in Antony Karanja v. Karanja

In I v I [1970] this is the first reported decision of the Kenyan High Court where the Married Women's Property Act (MWPA) of England was held to apply in Kenya. The court also considered various English authorities and made a finding on the presumption of advancement.

The husband in this case had acquired a property in England from his earnings and had it registered in the joint names of the spouses. The house was subsequently sold and most of the proceeds used to purchase a house in Kenya which was transferred into the husband's name. The wife had expected that the subsequent property would go into their joint names.

The question before the court was whether the Married Women's Property Act of 1882 of England (MWPA) would apply in Kenya. Further, whether the presumption of advancement to the wife as a result of the initial transfer to herself of a half-share had been rebutted.
Held:

1. The MWPA was a statute of general application in England on 12 August 1897. It would therefore apply in Kenya so far as the circumstances of Kenya and its inhabitants permit. The MWPA would apply in priority to customary law. Judicature Act (Cap 8) section 3 considered.

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2. The presumption of advancement may be rebutted where property was acquired for the joint use of the spouses. The presumption that the property was conveyed to the wife for her own use is however not rebutted if the transfer was effected to defeat creditors.
3. In this case, there was a post-nuptial settlement between the parties in relation to the property of the marriage. The word settlement' should be given a wide construction. Hence, the court has power under section 28 of the Matrimonial Causes Act (K), which is applicable in this case.
4. The husband in this case had not shown any reason for variation of the prenuptial settlement between the spouses.

In Karanja v. Karanja during the course of their marriage, the parties acquired several properties which were all registered in the name of the husband. One property was acquired from money supplied by the wife while the other properties were acquired with her direct or indirect contribution. The court considered whether customary law would operate to disqualify any imputation of trust in favour of a married woman, especially one in salaried employment.
Held:

1. The Married Women' s Property Act is applicable to Kenya, and customary law is subject to any written law.
2. Even without power to transfer property, the court has power under the MWPA to grant declarations of ownership of property. In cases where the property was acquired as a joint venture, it will be regarded as belonging to the spouses jointly no matter in whose name the property stands.
3. The absence of an agreement or intention that the contributing spouse share beneficially in the property does not exclude the imputation of such an intention. This will depend on the law of trust, which will not distinguish between direct and indirect contribution.
4. Where an African husband and wife are in salaried employment, the imputation of a trust cannot be rejected

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outright. This implication would arise where the wife is contributing indirectly through payments for household and other expenses which the husband would otherwise have had to pay.

5. In this case, the husband held the immovable properties in dispute in trust for himself and his wife in proportions of two to one respectively. However, it would not be equitable to order sale or possession of the Karen property since the husband was residing there with his new family.

The final decision of the court to award one-third beneficial interest in the properties to the wife is commendable.

The Act provides that a married woman is capable of acquiring, owning and disposing of property as her own separate property and the history to this Act is that under English Law women could not hold separate property. This act liberated married women who can now own and dispose off their own property.

Registration by Reference

1. Under the Matrimonial Causes Act Section 3 it provides that the law that is to be applied in Matrimonial proceedings is that which applies in the High Court of Justice of England. This provision exists in our law so when we draft our pleadings in matrimonial and divorce cases we have to go back to the proceedings in England to see how they do it.

2. Section 35 of the Marriage Act which provides that no marriage will be valid if the parties are within prohibited degrees of affinity according to the law of England. Again we go back to English law to find out what are the degrees of affinity and then find out who cannot marry who in terms of relations.

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A major problem is what happens when English Law undergoes subsequent changes, do we adopt the changes wholesale? The perfect example is in divorce law, the English divorce law underwent major reform in 1970. In 1970 in England all these grounds were removed and there is only one ground that of irreconcilable differences. In Kenya you still have to quote one or more of the grounds that are listed in the Matrimonial Causes Act.

See K v K HCCC No. 123 of 1975 where it was held that any amendments which are contrary to our own laws would not be applicable in our own situation.

PROBLEM OF CHANGING ONE S FAMILY LAW FROM ONE SYSTEM TO ANOTHER

The issue is whether one can change from one system of family law to another e.g. can one change from English Statutory Law to Customary Law or vice versa? Theoretically it looks possible because under Article 32 of the Constitution it is provided that freedom of religious belief is protected and guaranteed and following from this constitutional guarantee it follows that the moment you change from your religion, your family law will automatically change as ones family

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law is determined by ones religious beliefs. However it has not been that simple and the position is that while one can easily change from customary, Hindu or Islamic family law to statutory law, you have to have changed your religion. It is not easy to convert from statutory to Islamic or Customary just by the act of change of faith. Statutory law still insists on a number of formalities before one can change from one system to another.

English law started with a situation of non-tolerance of other family law systems other than their own family law system and you find cases like

Hyde v. Hyde (1866) L. R. 1 P & D 130

This case concerned the marriage in 1858 of two Mormons in Salt Lake City, and marriage was defined in that Ruling as marriage according to Christendom was the voluntary union for life of one man and one woman to the exclusion of all others' per lord Penzance (Sir James Wilde).

Re Bethel (1888) 38 Ch. D. 220

In this case an English man married a Botswana Woman under Botswana customary law and they had a child, the husband died and left property in England. The issue was whether this daughter was legitimate and could therefore inherit the property in England and the court held that that marriage was not recognized under English law because it was potentially polygamous and the daughter was therefore not legitimate and could not inherit the property. Hyde' s case that marriage was the voluntary union for life of one man and one woman to the exclusion of all others was quoted as authority for this position.

In Ex Parte Mir- Anwarrudin (1917) - there is a similar ruling with Re Bethel

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The attitude of the English courts not recognizing any other law marriage custom was also found in Kenya in colonial times e.g. Re Amkeyo 1917 KLR 14 the courts termed the wives in those kind of marriages as concubines and refused to recognize them as wives,

From 1940 the English Courts started to change their attitude and started recognizing other family law systems for purposes of entertaining matrimonial causes arising from those systems. Note that this recognition was not for purposes of validating them but for purposes of facilitating the change from those systems to statutory family law systems so that they would recognize another family law system for purposes of invalidating it or purposes of facilitating change from that system to the English law system.

During 1940s up through to the present day, courts now do recognize other family law systems and recognize that you can change from one system to another

In Bandail v. Bandail (1946) P. 122

A Hindu polygamous marriage was recognized for purposes of nullifying in England.

See also,Sowa v. Sowa (1961) P. 70

In this case, a polygamous marriage was celebrated in Ghana where the parties were domiciled. Prior to the ceremony the husband promised the wife that he would go through a later ceremony which, according to the law of Ghana, would convert the union into a monogamous marriage. He failed to carry out his promise. It was held that, despite his promise and despite the fact that the husband

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had not taken an additional wife, the marriage continued to be regarded as polygamous.

The English courts also made rulings as to what acts could change a polygamous marriage to a monogamous marriage. The first act to be recognized was a change or religious belief of faith which then affected the parties legal status.

Sinha Peearage Case [1946] 1 All E.R. 263 P.C

The parties changed their Hindu Sect from one practicing polygamous marriage to one practicing monogamous marriage. It was held that changing their religious beliefs changed their marital status and the polygamous marriage was changed to a monogamous one.

See also A.G Of Ceylon v Reid [1965] A.C. 720

Local Legislation is another recognized way of changing the character of one's family law system.

See Parkasho v. Singh [1967] 1 All E.R.

A statute converted a Sikh marriage from being a polygamous marriage to a monogamous marriage and it was held that it was out of these religion changes that family law of Sikhs was changed. The legislation must be full legislation that deals with all marriages in that category.

Under our thier Christian Marriages Act it is your religion that determines whether you can change your category of marriage.

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There can be a second ceremony of marriage that is designed to change one status from polygamous to monogamous union. This is the kind of situation which would obtain under the African Marriage and Divorce Act

Ohochuku V. Ohochuku [1960] 1 All E.R. 253

The parties had been married under Nigerian Customary Law and then underwent a Christian Marriage, under English law which created a monogamous marriage

The nature of a marriage can also change through change of domicile

Ali v. Ali

The case of Ali V. Ali (1968) P. 564 provides authority for the proposition that, if a husband changes his domicile from a country that permits polygamy to one which does not, this change of domicile renders the marriage monogamous.

Domicile is essentially ones permanent home or the place that one intends to set up their permanent residence and in this case the parties had contracted a polygamous marriage in India but the marriage had remained a de facto monogamous marriage. They then changed their Domicile to England which changed their marriage into a dejure monogamous marriage.

The English courts recognized other family law systems for the purposes of nullifying those unions or converting them into English systems, but never vice versa.

The Kenyan situation is very much like the English one. Kenya statutes do provide for the change from one system to the other. Section 8 of the Marriage Act 2014 implies that one can change their

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customary or Islamic law marriage into a Christian or Civil Marriage. When you apply for a marriage certificate there must be an Affidavit stating that neither party is married under customary or Islamic law to any other person they intend to marry. Under Section 8 a polygamous marriage can only be converted into a monogamous one if the husband has only one wife at the time of conversion.

Section 9 of the African Christian Marriage and Divorce Act provided for parties who are married under customary law to marry under the Act if they wish to do so. This is now covered under Section 8 of the Marriage Act 2014.

Case Law

Ayoob v. (1968) E.A. 72

Re Estate of Ruenji (1979) KLR 21
Re Ogolla' s Estate (1978) KLR 18

In Ayoob case the parties were Muslims and they got married under the Marriage Act as a statutory law marriage. On the same day they were married under Muslim Law. Subsequently the husband divorced the wife by way of talak a Muslim form of divorce. He then went to court seeking a declaration that his marriage had been lawfully disolved. It was held that the husband by performing the talak was able to divorce the Muslim marriage but if he wanted to divorce the statutory law marriage he would have to file for divorce under the Matrimonial Causes Act. The court was saying that the act of entering into a Muslim marriage into a Muslim one and the statutory law marriage does not convert the statutory law marriage so that the statutory law marriage was still persisting and had to be divorced by following court procedures under the then Matrimonial Causes Act.

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The facts are similar in both Estate of Ruenji and Re Ogola' s Estate.

In Estate of Ruenji, the deceased a Kikuyu by tribe and domiciled in Kenya, died leaving a gross estate of about 53,000 shillings. It was not disputed that he was married to one Loise Murugi Mbiri under the African Christian Marriage and Divorce Act in 1941. It was also alleged that the deceased subsequently married two other ladies, namely Mary Waithira and Mary Wanjohi according to the Kikuyu customary law and had children by them. The Public Trustee and the lawyer for Loise submitted that the first question that must be decided is whether in view of the deceased' s first marriage under the African Christian Marriage and Divorce Act the deceased could enter into one or more other lawful marriages. Marriage under the African Christian Marriage and Divorce Act is meant to be a Christian marriage and that parties become legally bound to each other as man and wife so long as both of them shall live and their marriage cannot be dissolved during their lifetime except by a valid judgment of divorce and that if either of them (before the death of the other) should illegally contract another marriage while their marriage remained undissolved, the offender would be guilty of bigamy, and liable to punishment for that offence. It is apparent that the deceased had not divorced Loise during his lifetime, and that, consequently, any subsequent marriage would be illegal.

In both Ruenji and Ogola a man married his first wife under statutory law and then contracted second marriage under customary law. The man died and the question arose whether subsequent wives could benefit from the husband Estate. The court held that the second wives were not recognized under statutory law because the man did not have capacity to contract a second marriage and they and their children could not inherit from the man' s estate. The court was saying that the man could not convert from a statutory marriage that he had committed himself to and become polygamous without first divorcing his first wife.

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These two cases were instrumental in leading to the enactment of in our Law of Succession Act Cap.160 under which customary law wives can inherit irrespective of the fact that the husbands could have married previously under statutory law.

The current constitution addresses this issue by giving equal recognition to all the systems under the constitution.

Other ways in which family law might be changed

1. Where one marries someone practicing another family law system: for example if a person practicing a customary law system marries a person practicing Islamic law normally the implication is that that marriage will bestow upon the parties a new family law system and normally the operating law system will be that of the man. Ours is a patriarchal society.

2. one can also acquire a new family law system by change of Domicile

Ali bhai a family was allowed to change their family law system after settling at the Kenya Coast. From Hindu to Islam.

Change of Family Law in other jurisdiction - cited under conflict of marriage laws.

Manjany v Ndongo (1967) JAL 13

Mokhotu v. Manyaapelo – Lesotho HighCourt Case No. 69 of 2012.
Onwudinjo v. Onwudinjo [1962] J.A.L 49-52 - Nigerian
Bakari v. Kichunda (1973) L.R.T Tanzania
Rattansey v. Rattansey (1960) E.A. - Tanzania

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These cases dealt with change of family law system,

These cases - most of commonwealth jurisdiction have basically adopted the Kenya position that is, you cannot change ones family law system just by changing ones religion especially if it is from a statutory law system to other family law system.

Onwundinjo v. Onwundinjo was a succession matter in which it was held that the other wife could not inherit because the husband had contracted an earlier statutory law marriage.

In Manyaapelo a second customary law marriage between the parties was declared null and void because at the time of contracting it the husband had not validly divorced the first wife who he had married under statutory law.

In the Gambian in case of Manjany vs. Ndongo the court recognized you could change from statutory to Islamic law marriage by contracting an Islamic marriage ceremony after the statutory marriage ceremony

In Ayoob the facts are similar to Manjany but the courts ruled differently.

In Ayoob, the appellant a Sunni Muslim, and the respondent, a Shiite Muslim, were married in accordance with the Marriage Act (Cap 150). A marriage under this Act is monogamous. Subsequently they went through a ceremony of marriage according to Mohammedan Law, the respondent by then having adopted the doctrines of her husband' s sect. The appellant later purported to divorce the respondent by pronouncing talak. Thereafter, the husban by petition to the High Court, sought a declaration that his marriage to the respondent was lawfully dissolved. The learned judge held that a marriage under the Marriage Act was not a Mohammedan marriage

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and that it could only be dissolved during the joint lifetime of the spouses by a valid judgment of divorce pronounced under the Matrimonial Causes Act (Cap 152) and he accordingly dismissed the petition.

In Rattansey the facts were similar but the courts held that the talak terminated the statutory law marriage earlier contracted.

The Gambia and Tanzania decisions can be distinguished from other commonwealth countries in the sense that they have made an attempt to recognize their own family laws and secondly, Islamic Law and Statutory Law in Gambia are treated as being equal.

CONFLICTS THAT ARISE

The conflicts that arise are in 3 main respects

1. Conflict between statutory and other systems of family law because of the reluctance by the court to recognize that one can change from statutory to other family laws. E.g. parties will get married under statutory law and continue to live their customary way of life and in the process contract customary law marriages and the issue becomes to what the that customary law in question applies to people already married under statutory law?

   There are situations such as Re Ogola arising or cases of people having gotten married under statutory law and then getting married under customary law only later to realize that they have committed an offence.

2. Different Customary Law systems. This problem is exacerbated by the fact that the Kenyan population is becoming increasingly urbanized and when it is said that customary law applies the questions, which is the customary

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law for those people who live in urban areas and do not practice any customary law.

3. Statutes – E.G. under the Marriage Act, marriages are strictly monogamous and it is an offence to contract a second marriage. The Law of Succession Act on the other hand gives recognition to potentially polygamous marriages and enables persons in such marriages to inherit. Under the Matrimonial Causes Act there was no provision for application of customary law in determining the fate of the children. Under the Children' s Act it is provided that in matters determining custody of children one of the matters to be taken into account are the customary affecting that child. So in an attempt to accommodate African system of law the children are brought into concept not present in other Acts.

1. MARRIAGE

Marriage is defined as union between one man and one woman who intend to live together as husband and wife. The question is whether this definition applies to polygamous marriages? As the man will contract separate marriages with each woman it can be said that each marriage is a union between the man and the woman. Marriage is basically a consensual contract/social contract between the parties involved. Before there can be a marriage there must be the agreement to marry, and the first stage in any marriage relationship is an agreement to marry.

OF AGREEMENT TO MARRY

Note that not every agreement to marry will result in a marriage.

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Statutory Position

Basically under statute law an agreement to marry is said to exist under common law when parties decide to get married and act in a manner that shows their intention to marry. Under common law, agreements to marry amounted to contracts that were legally enforceable provided it could be shown that the parties involved intended to enter into a legal relationship. A party who withdrew from such an agreement without any legal justification could be sued for breach of contract and the injured party could claim damages.

Being essentially a contractual relationship, the usual contractual requirements must apply i.e. requirements as to capacity to enter into that contract, consent, intention to create legal relations etc. All these must be met before one can allege that there has been a breach of that contract.

Shaw v. Shaw (1954) 2 Q 3

The Plaintiff had cohabited with a man she regarded as her husband for 14 years and they lived together as husband and wife and at one point even celebrated their marriage. Upon his death, the plaintiff discovered that for 10 years of their marriage the man had been married to another woman who died 2 years before him and that it was therefore in those two years that he had capacity to marry the plaintiff. i.e. he was only single for 2 years of their cohabitation and it is only in those 2 years that he could have been legally married to her. She sued in the States for breach of warranty and that warranty was that he was single and had capacity to marry and he had therefore breached his promise to marry her. The court awarded her damages for breach of that warranty.

Other than general damages, when there is a breach of agreement to marry under common law normally gifts given in contemplation of that marriage will also be required to be returned by the guilty party.

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E.g in Cohen v. Seller (1926) 1 K.B. 536

The gift in question was a diamond engagement ring that had been given to the lady and the issue was whether she should return the ring when the engagement was broken off. It was held that if it was the man who was guilty, or responsible for the breach, then he could not demand the return of the engagement ring but if it was the woman who had refused to fulfill the conditions of the agreement then she would be required return the ring. It was found that it was the man who had refused to carry out his promise and the woman was awarded general damages and allowed to keep the engagement ring.

Larok v. Obwoga (1970) (Ugandan Case)

The lady who was the Respondent and the Appellant were friends when the lady was a college student. She became pregnant and as a result was expelled from the college. The man then wrote to the lady promising to marry her by the end of April. This was in 1968. In October he again wrote to the lady indicating that he was no longer keen to marry her. The lady then went to court and sued for breach of promise to marry and the lower court held that the man had committed a breach of the promise and awarded the lady Shs.2,000/= as damages. The court based its computation on two grounds that the chances of getting married had been impaired and secondly the injury posed to her feelings. The man appealed but his appeal was dismissed.

In England the action of breach of promise to marry is no longer recognized. It was abolished in 1970 by the Law Reform Miscellaneous Provisions)Act of that year. In Kenya the action is still available via the Judicature Act, Cap 8.

See also Muinde V. Muinde- Nairobi HCCC No. 1969 of 1979.

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Note that under Section 170 of the Penal Code which states that any person who willfully and by fraud causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit and have sexual intercourse in that belief is guilty of a felony and is liable to imprisonment for 10 years.

AGREEMENT TO MARRY UNDER ISDLAMIC & HINDU LAW.

Under Islamic law agreements to marry are entered into between the parents of the intended spouses. This means that until the contract to marry and the actual marriage take place; no contractual obligations arise as between the intended spouses. Therefore no suit for breach of agreement to marry can be instituted. However, where gifts or ornaments have been exchanged between the two families, then these can be returned if the agreement to marry is broken. This was the issue in Fazaldin V. Din MOHAMMED

The girl' s father had entered into a betrothal agreement without her consent and she later refused to marry the prospective suitor. The prospective suitor filed an action in which he claimed damages for breach of agreement to marry and in the alternative he also sought an injunction to restrain her from marrying any other man until he had recovered all his damages and the gifts he had given. The court held that he could only recover the presents and the ornaments he had given but could not recover any damages.

The same position obtains under Hindu Law where agreements to marry are made between the parents of respective spouses and a betrothal in respect of a boy and a girl can be done when they are still infants.

Dhanji v. Ruda (1957) E. A 10.

The betrothal agreement was made when the parties were still children and the parents exchanged ornaments, clothing and other gifts. When the girl became of age, she indicated that she had no

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intention of getting married to the boy and the engagement was eventually broken off. The parents of the boy instituted proceedings for damages for the breach of contract. The court held that no damages were recoverable because a contract to which a person is forced against her will is contrary to public policy and morality and the parents could only recover their gifts and ornaments.

Agreement to marry under customary law

Under customary law agreements to marry normally take the form of betrothals and the nature of the betrothal will differ from community to community. For some communities it is quite an elaborate formal ceremony while for others it is a family affair with a few witnesses. The agreement under African customary law takes place between the families of the parties and not between the parties themselves. The effect of a betrothal under customary law is that on the part of the woman she loses her sexual freedom and cannot have any sexual or any relationship with any other man and on the part of the man he is under an obligation to pay the bride price .

On the part of the family, the family of the girl is bound to give away their daughter and are under an obligation to ensure her chastity while the family of the boy is under an obligation to pay the bride price. In the event of a breach occurring, it has been held that under African customary law an action of breach of promise to marry will not lie. See for example in Muinde V. Muinde HCCC No. 1969 of 1979 There are other remedies provided for under the Magistrates Act which include actions for damages for seduction, and also actions for pregnancy compensation.

If the Agreement to marry is made under statutory law, the action for breach of promise to marry will lie but it will not lie in customary law because the remedies provided for in customary law are listed and they had been awarded in the past.

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MARRIAGES

1. Conditions for valid marriages
2. Rights and duties during marriage

MARRIAGES UNDER STATUTORY LAW

Marriages under statute were prior to the Marriage Act 2014 celebrated under the then Marriage Act and the African Christian Marriage and Divorce Act. These two Acts reflected the inherited English law provisions and under then Marraige strictly monogamous. Under Sections 37, 49 and 50 of the Marriage Act, Cap 150 made polygamy illegal. The marriage Act 2014 recognized polygamous marriage but one may not contract another marriage if already in a monogamous marriage and one may also not enter into a monogamous marriage if already in a polygamous one. See Section 9

Under Section 171 of Penal Code the offence of bigamy is provided for. Bigamy is defined as going through a ceremony of marriage when having another husband or wife living and the first marriage has not been rendered void by a court of law. The offence of Bigamy is punishable by 5 years imprisonment.

Case Law both English and Kenyan case – the cases reiterate that these marriages are required to be Monogamous

In Hyde v. Hyde (1886) L.R. 130 it was held that

Marriage under Christendom is the voluntary union for life of one man and one woman to the exclusion of all others.

See also the Kenyan Case of K. V. K.

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In 1970 the petitioner went through a form or ceremony of marriage with the respondent, at the District Commissioner' s office, Nairobi. At the time, the respondent was married to one Grace Waiyaki Kang' ara in accordance with Kikuyu customary law. That marriage had never been dissolved or annulled but was still subsisting. Counsel for the petitioner argued that under the Matrimonial Causes Act, under which the petition had been brought, a monogamous marriage is the union of one man and one woman to the exclusion of all others and as such if there existed another marriage contracted under customary law, this one was null and void.

The court held that only a monogamous marriage could be created by a ceremony under the Marriage Act and as the husband was already married, the ceremony was in valid and created no marriage status. The respondent was held to have committed adultery with the co-respondent and a Decree nisi was consequntly granted.

Where a person is already married under customary law they cannot contract a statutory marriage.

CONDITIONS RELATING TO CAPACITY TO MARRY

The first condition is that the parties must be biologically man and woman.

E.G. Corbett v. Corbett (1970) 2 All E.R. 33

In this particular case the parties went through a ceremony of marriage. At the time of the marriage the petitioner knew that the respondent had been registered at birth as being of the male sex and had undergone a sex change operation and since that operation had lived as a woman. After 14 days of marriage the petitioner filed a petition for a declaration that that marriage was null and void on the ground that the respondent was a person of the male sex or alternatively for a decree of nullity for non consummation of

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marriage. It was held among other things that marriage is essentially a relationship between a man and a woman. The respondent having been a biological male from birth rendered the so called marriage void. It was held that the Respondent was incapable of consummating the marriage and that it was a nullity.

Right now there is a lot of controversy on the issue of definition of marriage with some countries allowing gay marriages.

The parties must be single meaning they can have never been married before, divorced or widowed.

LK v. CK
K V K
See Section 9 of the Marriage Act 2014 and Section 171 of the Penal Code that outlaw bigamy.

3. AGE

Parties must be of Age to contract a marriage. Under Section 4 of the marriage Act 2014 a person must be atleast 18 years of age to marry. Previously the minimum age was 16 years.

In Pugh V. Pugh (1951)

A man aged over 16 years married a girl aged 15 years and it was held that the marriage was void. In his ruling the judge gave the reasons why requirement as to age is provided for as follows.

"It is considered socially and morally wrong that a person of an age at which we believe them to be immature should have the stresses, responsibilities and sexual freedom of marriage and the physical strain of childbirth.

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4. PROHIBITED DEGREES OF RELATIONSHIPS

Relationship by way of consanguinity or affinity.

Relationship by consanguinity is where you have blood relationships and affinity is relationship by way of marriage. Marrages between relatives are regarded as incestuous and are prohibited for health reasons and to prevent inbreeding.

Section 10 of the Marriage Act 2014 sets out the prohibited marriage relationships.

Except for persons who profess the Islamic faith one may not marry their cousin.

English law on the other hand does not prohibit marriage between cousins.

REQUIREMENTS AS TO FORMALITIES

There are a number of formalities to be followed if one is celebrating a civil marriage under the marriage Act.

The first formality is that of notice,

1. NOTICE

Parties who seek to get married under statutory law must give notice of their intention to get married and this is provided for under Section 25 of the Marriage Act. This notice is given at the office of the Registrar of Marriages in the District where the parties reside. After receiving the notice the Registrar then enters it in a marriage notice book that he or she maintains and he is also required to publish that notice in the place where the marriage is to be celebrated. This requirement partly arises from the fact that in under common

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law it was demanded that a marriage be a public act and should not be celebrated in private but in a public place. The notice also enable persons who know of any impediments to the proposed marriage to object to the same.

The notice among other things must include a declaration that the parties are not within a prohibited relations.

Under Section 26 - if any person is dissatisfied with that notice, he or she gives a written notice of objection giving his or her reasons for challenging the intended marriage.

In both in the matter of the marriage of Alfred Nderi & Charity Kamweru and in the matter of EF and EC the facts are very similar but the rulings were quite different. In both cases the man gave notice of his intention to marry a lady and a caveat was then placed by the Respondent in each case claiming that the man was already married to the Respondent and therefore had no capacity to contract the intended marriage. In Nderi' s case it was actually 2 caveats and it was held that the common knowledge that Nderi had in fact been married to both women under Kikuyu Customary Law and while one of the marriages had been dissolved the other one had not. Registrar should therefore not issue the certificate of marriage because Nderi did not have capacity to marry under statutory law.

In the matter between EF AND EC the caveator claimed that she had eloped with the man and therefore he had no capacity to marry another woman. In this case it was found that the formalities under customary to contract a marriage had not been met and especially the consent of her family to that marriage had not been given and therefore she could not invalidate the intended marriage there was no marriage between her and the man and the caveat was therefore removed from the notice book.

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If the Registrar is satisfied with the notice and is further satisfied that no caveat has been registered against it, then he may issue a certificate of compliance and in that certificate indicate that a marriage should take place within three months of the notice being given. If the marriage does not take place within the 3 months, then the notice and all proceedings consequent to that notice shall be void and if the parties still intend to get married, fresh notice must be given.

The role of the Registrar is sometimes performed by church ministers whereby rather than give notice at the Registrar' s office the church minister announces in the church which the parties attend that the parties intend to get married better known as bans of marriage and this is a recognise and valid way of publishing the notice to get married..

B. CONSENT

If a party intending to marry was below 21 years consent in writing from the parents or guardian was required under the old legal require. Under the Marriage Act 2014,one is prohibited from marrying if below 18 years of age.

In Re Bennet (1974) 45 D.L. R. 409 a 16 year old girl sought an order to dispense with her parental consent to her intended marriage and the court refused to give that order insisting that consent must be given for the marriage to proceed.

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c. CELEBRATION OF THE MARRIAGE

The requirements about celebrations of marriages are found in Parts III to VIII of the Marriage Act 2014 while part IX deals with registration of marriages. The Marriage must be celebrated by a licensed by a licensed person in the case Civil Marriage a Registrar of Marriages and in the case of Christian Marriage a church minister. The marriage should also be celebrated in a licensed place. Again this is the Registrar' s office or in a church though there are certain exceptions.

Sections 19 and 27 of the Marriage Act 2014 allows for objections to intended marriages and such marriage will not be celebrated until the objection has been heard an determined.

D. REGISTRATION

After compliance with all the requirements for the Marriage the parties then register their marriage and they are issued with a marriage certificate. They are required to sign the marriage certificate in duplicate and their signatures must be witnessed by two witnesses. Under part IX of the Marriage Act 2014 all types of marriages must now be registered which was not the case previously.

MATRIMONIAL RIGHTS & DUTIES UNDER STATUTORY LAW

These are duties that arise once parties are statutorily married

1. The right to consortium – a consortium is the right to the company society and affection of a spouse in any matrimonial relationship. Under the old common law rules it was the husband who had a right to the wife' s consortium but the wife had no such right to her husband' s consortium. What she had was a duty to

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offer her companionship and services to the husband. Under the old common law rules the husband also had the right to chastise his wife if she failed in her duties including confining her within the house.

Republic v. Jackson (1891) I Q B 671.

In this case, the wife had gone to live with relations whilst her husband was absent in New Zealand. After his return she refused to live with him again. Consequently he arranged with two men that they should seize her as she came out of church one Sunday afternoon. She was then put into a carriage and taken to her husband' s residence, where she was allowed complete freedom of the house but was not permitted to leave the building. She then applied for a writ of habeas corpus and it was unanimously held by the Court of Appeal that it was no defence to her application that the husband was merely confining her in order to enforce his right to her consortium. Self-help was discouraged.

See also Republic v Reid (1973) Q. B. 299 in which it was held that a husband no longer has any right to control his wife by physical force and would be guilty of the crime of kidnapping if he forcibly removed her from a place she wished to remain.

The two cases established that the current position is that though spouses have the right to the others consortium, they cannot use extra judicial means to enforce them.

In Nanda v. Nanda (1968)

The husband deserted the wife and went to live with another woman. The wife then installed herself in the flat where they were living and refused to move. The husband applied for an injunction to restrain the wife from moving to the flat where he was living with another woman. In granting the injunction the court stated that a wife or a husband cannot force a husband/wife to live with a spouse who has

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rejected them. In other words while the law recognises there is a right to consortium, they cannot enforce it and neither can one use extra judicial means to enforce it.

The then Matrimonial Causes Act Cap 152 provided for restitution of conjugal rights but if the other party is not willing, no court can force an order for restitution of conjugal rights. Where consortium is lost, a husband cannot insist on conjugal rights. One cannot enforce an order for restitution of conjugal rights if the other party is not willing. One has an option to go to court for divorce. The marriage Act 2014 does not provide for this.

R V. Kadhi EX PARTE NASRREN (1973) E.A. 153

This case is important for the position that whatever system of family law is applied, whatever rights are demanded must be constitutional or they are declared null and void.

There are a number of other various rights that accrue from consortium.

(a) Right of the wife to use her husband' s name; in the Kenyan case to acquire her husband' s citizenship. In Kenya the husband does not acquire the wife' s citizenship although in other countries he does.

(b) Both spouses have a duty to cohabit together in their matrimonial home, however the decision as to where that matrimonial home will be cannot be specifically made by a specific spouse and it has to be a joint decision. This was the ruling in Dunn v. Dunn (1949)- In this case the husband petitioned for divorce on the ground of desertion alleging that when he had returned from working overseas (he was a sailor) he had requested his wife to go and live with him at a sea port where he was stationed and that she had refused and persisted in her refusal of

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his request. His argument was that the husband has the right to decide where the spouses should live and that by refusing to join him she was therefore guilty of desertion. It was held that it is not the law that a husband has the right to say where the matrimonial home should be. It is simply a matter of ordinary good sense arising from the fact that the husband is usually the wage earner and has to live near his place of work. It is the duty of the spouses to decide by agreement as to what their matrimonial home should be. Therefore the wife was not guilty of desertion in this particular case.

(c) The spouses have the right to sexual intercourse with one another and this right commences with the consummation of the marriage and continues even after the marriage has been consummated. Consummation is the act of sexual intercourse after the celebration of the marriage. The right to sexual intercourse continues even after consummation. However this does not mean that a spouse should submit to unreasonable demands of sexual intercourse See AB V CD 28 K.L,R, 210 in which the court held that the wife had the right to refuse to submit to unreasonable demands for sexual intercourse. Such demands amounts to cruelty and can be a ground for divorce. On the issue of marital rape, it has been held that a man cannot be guilty of raping his wife unless they are separated or divorced. If a man insists on sexual intercourse when they are judicially separated, he will be guilty of rape as was the case in R v. Clarke and R v. Miller (2007). It has been that the rise of contraceptives against the wishes of the other spouse a contravention of marriage does not affect the right to sexual intercourse but it can however give rise to divorce if it is shown to have injured the other party whether emotionally or physically. It can amount to cruelty.

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Right to Matrimonial Confidence between the spouses.

This is the basis for privilege position of spouses in the law of marriage. The law will protect any matrimonial confidence that is entered into during the subsistence of marriage. Even in the event of a marriage break down the law will seek to protect a spouse from disclosure of such confidences.

See Duchess of Argyll v. Duke of Argyll (1967) Ch.302 in which the Duke was restrained by injunction from publishing marital confidences exchange during the happy days of the marriage.

(a) Name/citizenship
(b) Right to cohabit
(c) Right to sexual intercourse
(d) Matrimonial confidence all this arise from the right of consortium.

2. RIGHT OF MAINTENANCE:

Under common law, the obligation to support a spouse applied to both spouses. Therefore a man was under an obligation to support his wife and vice versa. However this was modified by statute and until recently the wife is the one who haf the right to maintenance by her husband if she was financially dependent on him. The scope of maintenance was in accordance with the husband' s financial standing and his standard of living. The husband was also under a duty to maintain his children during a marriage and even after a marriage. Under the Marriage Act 2014 both to provide maintenance to the other spouse depending on who is dependent on whom under the Children Act both spouses have equal responsibility to provide for the children.

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When claiming for maintenance the spouse has to indicate thier needs and their children' s needs, her own income as their other spouse' s income. There is no hard and fast rule as to the amount of maintenance that a court may order, however there are certain guidelines which apply.

Under section 80 of the marraige Act 2014 the court can vary a maintenance order where circumstances arise warranting that variation.
N v N (1973) KHD 40

In common law the right to maintenance stops as soon as cohabitation ceases but under statutory law the right continues even after cohabitation has ceased. Under customary law the right to maintenance cease once cohabitation ceases.

OTHER SYSTEMS OF LAW INSOFAR AS MARRIAGE IS CONCERNED

1. MARRIAGE UNDER CUSTOMARY LAW

There are different forms of marriages that exist under Customary Law

(i) A monogamous marriage which is a marriage between one man and one woman;
(ii) Polygamy – whereby a man can celebrate marriage with many women at different times.
(iii) Leviratic Marriages – these arise where the husband predeceases the wife and a relative or brother of the deceased husband assumes the role of the deceased. Any children born out of this union are regarded as children

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of the deceased. This is common among the Meru, Kamba, Kikuyu, Kuria, Kisii and Nandi tribes.

(iv) Sororate Unions – where the wife dies before the husband. Her family may offer her younger sister as replacement and the younger sister assumes the role of the deceased wife. This may also arise where the family is unable to return the bride price and offer their daughter as a substitute. Sorarate unions also take place where a wife is not able to have children and she may invite her sister to come and get married by the husband for the purpose of getting children. This is common among the Luo.

(v) Widow Inheritance: - this is where the husband predeceases the wife and the wife is inherited by one of the husband' s brothers and for all purposes becomes his wife. It is different from the Leviratic Union in the sense that any children born out of that union are regarded as children of the brother and not children of the deceased. This is common to the Luo, Luhya, Kalenjin and the Masai tribes.

(vi) Woman to Woman marriages – these arise where a woman is barren and she then marries another woman for the sole purpose of having children and those children become the children of the barren woman who is the husband in the relation. This marriage can take place whether the husband of the barren woman is alive or dead. If the husband is alive the other woman is allowed to have sexual relations with the husband for the purpose of having children. Any children out of this relationship will be regarded as the children of the barren woman. Where the husband is dead she must select a man from the husband' s family or leave the decision to the woman to select whom she wants to have children with. This is common among the Kikuyu, Kisii, Taita and Kuria tribes.

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(vii) Forcible Marriages – These arise in a family where there are only daughters. The last daughter is to forced to remain at home to beget children especially male children with a man of her choice and these children belong to her father' s family. The Nandi and Kipsigis practise this.

(viii) Child Marriages – this is where children are betrothed to each other when they are still young and dowry is paid when they are still young and on reaching the age of maturity the bride is then taken to her husband' s home. This was normally done where prominent families wanted to see their friendship or during times of famine. It was common among the Kisii, Kuria, the Kalenjin tribes the Pokot and the Teso. It is also common practice amongst the Hindus.

The question that arises is whether any of the practices offend the repugnancy clause under the Judicature Act Cap 8.

During the colonial times Leviratic marriage arose during the colonial times

Ocharo d/o Oigo v. Ombego Mogoi (1955) - was a case of a Leviratic marriage (wife inheritance).

In this case the Applicant' s husband with whom she had one child died in 1953 and upon his death the Applicant was inherited against her will by the respondent who was a brother of her deceased husband. The union was an unhappy one and the applicant then sought a divorce. The Applicant' s father consented to the divorce and also to her marriage with another man whom she claimed was the father of her second child. The father was also willing to repay the bride price he had received from the deceased husband to the Respondent.

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It was held that it was repugnant to natural justice to refuse a divorce to a woman who had been inherited against her will. Custody of the child of her first marriage was given to the Respondent but with regard to the second child the custody was given to the Applicant.

CONDITIONS THAT APPLY WHEN CONTRACTING A CUSTOMARY LAW MARRIAGE.

1. Capacity:

Insofar as the age of the parties is concerned, the parties need not be of a specific age. Under Customary law what matters is not the age but whether the parties have gone through an initiation ceremony. These initiation ceremonies differ among the various communities, for some communities initiation ceremonies is circumcision and other communities there are different initiation ceremonies. The age will depend upon the age when the initiation ceremony takes place ranging from 10 to 16 or 17 years.

Insofar as the marital status of the party intending to marry is concerned, for a man he may be single or married since customary law allows for polygamy. However women are required to be single and for most African communities, single here means unmarried, if you have been married widowed or divorced you are not considered as single; Under customary law once a woman has been married she is considered forever married whether divorced or widowed.

Insofar as consent is concerned under customary law consent is required both from the spouses and their families so that the families' consent is essential in a customary law marriage and there are stages and ways in which this consent is given by the family. However the parties must also consent to the marriage and this as was held in.

Mwagiru v. Mumbi 1967 EA 639.

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In this case the Plaintiff sought a declaration that there was a valid subsisting marriage between himself and the defendant under Kikuyu Customary Law. The Defendant alleged that no such marriage existed because she had not given her consent and had not even been present at the essential ceremony. She admitted that she had lived with the Plaintiff for a short time but claimed that she had been forced into doing so by her father. She also claimed that she had gone through a civil marriage ceremony with another man after she escaped from the Plaintiff and that she was in fact married to this man and not to the Plaintiff.

It was held by the Court that the signifying of consent by the bride is necessary at two ceremonies which are vital in Kikuyu customary marriages and on the evidence, the Defendant was not present and consenting at any of these ceremonies and the Plaintiff had therefore failed to prove his case.

Finally insofar as capacity is concerned the parties should not marry within the confined degrees of consanguinity and affinity but the degrees differ from community to community and some communities will allow marriage between blood relatives while others will not. For example among the Luhya and Luo a man may marry his wife' s sister even when the wife is still alive, a Teso may take over his father' s wife in a polygamous household while in other communities this is a taboo. So the prohibited degrees vary from community to community.

FORMALITIES IN A CUSTOMARY LAW MARRIAGE

1. Firstly, the parties have to undergo a betrothal ceremony. And the nature of the ceremony depends on the customs of the parties, for some communities it is a single event for others it is done in stages. For some it is a simple ceremony

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for others it is a very elaborate affair. Essentially during the betrothal, the intention to get married is expressed and an agreement to that marriage is secured. During the betrothal there may also be exchange of gifts but this is distinguished from dowry. It is just an exchange of gifts.

2. Secondly, there has to be payment of dowry after the betrothal. For a customary law to be valid dowry must be paid and the amount will differ among the communities. For some it is a standard rate for others it is the prevailing commercial rate. For example among the Taveta they have a fixed dowry of one cow, three female goats, two bulls and a home for the bride' s father. For the Kisii it depends on how educated the woman is and this determines the rate you pay. It is also dependant on the families involved where you find that if you marry from prominent families the likelihood of paying a higher bride-price exists.

In Amulan Ogwang v. Edward Ojok it was held that

Under Customary Law there is no marriage until full bride price is paid and in this case the father was entitled to pregnancy compensation because the man had made his daughter pregnant while he had not paid the full bride price.
See also the □□.on High Court decision in Nemezio Ayiiya Pet V. Sabina Ayiiya – Divorce Petition No. 8 of 1973 for the same position

The institution of bride price has been criticised and cases are also recognised that it may be subject to abuse however initially bride price was paid as a token of mutual appreciation for the bride. It was a way of thanking the parents of the girl for not only bringing up the girl but also for allowing the boy' s family to take her away and it was also compensation in the sense that they were being compensated for the progeny that would go to the boys family from the daughter. Children are closely tied with the bride price and the return of bride

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price is determined by who will have custody of the children. If the woman is unable to bear children, this is a ground for returning her to her parents and demanding return of the bride price under customary law.

Both Momanyi Nyaberi v. Onwonga Nyaboga and

Onchoke vs. Kerebi deal with the issue of dowry and the courts did recognise that this institution can be abused.

In Momanyi Nyaberi (1953) the Applicant applied for a declaration that he was entitled to a woman and the children which he had with her. The woman had been married under Kisii Customary law to the Respondent but could not get any children with him. Under Kisii Customary Law any children which are gotten by a woman with a man other than her husband belong to the husband and the husband refused to divorce the wife insisting that she must stay with him and that the children are his.

It was held that the practice whereby a husband refuses to divorce his wife on the grounds that bride price had not been repaid to him so as to claim the children that she may have was an abuse of customary law and repugnant to natural justice.

In **Onchoke Kerebi** the husband was very forthright and he said that he was claiming the children that his wife had with another man for the bride price that he might expect to receive from the marriage of those children. Infact in this case the man said that he was only interested in the children and not the wife so that he was the one to receive the bride price for those children. The same holding as in Momanyi Nyaberi was arrived at by the court.

The final formality after payment of dowry is the celebration of the marriage itself and under Customary Law this can be in 3 ways.

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1. The marriage can be celebrated through a formal ceremony according to the recognised practices and customs of the community;
2. Through cohabitation so that once the parties start cohabiting the marriage is deemed to have been celebrated
3. by way of elopement or capture.

WHAT MATRIMONIAL RIGHTS AND DUTIES ARISE UNDER CUSTOMARY LAW

Normally **both parties have the right to consortium** however the rights that arise from this consortium will vary between the husband and the wife. On the part of the man, he has a duty to provide shelter for his wife and children.

Secondly the **man is also the guardian of his wife and children**. He is the one to sue or be sued on their behalf and is the one who will represent them in any formal ceremonies. Hence the notion in customary law that wife and children are to be seen and not to be heard.

The **husband has the sole right to sexual intercourse with his wife** and can claim compensation from a man who commits adultery with his wife. The person who pays the compensation differs from community to community, it could be the adulterer or the father of the woman who commits the adultery.

Among the Maasai the husband may allow the wife to have sexual intercourse with members of his age group but he reserves the right to object to any member of that age group.

The husband has the duty to maintain his family and to ensure that they have adequate food and clothing

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The husband reserves the right to chastise his wife when she has wronged him. However, excessive beating is not allowed in customary law. The question is whether any beating can ever be justified?

On the part of the wife her duties include cultivating any fields given to her by the husband and maintaining the household including preparing the food for her family and bearing and looking after her children.

In the event of a divorce, the husband' s duty to maintain the wife ceases because upon divorce, she returns to her parents and is now the parents responsibility and no longer the husband' s.

MARRIAGE UNDER ISLAMIC LAW

There are 3 aspects to a marriage under Muslim Law

1. Legal Aspect;
2. Social Aspect;
3. Religious Aspect.

Legally a Muslim marriage is a contract which provides for certain requirements as regards consent and also provides for provisions for its breach. One can enforce a Muslim marriage judicially and it provides for specific terms.

The Social aspect of Muslim marriages is that they normally provide for higher status to women in society and there are also restrictions placed in Muslim marriages on polygamy in that polygamy is allowed but to a limited extent.

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Insofar as the religious aspect is concerned, marriage in Islamic law is considered to be a sacred covenant and it is said that the Prophet Mohammed encouraged it.

There are 3 forms of marriages under Islamic Law and the classification is based on their legality.

1. SAHIH MARRIAGE

This is basically a marriage which has conformed with all the laid down requirements.

2. **BATIL** MARRIAGE

This is in fact a void marriage either by reason of some blood relationship between the parties or some other incapacity to contract the marriage. The consequences of such a marriage are that children born out of this union are considered illegitimate and no mutual rights or obligations arise as between the parties who are married.

3. **FASID (IRREGULAR**)

This is where either:

1. **There were no witnesses to that marriage.**
2. **The woman was undergoing the period of Iddat.**
3. **The marriage is with a person from a different religion.**
4. **The man purports to marry a fifth wife.**

The effect of an irregular marriage is that as between the parties it does not confer any rights; however children born out of this union are considered legitimate.

Under Islamic law marriages arising out of cohabitation are not permitted. One has to comply with all the requirements of marriage.

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CONDITIONS RELATING TO CAPACITY

1. Parties must be biologically a man and a woman;
2. The parties must have reached the age of puberty;
3. Insofar as marital status is concerned, on the part of the man he can be single or married so long as he marries only up to four wives and even so a man may not marry two wives at the same time and can only marry one wife at a time and if he marries two wives at the same time, the marriage is considered as being irregular. In the case of the woman, she has to be single and single includes widowed or divorced. Where she has been widowed or divorced, she has to wait for a period of about 4 months before she can contract another marriage. This waiting period is what is known as the Iddat' period and its purpose is to determine whether or not she is expectant before she can contract another marriage.
4. Parties should not be within prohibited degrees of consanguinity and affinity. These are not provided for under the Law and the applicable law is the Mohammedan Law. The marraige Act provides that marriages should be contracted under the Islamic law and scholars on Islamic law have stated that under Islamic law, a man may not marry his mother, grandmother, sister, niece, grandchild, aunt or the ascendants or descendants of the wife. Prohibition is not only on grounds of consanguinity but also of affinity.

See e.g. Mulla: *Principles of Mohamedan Law*

5. Consent of the parties is very important and in some instances consent of legal guardians may also be required. Refer to the case of.

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See for example Ockba v. Ockba (1957) E.A 675

In this particular case the Plaintiff was the father of the Defendant and he sought a declaration that he was entitled to her guardianship and custody until she was married. He also sought an injunction to restrain her from marrying without his consent. The Defendant wished to marry an Ethiopian who was a Christian. It was held that the Plaintiff was entitled to the injunction restraining her from marrying without his consent and that the proposed marriage would not only be invalid for lack of consent of the father but also for the reason of the religion of the proposed bridegroom because a Muslim woman cannot validly marry a non-Muslim man.

In Mohammed v. Salim 6 KL.R 91 it was held that

A Muslim woman should marry a man within her station in life or within the same social status and this is because under Muslim law the husband is required to maintain his wife according to the standards she is used to.

In Bibi v. Bibi 8 E.A.L.R. 200 the Petitioner was seeking to have her niece' s marriage annulled on grounds that she had married a man of lower status and bad character without the consent of her guardian. The court granted her those prayers.

There are requirements as to the parties' religion. Under some Muslim sects a Muslim man may marry a non-muslim woman as long as the woman belongs to a religion which has a divine or holy book. In some other sects marriages between Muslims and non Muslims is not permitted at all. However among all Muslim sects a Muslim woman cannot get married to a non-Muslim man.

FORMALITIES FOR CONTRACTING A MUSLIM MARRIAGE

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1. An offer and acceptance must be entered into by the parties or their guardians. The following procedures should be met:
   (a) A declaration or offer firstly made by one party and acceptance by the other party;
   (b) The words in the declaration or offer must show a clear intention to contract a marriage;
   (c) This declaration and acceptance should be made in the presence of sufficient witnesses;
   (d) The declaration and acceptance should be made or in the same meeting.

2. The man is required to pay some form of compensation known as □Mahir' . This is payable to the wife and becomes part and parcel of her Estate. Unlike dowry in African customary law which is payable to the family; Mahir is paid to the wife herself and can be paid either before the parties enter into conjugal cohabitation, during the course of the marriage or even after the dissolution of the marriage. The amount payable is not fixed it will depend on the different Muslim sects and it is normally fixed according to the social status of the wife' s family.

3. Registration: Under Section 49 of Marrriage Act 2014 it is required that once a Muslim marriage has been contracted, it should be registered with the Registrar of marriages. The Registrar must be satisfied before registering the marriage as to the identity of the parties, the capacity of the parties and that the marriage did actually take place.

RIGHTS & DUTIES BESTOWED BY ISLAMIC MARRAIGE

1. Wife is entitled to a dowry and she may choose to recover it if it is not paid in full.

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2. The husband is under a legal obligation to maintain his wife to the standards that she is used to. Refer to Saliha Binti Baraka v. Tiabit Bin Salim 2 E.A.L.R. 131 Saliha case deals with recovery of dowry and the other one as to maintenance.

3. Each spouse has a right to the others consortium and to enforce performance of the other spouses marital duties.

4. The husband has the right to restrain the wife' s activities and to exercise marital authority over her and the children.

5. Where the man has married more than one wife Islamic Law obligates him to treat each wife with kindness and equality.

HINDU MARRIAGES

These were previously are governed by the Hindu Marriage and Divorce Act and the first thing about Hindu Marriages is that they are strictly monogamous. Until 1960 Hindu Marriages were potentially polygamous but upon enactment of the Hindu Marriages and Divorce Act it was expressly provided that after enactment of the Act Hindu Marriages were to be monogamous and this was provided for in Section 27 (2) of the Hindu Marriage and Divorce Act which also provided that Hindu Marriages have got the same definition as the definition within the then Matrimonial Causes Act which meant that they must be strictly Monogamous Marriages.

Section 5 of the Hindu Marriage and Divorce Act provided that Hindu marriages shall be solemnised according to the customary rules and ceremonies of the party and that Section thereby imported Hindu Customary Law into the celebration of Hindu Marriages. There are two forms of marriages under Hindu Customary Law

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1. Brahma Marriage: No marriage consideration is paid by the bride' s father.
2. Asura Marriage: Consideration is paid by the bride' s father

In both kinds of marriage dowry is paid by the bride' s family.

CONDITIONS WHEN CONTRACTING A HINDU MARRIAGE

Insofar as capacity is concerned, it was provided for under Sections 3 and 4 of the Hindu Marriage and Divorce Act which provided that

1. firstly neither party should be married to another person so both parties must be single and
2. secondly the parties should be of sound mind at the time of contracting the marriage and
3. thirdly the man must have attained the age of 18 years and the woman should be at least 16 years of age. Where the woman is aged between 16 and 18, consent of her legal guardian is required.
4. Fourthly the parties should not be within the forbidden degrees of consanguinity and affinity. Section 3(2) of the Hindu Marriage and Divorce Act listed the persons who are within prohibited degrees of consanguinity.
5. Fifthly consent where required must be given and again Section 4 of the Act subsection listed down the guardians who may give consent in order of priority where it is required.

FORMALITIES

The Act provided for two ceremonies which may be performed when a Hindu marriage is being celebrated.

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1. The Saptapadi ceremony: Under this ceremony the bride and the bridegroom go round a sacred fire seven times and on the seventh round the marriage is deemed to have been celebrated.
2. The Anand Karaj ceremony: Here parties go round their holy book known as the Granth Sahib four times and on the fourth round the marriage is deemed to be complete and binding.

The Marriage Act 2014 provided for registration of Hindu Marriages.

MATRIMONIAL RIGHTS AND DUTIES UNDER HINDU MARRIAGES

They are generally that the parties have a right to consortium and the right to consortium is similar to that that arises under statutory marriages.
Under section 77 of the Marriage Act 2014 spouses have the right of maintenance from each other.

Under Hindu Customary Law the wife has a duty to cohabit with her husband and to submit herself to his authority. So in many respect Hindu Marriages are similar to civil marriages.

VOID AND VOIDABLE MARRIAGES

These are provided for under Sections 11 and 12 of the Matrimonial Marriage Act 2014.

DIFFERENCE BETWEEN NULLITY AND DIVORCE

In effect when one goes to court to ask marriage to be declared null and void you essentially saying that there was never a marriage but when you seek divorce you acknowledge the marriage and seek to annul it. Grounds for nullity are different from grounds for divorce.

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GROUNDS OF NULLITY

1. Where either party is physically incapable or consummating the marriage. Consummation is the sexual intercourse between the parties after the marriage is solemnised and in D.E. V. AG 163 E.R it was stated that in order to amount to consummation the sexual intercourse must be ordinary and complete sexual intercourse. In this case the wife had a physical deformity that made full penetration impossible and it was held that this amounted to physical incapacity to consummate the marriage and it was declared null and void. Physical deformities which make consummation difficult must be those which cannot be corrected. If they can be corrected, courts are reluctant to declare such a marriage null and void. Refer to S. V. S (1956) P 1 . The use of contraceptives will not affect a marriage as was held in Cowen v. Cowen (1945) 2 II E.R. 1946

   Further the fact that a husband or wife is sterile will not affect consummation of marriage
   R V. R (1952) ITLR 1201

2. Wilful refusal to consummate the marriage: This is where a party refuses to consent to any sexual intercourse and such refusal is steadfast and determined.

The case of S V. S dealt with both physical incapacity as well as wilful refusal to consummate. In this case the consummation of the marriage was prevented by a physical defect in the wife which was curable. The husband suggested to the wife that she should consult a doctor but the wife delayed in consulting the doctor.

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The husband then petitioned for nullity of the marriage on the grounds that of incapacity and wilful refusal to consummate. Upon service of the petition the wife expressed a willingness to undergo the necessary operation which she underwent and which removed the defect. It was held that the husband had not proved that failure of the wife to see the doctor amounted to wilful refusal. Her conduct was merely a state of indecision and mere neglect to comply with the husband' s request was not necessarily the same as refusal.

The petition therefore failed on the ground of wilful refusal and also failed on the ground of incapacity since consummation of the marriage was not practically impossible especially since the result of the operation was to remove any impediment to consummation. Wilful refusal need not be physical as was stated in Jodla v. Jodla and Kaur v. Singh.

> The facts in both cases are very similar and in both cases the husbands were supposed to organise their marriage ceremonies. In Jodla the marriage was supposed to be a church ceremony while in Kaur it was a Hindu ceremony and in both cases the husbands failed to organise for the ceremony as a result of which the wives refused to consummate the marriages on religious grounds. It was held that the wilful refusal was on the part of the husbands and not on the wives because they had failed to arrange for an exercise which was crucial to consummation.

DOCTRINE OF APPROBATION

What this doctrine provides is that where parties have stayed together for a long time with a deformity or where they have accepted the wilful refusal, then courts will not declare their marriage null and void on the ground that the parties by staying so long together have assumed that deformity and accepted it.

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In Harthan v. Harthan (1948) 2 All E.R

The husband sought a declaration of nullity on a claim of his own impotence and claimed that in their 20 years marriage he had been unable to engage in any sexual intercourse and the court declined to grant him the decree citing this doctrine of approbation.

See also G V. M (1885) 10 A.C. 71

3. Where parties are related to one another within the prohibited degrees of affinity and consanguinity.

4. Where either spouse is married to another person and that other marriage is still subsisting.

5. Where the consent of the parties was obtained through fraud or duress. In Buckland v. Buckland - the petitioner who was seeking a decree of had been nullity was accused of defiling a girl of 15 years and although he was protesting his innocence, he was advised that unless he married the girl he would go to prison. He contracted the marriage to avoid imprisonment and later petitioned for decree of nullity on the grounds of coercion and the court granted him the order.

6. Where a party to a marriage is at the time of contracting that marriage of unsound mind, drunk, insane or suffers from epileptic fits, this will be a ground for nullity of that marriage. This only affects the marriage if it is the case at the time of contracting the marriage. The parties must be aware of what they are entering into.

7. Mistake – however this will only be a ground in two circumstances only

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(a) where the party relying on mistake proves that he/she was mistaken as to the identity of the other party. i.e. he/she did not marry the person they intended to marry. This is usually difficult to prove when the person you are marrying is in front of you and only normally happens where marriages by proxy or mail order are allowed. In Singh v. Singh the woman married the man on the mistaken belief that he was a famous boxer. The man shared a name with the famous boxer and even told her that he had won various championships. She petitioned for divorce on grounds of mistake but the court held that she had married the man that she intended to marry and was only mistaken as to his qualifications.

(b) Where a party is mistaken as to the nature of the ceremony and do not appreciate that he/she is contracting a marriage. This was the case in Kelly v. Kelly and Mehta v. Mehta. In Mehta a woman got in into a marriage thinking that she was celebrating becoming a Hindu but she was later to discover that she had entered into a potentially polygamous marriage and she successfully petitioned for divorce.

8. Where a spouse is suffering from a venereal disease in a communicable form:

9. If at the time of contracting the marriage the woman is pregnant by some other person other than her husband. Poulet Peerage Case - the wife was three months pregnant at the time of contracting the marriage and the husband gave evidence that he had not had any sexual intercourse with her before the marriage and was granted a petition for nullity on this ground.

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Sometimes the issue arises with issue to nullity about what are sham marriages and whether these marriages are null and void. Sham marriages are those where parties enter into a marriage merely for purposes of representing themselves as married but have no intention of cohabiting. This are normally conducted for purposes of acquiring citizenship and acquiring jobs or just to legitimise children. It has been held that such a marriage is perfectly valid provided the parties have freely consented to it. This was the ruling in Silver v. Silver (1955) in this particular case a German woman married an English man so that she could be allowed to reside in England. Upon arrival in England the parties separated and only met twice in a period of 29 years. After 29 years the wife filed for proceedings to nullify the marriage on the grounds that the marriage was a sham marriage. The court declined to declare the marriage null and void on the grounds that it was their intention to get married and the reasons were irrelevant. See however the provisions of Section 11 (1) (i) of the Marriage Act 2014 under which a marriage entered into for fraudulent purposes is now void.

The option available in sham marriages is divorce.

In VERVAEK V. SMITH (1983) 1 A.C. 45 the marriage was entered into to avoid the woman being deported (she was a prostitute) from England and the court held that the marriage was valid.

In Szechter v. Szechter (1971) P. 286 - the marriage was declared null and void on the ground that the parties had not consented. They had entered into the marriage out of fear that the woman would be killed. This was a marriage which was not really consented to by the parties.

In Rosemary Moraa v. Charles Kizito - The woman entered into a marriage for purposes of legitimising a child but cohabited with another man. It was held that the later marriage arising out of cohabitation was the valid marriage.

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EFFECT OF A DECREE OF NULLITY

At common law that when a marriage was declared void any children of that marriage were declared to be illegitimate and no legal consequences could flow from that relationship e.g man was under no obligation to maintain the wife or children born of that relationship and neither could they inherit from his estate. However this position was changed by statute law both in England and in Kenya any and now children born out of such a marriage will be treated as legitimate. From legitimacy will flow other rights as to maintenance and inheritance.

Note that there is a proviso under Section 11 of the Marriage Act 2014 that a marriage will still remain void if under that section it is void irrespective of the fact that a decree of nullity has not been granted. The fact that somebody does not go to court to declare the marriage null and void, it still remains void does not make it valid.

Where the ground for nullity is either that at the time of contracting the parties were of unsound mind or that one of the party' s was suffering from a venereal disease or that the woman was pregnant there are certain conditions which must be proved by the petitioner as follows:-

1. The petitioner has to show that at the time of contracting the marriage, he/she was ignorant of the facts alleged;
2. The proceedings must be instituted within one year of the marriage being contracted.
3. The petitioner must show that no sexual intercourse has taken place between the parties after the petitioner discovered the existence of the allege facts.

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RECOGNITION OF FOREIGN MARRIAGES

A marriage may have a connection with foreign law in two ways:-

1. It may have been celebrated abroad but the issue of validity arises in a Kenyan court or;
2. One or both parties to the marriage may be domiciled or resident in a foreign country;

The question first which arises on the validity of such a marriages is which law will determine whether the marriage is a valid one? Is it Kenyan law or is it some foreign law?

The applicable law for purposes of determining the validity of such a marriage with links with foreign law is dependant on two aspects

(i) Formal validity of that marriage;
(j) Essential validity of the marriage.

Generally the law governing the formal validity of that marriage will be the law of the country where the marriage was celebrated. This is what is referred to as known as the *Lex Loci Celebrationis (the law of the place where the contract is made)*

When it comes to essential validity as in issues related to capacity, the law that governs is the law of the parties domicile – (lex domicile).

So for a foreign marriage to be valid in Kenya it must comply with the formal requirements under the laws of the country where it was celebrated and must fulfil the issues as to capacity and the law of the parties domicile and if it is formally and essentially valid under the applicable laws then it will be valid in Kenya.

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FORMAL VALIDITY

So long as the parties did comply with the formal requirements of the law of the place of celebration the marriage will be recognised as formally valid in Kenya. This is so even if that marriage does not comply with the formal requirements of the parties personal law which is the parties' domicile. In some cases parties will go to a certain place to evade conditions laid down by their personal laws.

In Simonin v. Mallac the parties came to England to get married so that they could escape the condition as to parental consent which prevailed in France which was their domicile. It was held that marriage was valid in England. The converse also applies if it is formally invalid in the place where it was celebrated and formally valid under their domicile that marriage will be formally denied. This was the case in Berthiaume v. Dastous [1930] In this case the spouses were domiciled in Canada and they were married in a Roman Catholic Church in France. However under French law a church marriage had to be preceded by a civil ceremony which the parties did not undergoand therefore under French law this marriage was void.

The court held that that marriage was void even though under the law of Quebec a religious ceremony alone would have been sufficient.

Formal validity his refers to the rules that relate to formalities for contracting a marriage. This will normally be rules relating to the preliminaries to marriage e.g. requirements as to notice and so forth. These are also rules relating to the actual ceremony itself such as time, place, nature of the ceremony, requirements as to witnesses. In Apt v. Apt (1948) P.83 a rule which permitted **marriage by way of proxy** was classified as a formality and such a marriage in a country where marriages by proxy are permitted was held to be valid and recognised by the English Courts.

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In Ogden v. Ogden (1908) P.46– the question was whether parental consent was one of the formalities required for the marriage and whether without parental consent the parties had capacity to marry. Parental consent in this case was classified as an issue of formality and since the marriage had been celebrated in England, English law was applied as opposed to French law which was the law of the parties' domicile. Under French law the parties' would have required parental consent which had not been given and that marriage would have been declared null and void in France.

EXCEPTIONS TO THE RULE THAT FORMAL VALIDITY IS GOVERNED BY THE LAW OF THE PLACE WHERE THE MARRIAGE TOOK PLACE

Under sections 37 and 39 of 2014 the marriage Act, marriages can be contracted under Kenyan law in a Kenyan Embassy or Consulate in any foreign country. The sections are to the effect that where persons marry in a Kenyan Embassy or Consulate the applicable law will be the Kenyan law. Once it has been contracted that marriage will be formally valid in Kenya even though it may not be formally valid in the country where it was celebrated.

The two common law exceptions are

1. Marriages in situations where compliance with the local law is impossible for example when you get married in a place where no laws apply or in an uninhabited region.
2. Where the marriage occurs in a country under hostile occupation and at least one of the parties to that marriage is a member of the occupying forces.

In these two exception the law that will then apply is the common law as to formalities of marriage. That marriage will be valid so long as the formal requirements under common law are met.

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See Preston v. Preston (1965) P.411

In Taczanowska v. Taczanowski (1957) P.301 two Polish nationals, domiciled in Poland were married in Italy in 1946 by a Polish Army Chaplain, an episcopally ordained priest of the Roman Catholic Church. Their marriage was held to be valid under English Common Law. Although it did not comply with the local forms and was therefore void under both Italian domestic law and polish law. The husband was at the time serving in the Polish Army which was in occupation of Italy.

The parties moved to England and later the wife petitioned for a decree of nullity on the ground that the marriage was void for non-compliance with the local forms. The court of appeal felt that since the parties were presumed not to have submitted themselves to the Italian law of the place of celebration, that law did not have to be applied. It was considered that there will often be no submission by a member of the military forces in occupation of a country to the Law of that country. As Italian law was not applicable and the law of the parties' domicil was considered irrelevant, English common law was applied and the validity of the marriage upheld.

ESSENTIAL VALIDITY

Essential validity id is concerned with issues of capacity and the applicable law is the law of the parties domicile. The problem that arises in the application of this rule is what test is to be applied to determine the parties' domicile. You may find parties domiciled in different countries at the time of contracting the marriage or they may even intend to acquire a different domicile after they get married.

The traditional theory which has been used is the dual domicile test. Under this theory it is stated that capacity to marry will be governed by the law of the parties and thier ante-nuptial domicile i.e. each party

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must have capacity according to the law of his/her domicile at the time of the ceremony of marraige. This has been applied in a number of cases e.g.Pugh v. Pugh (1951) 2 ALL E. R. 680

In this case a British officer, domiciled in England but stationed in Austria, married a Hungarian girl in Austria in 1946. The girl whose domicile of origin was Hungarian, had gone to Austria with her parents to escape from the Russian advance. She was only fifteen years of age and therefore, if her capacity had been governed by English domestic law, the marriage would undoubtedly have been rendered void by the Age of Marriage Act 1929 which prohibited a marriage " between persons either of whom is under the age of sixteen.

By Austrian law the marriage was valid, and by Hungarian law it had become valid in that it had not been avoided before she had attained the age of seventeen.
The wife submitted that the marriage was void for want of capacity, first because the husband was a British subject with an English domicil and therefore bound by the 1929 Act. Secondly and alternatively because the essential validity of the marriage was determinable by English law as being either the law of he husband' s domicil or the law of the country of the proposed matrimonial home. Pearce J granted a decree of nullity, holding that the wife was entitled to succeed on both submissions.

See also Republic v. Brentwood Superintendent Registrar of Marriages (1968) 2 Q. B. 956

Intended Matrimonial Home Test

Under this test parties should have capacity to marry as determined by the law of their intended matrimonial domicile.
Cases which apply to the test include

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De Reneville v. De Reneville (1948) 1 ALL E R 56

Kenward v. Kenward (1950) 66 T.L.R. 150

Radwan v. Radwan (1972) 3 ALL E. R. 1026

Cheni v. Cheni – (1962) P. 85

Mohamed v. Knott (1969) 1 Q.B - a Nigerian man married a 13 year old Nigerian girl and then left to live in England with the bride and the marriage was recognised in England because under their domicile law they could get married. Both were domiciled in Nigeria at the time of their marriage.

See also The Sinha Peerage Case (1946), All E. R. 348

The Exceptions to this rule on essential validity

1. The rule in Sottomayor v. De Barros (No.2) (1879) L R 5 PD 94 – this case held that the validity of a marriage celebrated in England between persons of whom one has an English and the other a foreign domicile is not affected by any incapacity which though existing under the law of such foreign domicile does not exist under English law. This exception was a way of going round the dual domicile test. The wife and husband were first cousins and the husband lived in England and the wife in Portugal. Under Portuguese law marriages between cousins were prohibited but allowed in the UK. The marriage was held to be valid in the UK.

2. Where the law of the place of celebration is also the place where the issue of validity is being heard. In that case the court applies the law of the place of celebration to determine

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issues of essential validity. The lex fori is the same as lex loci celebrationiis in such a case.

3. If the foreign domicile law that governs the issue of capacity is repugnant to public policy, it will not be recognised. Courts will not recognise a foreign incapacity which is of a penal or discriminatory nature. For example incapacity which is based on grounds of race, religion or any other classification which discriminates or penalises a particular section of the population.

See e.g. Chetti v. Chett (1909) P 67

DIVORCE

BARS TO DIVORCE UNDER STATUTORY LAW

The Petitioner has to prove that he has not connived with the Respondent for the commission of matrimonial offence.

There are two kinds of bars to divorce.

1. Absolute Bars
2. Discretionary Bars.

If an absolute bar is found to exist then the court has no choice but to refuse to grant the divorce where a discretionary bar is proved the court may or may not grant the petition.

1. Connivance is the first absolute bar – connivance is where the adultery of one spouse has been caused or has been knowingly or recklessly permitted by the other spouse. In such case the other spouse is an accessory to the adultery. If the court is satisfied of the evidence that the petitioner has

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been an accessory or has connived at the adultery then it has to dismiss the petition. The principles as to what constitutes connivance were laid down in Churchman v. Churchman (1945) P 44 in which it was stated as follows:**It is the essence of connivance that it precedes the event and generally speaking the material event is the inception of the adultery and not its reputation although connivance at the continuous of an adulterous association may show that the party conniving must be taken to have done so at the first. In this case it was stated that the material event is the inception of the adultery, that is when the petitioner first knew of the adulterous association, he must have connived for the adultery to happen.**

In Godfrey V. Godfrey & Wall (1965) the court held that a husband petitioner was guilty of connivance at his wife' s adultery. The wife told the husband that she was going to live with the co-respondent i.e the co-respondent then came to stay at the matrimonial home. The husband one day after a drink or two came home and found the wife and co-respondent embracing each other. He then told them

"**if you two want to go to bed together then why the hell don t you**

which is exactly what the wife and Wall proceeded to do. The next day the petitioner turned the co-respondent out and chased him out of the home but the wife and the co-respondent continued with the association and eventually the wife moved out to live with the co-respondent. When the husband petitioned for divorce on grounds of adultery the court in refusing to grant him the decree held that he had not shown that his initial connivance was not the effective cause of the subsequent adultery.

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2. Condonation: This is the forgiveness of a marital offence and reconciliation between the parties with full knowledge of all the material circumstances. Under Section 10(3) adultery shall not be deemed to have been condoned unless and until conjugal cohabitation shall have resumed.

In Henderson v. Henderson the court stated that where the wife had committed adultery, the essence of condonation is that the husband with the knowledge of the wife' s offence should forgive her and should confirm his forgiveness by reinstating her as his wife. The issue was whether this re-instatement included sexual intercourse or conjugal cohabitation as provided for by statute. In this particular case at the time the matter was in court, such intercourse had not taken place. However the court pointed out the decision in Cramp v. Cramp (1920) P. 158 which held that a husband who has sexual intercourse with his wife after knowledge of her adultery must be conclusively presumed to have condoned the offence. Mere forgiveness does not amount to condonation. For condonation to exist the forgiveness must be followed by cohabitation and the restoring of the offending party to their former position as husband or wife. In Crocker v. Crocker (1921) P. 25 a soldier who was serving overseas during the war wrote to his wife offering to forgive her for having committed adultery when he was away. The wife accepted the offer but on his return home he changed his mind and petitioned for divorce. It was held that there was no condonation because there was no reinstatement.

Commission of a further marital offence will revive condoned adultery or cruelty. That is where the respondent has committed adultery and cruelty which is condoned by the petitioner if the respondent commits another offence then the condoned offence will revive and the petitioner will be entitled

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to a divorce on the ground of the condoned act. See e.g Beard v. Beard (1945) 2 All ER and Bertram v. Bertram (1944) P. 59

3. COLLUSION: This is the presenting of a divorce petition by way of a bargain or agreement between the parties. The reason why this is a bar to divorce is that true facts will be hidden from the court and in some cases marital offences will be procured or pretended for the purposes of securing a divorce. In Churchward v. Churchward the petitioner declined to divorce his wife who wanted to marry the co-respondent until she had made a settlement in favour of the children of the marriage and she agreed to do so since she wanted to be released from the marriage, she deposited some amount and the petitioner then filed his petition. It was held that this amounted to collusion.

DISCRETIONARY BARS

1. Unreasonable Delay:Delay that is unexplained may be fatal to a petitioner' s application relief. In Johnson v. Johnson (1903) it was stated that the reason why courts insist on steps being taken promptly are that it is a terrible thing that people should go around and about neither married nor unmarried possibly liable to contract fresh and illegal matrimonial relationships and certainly exposed to the temptation to commit adultery. The court is saying that once a marital offence has been committed then parties are in a state of limbo, they do not discharge their usual marital obligations and the temptation to commit adultery is there and that is why the court wants them to take steps promptly. In this case the fact that the respondent wife had become insane and had been in an asylum for many years and that the husband had been expecting release by her death was held to be a sufficient answer to a plea of unreasonable delay. In this case the wife just simply refused to die.

   In Binney v. Binney the husband took no steps for divorce until his wife had been living with another man for 20 years and

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even so only petitioned for the purpose of freeing himself to marry another woman. It was held that there had been culpable delay and the petition was dismissed.

2. Conducing Conduct: This is conduct which conduces the commission of a marital offence. Therefore cruelty, neglect, desertion or other misconduct towards a spouse who afterwards as a result commits a marital offence may bar the petitioner from obtaining a divorce. Lander v. Lander (1890) and Dixon v. Dixon (1952) are classical decisions where the wife refused to agree to intercourse until the husband filed for divorce and it was held that the wife was guilty of conducing conduct.

3. Petitioner' s own Adultery: This receives some special treatment because in most cases the petitioner' s own adultery is a consequence of the respondent' s conduct. Therefore the courts will look at the circumstances to gauge whether that adultery will bar the petitioner' s petition. In Blunt v. Blunt the court laid down the considerations that will be taken into account in exercising its discretion when a petitioner is guilty of adultery as follows:

   (a) The position and interest of any children of the marriage;
   (b) The question whether if the marriage is not dissolved there is a prospect of reconciliation between husband and wife;
   (c) The interest of the petitioner and in particular the interests that the petitioner should be able to remarry and live respectably;
   (d) The interests of the party with whom the petitioner has been guilty of misconduct with special regard to the prospects of future marriage;
   (e) The interests of the community at large to be judged by maintaining a balance between the sanctity of marriage

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and maintenance of a union which has utterly broken down.

A full statement of the facts upon which the petitioner relies for the exercise of the court' s discretion should also be lodged in court with the petition. Once the petitioner has proved his ground for divorce and none of the bars has been proved then the court should grant the divorce decree.

Under the then Section 15 of the Matrimonial Causes Act every decree for divorce was in the first instance a decree nisi which was not to be made absolute until after the expiration of six months after the pronouncement of the decree. However an application could be made to expedite the decree absolute within a shorter time when reasonable grounds are shown. For example where it is shown that a child will be born illegitimate or for purposes of making financial provision for children of the marriage.

The main reason why we have an intervening period of 6 months is to enable unsuccessful respondents to appeal against the granting of the decree nisi or for any other person to intervene to show cause why the decree should not be made absolute. It also gives the parties a opportunity for re-thinking and possible reconciliation.

As soon as the decree nisi is made absolute either spouse is then free to remarry which was not the case under the decree nisi. The Marriage Act 2014 does not contain a similar provision but under Section 66 (5) the court may adjourn divorce proceedings for up to six months on the reasons being to allow parties time for attempts at reconciliation.

DIVORCE UNDER HINDU LAW

Divorce under Hindu law is now as provided for under the Act 2014 and all that is stated in the Marraiges Act will apply to Hindus.

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Section 10 of the then Hindu Marriage and Divorce Act and gave the grounds for divorce as:-

1. Adultery;
2. Cruelty;
3. Desertion for a period of 3 years;
4. Unsoundness of mind where the Respondent has been under medical care for a period of five years: and
5. Where the husband is guilty of bestiality sodomy or rape

Consideration that will be taken into account for all these grounds are the same as those for a Civil Marriage. There are other grounds for divorce under Hindu Law as follows:-

1. Where the Respondent has ceased to be a Hindu;
2. Where the Respondent joins a religious order which requires him/her to renounce the world and remains in that position for a period of at least 3 years. Monasteries, Hermits and so on.
3. Where there is a decree of judicial separation and the decree has been in force for a period of 2 years and the parties have not resumed cohabitation.
4. Where the husband is married to another woman at the time of celebration of the marriage. This can be both for annulity of a marriage and divorce as well.

DIVORCE UNDER ISLAMIC LAW

There are two forms of divorce under Islamic Law

1. Extra Judicial Divorces
2. Judicial Divorces.

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Extra Judicial Divorce: There has been misconception about this form of divorce with some people feeling that it is very easy to divorce extra judicially under Islamic Law. However under Islamic Law divorce is discouraged and will only be allowed if the conditions are grave and weighty and even so divorce will be the last resort and reconciliation between the parties is encouraged. This reconciliation is provided for and where the conflict originates from the wife, her husband has the right to judge her, consider the wrong she has committed and make a decision. The husband is also supposed to guide her and show her that what she has done is wrong, and that she should not repeat it. If she repeats her actions, he may then resort to disciplinary action which is in 3 phases,

1. He may start by kind exhortations or reprimands where he denies her a few necessities;
2. He may then withdraw from the matrimonial bed temporarily; and if this fails
3. He may undertake some symbolic beating but this should not be severe. At this stage he has the right to abstain from sex until the wife reforms.

When in conflict from the husband, the wife has to try and make peace with the husband and try to settle their differences. If all these fail two arbitrators from both sides are appointed to review the situation and to try and settle the dispute. It is only after this that the parties can then resort to divorce if the arbitration fails.

There are a number of extra judicial divorces that the parties can undertake

1. Talak which is dissolution of the marriage by the unilateral acts of the husband; there are certain conditions to be fulfilled in order to make this divorce complete and valid:-
   a. The husband must be of age;
   b. He must be seen to be consciously alert and should not be angry;
   c. He should not be intoxicated;

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d. He should be free from external pressures; and
e. His intention to terminate the marriage must be clear.

On the part of the wife

a. She should be of age;
b. Must be in a healthy state of mind; and
c. Must be in a state of purity by which is meant that she should not have had any sexual relations with her husband and should not be menstruating.

If these conditions are met, the husband may then pronounce the first talak, either in written or oral form and by talak he merely says I divorce thee' . He may revoke this pronouncement, forgive his wife and they may resume conjugal cohabitation. If however 40 days have passed and the husband has not revoked his pronouncement and the conditions stated still apply, he may then pronounce the second talak, he still has the option of revoking this pronouncement but if he does not and 40 days elapse and the conditions remaining constant he may then pronounce the 3rd talak. The effect of the 3rd talak is to make the divorce complete and valid and the wife has the option of remarrying. All the time that the talaks are being pronounced she is still in the matrimonial home.

Before the wife remarries she has to wait for the period of 4 months or Iddat period and she cannot remarry her ex husband until she has been married by another man and been divorced or widowed. This condition is there so as to ensure that the husbands do not divorce their wives recklessly.

2. Ila Divorce: this is a form of constructive divorce which is effected by abstinence from sexual relations for a period of not less than 4 months. If reconciliation is impossible then the marriage is dissolved.

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3. Zihar – this divorce arises where the husband continuously compares his wife with another female or his mother and the wife may refuse to have any sexual intercourse with him unless he changes and if this fails the marriage is deemed to have been dissolved.

4. Lian Divorce: this is where a husband suspects that his wife is committing adultery but does not have any evidence. He then testifies or swears that he is telling the truth and he does so four times and on the fifth time he swears that he be cursed if he is lying. The wife also swears four times that she is telling the truth and the fifth time that she be cursed if she is lying and after this the marriage is dissolved.

5. Khula: initiated by the wife if she feels that she is unhappy with the marriage, she then returns the mahil to the husband and any other marriage gifts that he had given her and the divorce will only be valid where the husband grants her the divorce and he may waive the need for her to return the compensation.

6. Mubarat; divorce by mutual agreement where both parties desire the divorce. It can be initiated by either party and the wife loses any right she had to her dowry but the husband remains liable to maintain the children.
7. Apostasy: where either spouse abandons the Islamic religion.

Section 3 of the then Mohamedan Marriage Divorce and Succession Act granted the High Court the jurisdiction to hear and determine matrimonial causes under Islamic Law where the Petitioner is resident in Kenya. Kadhi' s courts can also hear and determine matrimonial causes where both parties are Muslims. The Act did do not provide the grounds for divorce but referred to the principles of Islamic Law which is also the position under the Section 71 of the

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Marriage Act 2014. Under Islamic Law, according to scholars grounds for divorce include

a. Desertion by the husband for a period of 5 years;
b. Failure of the husband to provide maintenance for a period of two years;
c. Imprisonment of the husband for a period of 7 years;
d. Failure of either spouse to perform marital obligations.
e. Where the husband is either insane, cruel, impotent, suffering from leprosy or a venereal disease or where he is captured by war enemies; and
f. In cases of extreme or severe poverty.

DIVORCE UNDER CUSTOMARY LAW

Divorce under Customary law can be both judicial or extra judicial and just like Islamic Law before the parties are divorced there is a reconciliation process whereby the elders seek to reconcile the parties. It is only after reconciliation has failed that the elders may dissolve the marriage.

Not all Kenyan communities practice divorce. There are some communities that do not recognise divorce at all for example the Kuria community and to a certain extent the Kisii community as well.

EXTRA JUDICIAL DIVORCE

This may be initiated by the Husband or the wife or even by the wife' s family. The husband initiates it by chasing away his wife and telling her to return to her parents home. He is also required to inform her parents that he intends to be separated or divorced from their daughter.

The wife may also initiate divorce by voluntarily leaving her husband' s home and returning to her parents while the wife' s

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family can also initiate divorce especially where the husband has refused to pay the full bride price.

Under customary law, return of the bride prices symbolises a valid divorce but this will depend on whether there are any children of that marriage. If the husband retains custody of the children no refund of the bride price is due. Where the mother seeks to retain custody of the children, then the bride price returned will depend on the number and gender of the children.

Where the wife initiates the divorce, the full bride price is due. Among some communities where the husband has initiated the divorce and the wife remarries then her new husband refunds him the bride price.

In order for the elders to dissolve a marriage, they have to be satisfied that certain factors have taken place which are sufficient enough for a party to seek divorce. This include

1. Refusal to have sexual relations for no good reasons;
2. Witchcraft;
3. Wilful desertion;
4. Habitual theft;
5. Incest;
6. Excessive physical cruelty;
7. Failure of the husband to maintain his wife and children;
8. Adultery on the part of the wife; and
9. Impotence on the part of the husband although some communities allow an impotent man to allow his close relatives or friends to have sexual relations with his wife. Barrenness of the wife is not a ground for divorce because African Customary Law allows for polygamy.

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JUDICIAL DIVORCES

A Judicial divorce will only take place where a party has refused to comply with an extra judicial divorce e.g. where the husband refused to accept return of the bride price or where the wife refuses to leave her matrimonial home.

The grounds for divorce under customary marriage are set out in Section 69 of the Marriage Act 2014 and are the same as those for Civil Marriages but in addition a court is to consider grounds under the Customary Law of the parties. Normally the courts will insist on reconciliation procedures and it is only after proof that reconciliation has failed that the courts will proceed to hear the divorce case and grant divorce.

Divorce Cases arising under Customary Law in Cotran' s Book

In Leonita Salume V. Captan Nyongesa, the ground was claimed that the husband had failed to maintain the wife and the children. In

In Isaiya Bedi vs. Ether Munyasia, the grounds were the wife' s cruelty and the husband brought evidence to show that the wife had arranged for members of the public to give him a thorough beating and secondly she had borne a child with another man.

In Okutoyi v. Nyongesa the grounds were habitual theft of chicken and cruelty of the husband. The wife stated that in addition to the husband being cruel; every time he came home with chicken which had been unlawfully obtained.

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MATRIMONIAL PROPERTY RIGHTS

This is concerned with the rights that spouses have over property that they acquire before, during and on the break down of marriage. Property rights on the death of a spouse are dealt with under the Law of Succession.

There are two approaches in respect of matrimonial property rights

1. Community of interest approach;

This is based on the assumption that marriage is an equal partnership which has both a social as well as an economic dimension and that system recognises that each party to the marriage performs an important role in that social and economic unit even though their roles may be different in type or in quality. This system assumes an equality in matrimonial property with each party having an equal right to the assets of the marriage. In a pure community of interest system, legal ownership of the matrimonial asset is joint from the time of cohabitation or marriage. Therefore under the pure community of interest approach at the celebration of the marriage all the properties that are owned by either spouse are pooled together and deemed to be jointly owned and this will include any property that was owned before the marriage by the spouses.

In some legal systems you have a deferred community of interest approach. The question of joint ownership of property is deferred until the relationship breaksdown. Therefore under this approach during the currency of the marriage either spouse may own their own property and use it in any manner that they wish or dispose of it but in the event of the marriage breakdown all the property they own is then put together and deemed to be joint property.

In the community of property system in the event of the marriage breaking down entitlement to that property is regarded as an incident

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of marriage , it is regarded as one of those facts arising out of the marriage itself and that property is then divided equally between the spouses.

This system is common in civil law countries and is also practised in South African countries like Lesotho and Botswana while the Deferred Community property system is common in Scandinavian Countries.

THE SEPARATE OWNERSHIP APPROACH

This approach presupposes that during the subsistence of the marriage, either spouse may own separate property. However this has not always been the case in the common law tradition and in fact under common law husband and wife were regarded as one (doctrine of unity under common law).

According to Lord Denning the common law regarded husband and wife as one and the husband was that one. This was stated in the case of William & Glyns Bank vs. Boland (1979) Ch. D 312 at 332. Under common law all the wife' s property and income vested in the husband on marriage and a wife could not own property separate from that of her husband. The position remained until 1882 when the married Women' s Property Act was enacted in the UK.

In the 18th and 19th century England it was common to have professional husbands. See eg. Republic v. Smith (1915) 1 Cr. a case involving a professional husband. Men married rich women who then died under mysterious circumstances leaving them all the wealth. With the onset of the industrial revolution, women started to agitate for involvement in socially and economically productive work and sought enfranchisement and the solution to the problem that commended itself was that of separation of property because the problems in their legal status at the time arose from the legal regime that applied to married persons. It was therefore thought that if the

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spouses marital status no longer affected their property rights then the problem would be solved. This led to the enactment of the Married Women Property' s Act of 1882. This Act recognised the right of married women to hold and own property separate from that of their husbands. This is one of the Acts of general application which applied to Kenya under the Judicature Act until the coming into force of the Matrimonial Property Act, No. 49 of 2013.

However, the paradox was that was system of separate ownership which was created to protect married women' s rights became a serious injustice especially when determining matrimonial property rights upon marriage breakdown. The system of separation failed to deal adequately with the economic realities of married life and this because this system insists that entitlement to matrimonial property be based on evidence of contribution to the acquisition of that property the system had the disadvantage of not giving recognition to a wife' s contribution by way of her services in the home as opposed to those of the husband as the bread winner.

The contribution that was required had to be shown to be direct or financial contribution and not indirect contribution.

Our courts have responded to questions of matrimonial property rights in two main ways.

1. Recourse to the Married Women' s Property Act 1882 (MWPA) (now repealed by the Matrimonial Property Act 2013)
2. Presuming certain equitable interests in the matrimonial property

Section 17 of the MWPA provided that in any question between husband and wife as to the title to or possession of property either party may apply for an order to the court and the Judge may make

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such order with respect to the property in dispute as he thinks fit. It was at one time thought that the power given to a judge in this section to make such orders as he thinks fit provided statutory justification for doing what was thought to be just between the parties without having regard to the technicalities of property law.

However this changed in 1965. Before 1965 courts would rely on section 17 to vary property rights in matrimonial property but after 1965 case National Provincial Bank v. Ainsworth (1965) A.C. 1175. the House of Lords was of the opinion that Section 17 only provides a method or a summary procedure for determining proprietary rights between spouses but the courts cannot vary those rights using Section 17, courts cannot confer rights which were previously not there. In this case the husband had deserted the wife and it was conceded that she had a right to be provided with housing by her husband under what was known as the deserted wife' s equity. It was also conceded that she could have obtained an injunction from the court to stop the husband from interfering with her rights to housing. However, the husband had mortgaged the house without her knowledge and he subsequently became insolvent. The House of Lords held that her right to housing was not a proprietary right within the meaning of section 17 and therefore was incapable of binding the bank to whom the house had been mortgaged. The wife was relying on section 17 to fight the bank' s interest in the house but it was held that her rights could not qualify as a defence to the bank' s interest.

This was followed in later cases such as:-

Gissing v. Gissing (1971) AC 886;

Pettit v Pettit (1970) AC 777; and

Heseltine v. Heseltine (1971) I ALL E. R. 952

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Pettit v Pettit the wife had purchased the matrimonial home and it was registered in her name alone. During the cause of the marriage the husband during his free time undertook to decorate the home and due to these decorations the value of the house increased. Upon the marriage breakdown the husband claimed an interest in that property under Section 17 of the MWPA. The court held that despite the fact that he had decorated the house which led to an increase in its value this did not confer upon him a beneficial interest in that house and this is because it had no jurisdiction to vary the title of the House under Section 17.

Lord Reid stated as follows, the meaning of Section 17 cannot have altered since it was passed in 1882. At that time the uncertainty and security of rights in property were generally regarded as of paramount importance and I find it incredible that any parliament of that era could have intended to put a spouse' s property at the hazard of he unfettered discretion of a Judge if the other spouse raised a dispute about it.

In other words courts could not vary property rights under Section 17.

As a result of these decisions the law in England was changed in 1970 under the Matrimonial Proceedings and Property Act of 1970. Under Section 37 of this act it is provided that where a husband or wife contributes in money or money' s worth to the improvement of real or personal property in which either or both of them have a beneficial interest the husband or wife so contributing shall if the contribution is of a substantial nature be treated as having then acquired by virtue of his/her contribution a share or an enlarged share as the case may be in that beneficial interest. The important thing is that this section recognises indirect contributions to the property.

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Kenya until recently continued to rely on section 17 of the MWPA and the courts have upheld in the decision in National Provincial Bank V. Ainsworth that it does not confer jurisdiction on the court to vary title but only to determine rights in matrimonial property.

Kenyan courts in response to the inequity caused by this approach have been able to interpret section 17 to enable them control the way that property is used without departing from the principle that they cannot alter title. They have been able to give orders as to the way the property is to be used without necessarily altering title. In most cases they have ordered that the property be sold and directed on how the proceeds of the sale are to be divided. The court' s position has evolved over time in Kenya in response to the changing social and economic realities.

Section 17 was first substantively discussed in Karanja v. Karanja (1976) K. L. R. 356. In this case the wife brought an action under section 17 and she alleged that she had made financial contributions towards the purchasing of the matrimonial property. The husband on the other hand maintained that even if that was the case under Kikuyu Customary law a woman was not permitted to own property and therefore his wife' s claim could not stand. The couple had married under the African Christian Marriage and Divorce Act and throughout the course of the marriage the wife made substantial contributions to the running of the household. She also assisted her husband in paying school fees for the children and at a time when the husband was away for 5 years studying abroad she was the one who was running the home. In support of her claim of financial contribution she brought evidence to show that every month her salary went to her husband' s account who would then withdraw money for her personal use. The property in dispute was a farm in Karen where the matrimonial home was also situated and the wife claimed that she was a joint owner of this property. The husband had met another woman and chased away his wife who was forced to live in the servants' quarter. Although the couple had other

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properties the wife claimed that she was entitled to remain in Karen since she is the one who had developed it.

The court then undertook to determine the amount of financial contribution that had been made by the wife towards acquisition of the entire matrimonial property and found that her contribution amounted to one third of the entire value of the matrimonial property. The matrimonial property was valued at 900,000 shillings and she was awarded 300,000 shillings because of her one third financial contribution.

The husband was advised to sell one of his other properties and give the proceeds to the wife. The court was not varying any existing title and only determined what her contribution was and then gave her that contribution.

See also Kivuitu v. Kivuitu (1991) 2 K. L. R. 241.

The marriage in this case was a statutory marriage and the husband and wife both made financial and indirect contributions to the acquisition of the matrimonial home which was registered in their joint names. On the institution of divorce proceedings the wife applied that the matrimonial home be sold and the proceeds be shared out equally. The court held that on the basis of the wife' s contribution, the parties were entitled to the property in equal shares and ordered that the property be independently valued and the husband pays to the wife as sum equal to half of that valuation.

The court is not varying any title but determining the interests of spouses in the property.

In these two cases, two issues were not addressed:-

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Firstly section 17 of MWPA apply to marriages under other systems of family law? Did it apply to marriages under Islamic or Customary Law?

Secondly, did not address the question whether indirect contributions alone can suffice for orders under Section 17. These issues have been addressed in two latter cases, namely:-

Fathyaa Essa v. Mohamed Alibhai Civil Appeal No. 101 of 1995

And Tabitha Wangeci Nderitu v. Simon Nderitu Kariuki (1998) ekLR

Fathya Essa V. Mohamed Alibhai involved a Muslim marriage; The wife went to court asking for an equal share in the matrimonial property to which she had contributed. She proved her financial contribution and the court awarded her 50% of that property. This is authority for the proposition that Section 17 also applies to Islamic Marriage.

Tabitha Wangeci Nderitu V. Simon Nderitu Kariuki involved a customary law marriage and the wife' s contribution was indirect; She was nevertheless awarded 50% of the Matrimonial Property.

The court stand by actual valuation of one's contribution and one's interest is proportional to the contributions that one has made. There is a presumption of equality of shares when a contribution is as such.

In Muthembwa v. Muthembwa Civil Appeal No. 74 of 2001 it was held that a spouse who has contributed to the increase in value to property that is inherited by or gifted to the other spouse before the marriage will be entitled to a share of the increased value under

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Section 17 of the MWPA. The wife claimed that one of the properties she was claiming was a property that the man had inherited from the father before they got married. The wife claimed that she had increased the value of that land by improving it and it was held that she was entitled to 50% of the value of the improvement of the property.

The other method that can be used to determine matrimonial property is by suing in equity by way under two presumptions

1. Presumption of a resulting trust;

A spouse who provides all or part of the purchase money towards acquisition of property will be entitled to a share of that property even if he or she is not the registered owner and this will be proportionate to the contribution that he or she has provided. This presumption presupposes financial contribution and does not hold where there is indirect contribution. It is easier to apply when there is an outright purchase of property. So when there is purchase or acquisition of property for example by way of mortgage then it becomes more difficult to assess the parties contribution to that acquisition. The presumption was applied in Rimmer v. Rimmer (1953). The wife was able to show that she paid the deposit for the matrimonial home and also continued to make mortgage repayments when the husband was away at war and it was held that she had an equal share in the property even though it was held in her husband' s name.

2. Advancement

Under this presumption, if a husband or wife makes payment for or puts property in the name of the other spouse, the equitable rule is that he intends to make an advancement to her. That is that property was intended to be a gift to the other spouse. This presumption normally arises when there is a special relationship between the

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parties, like husband/wife and parent/child. It is presumed that such transfer of property is a gift. However both presumptions are rebuttable. One can bring evidence to show that transfer of beneficial interest was never intended. However evidence will not be admissible if it involves an improper or fraudulent motive e.g. if a person registers property in the spouses name to protect it from creditors one cannot use this evidence to rebut the presumption of resulting trust or advancement.

Sarah Wanjiku Mutiso v. Gideon Mutiso (1984) ekLR the Respondent who was the husband bought a farm through a loan in 1967. 1971 he was jailed for sedition for a period of 9 and a half years. That left the Appellant who was the wife to look after the family and to manage the matrimonial property. During the cause of the jail time, the wife was unable to meet the loan repayments and she was also unable to secure a loan using her husband' s property. She then requested the husband to transfer the property into her name so that she could be able to secure a loan and the husband reluctantly transferred the property into her name. The husband was subsequently released from prison but soon thereafter the appellant left him taking with her all the moveable property and also claimed that she was the sole owner of the property which had been transferred to her name. She claimed that the transfer was a gift made to her by her husband and as such he had no claim to the property.

It was held that the transfer of the property into her name was solely for the purpose of enabling the wife to carry out the husband' s business while he was in jail and this rebutted the presumption of advancement.

Matters related to Matrimonial Property rights are now governed by the Matrimonial Property Act 2013 irrespective of the systems of family law.

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PARENTAL RIGHTS AND DUTIES OVER CHILDREN

Under the common Law a parent was under an obligation to take care of his child during marriage and this obligation was only on the part of the father. In the event of marriage break-down the father always had a right to custody unless he forfeited it through immoral or cruel conduct. The case of Re Agar Ellis [1883] 24 Ch. D 317 is authority for this position.

The position under common law has been over time changed by statute which have watered down the exclusive rights of fathers over children. Common law started from a position of paternal preference when it came to rights and responsibilities over children. The factors which weakened this paternal preference included an increased focus in children' s welfare as the primary consideration and also with industrial revolution fathers increasingly sought work outside the home while the mothers remained at home as the primary caretakers. The resultant division of family responsibilities influenced custody decisions and the paternal preference was gradually replaced by a maternal preference.

This maternal preference was based on the tender years doctrine which was intended to apply to children under the age of six years and was invoked to give mothers custody of children of tender years. The assumption here was that in the interest of the welfare of children mothers were better suited to nurture and raise children of tender years.

Maternal preference also obtained in Kenya under the Guardianship of Infants Act which was repealed by the Children Act enacted in 2001 it provided that a court in awarding custody had to ensure that the child' s welfare was of paramount consideration and if that child was of tender years, then custody was to be given to the mother to

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protect the child' s welfare. For this position see for example the cases of Karanu v. Karanu (1975) E. A. 18 and Githunguri v. Githunguri (1981) KLR 598.

The maternal preference position remained in place for many years and has only recently been substituted by the standard of the best interests of the child now enshrined in Section 83 of the Children Act 2001.

Under this standard, custody decisions are now based on considerations of the child' s welfare needs and interests rather than based simply on the gender of the parent.

Under common law parental custodial rights include the power to physical possession of the child, their rights to control or direct the child' s upbringing and education, the power to control the discipline of the child, the power to determine the child' s religion, the power to control any property belonging to the child until the child attains majority age, the right to be the child' s legal representative if a suit is brought against or on behalf of the child and the right to decide on the type of medical treatment to be given to the child including the right to consent to such medical treatment. Other rights include the right to domestic services of the child right to consent to the marriage of the child right to contact with the child and the right to the choice of the children' s home.

The leading case on custody in common law is J v. C (1970) A.C.668

In this case the parents of a child were unable to look after him and offered him for foster parenthood. After sometime their financial situation improved and they sought to have the child returned to them. It was held that in deciding custody of children certain factors are taken into account in common law.

Firstly, the court has to consider the child' s best interests.

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Secondly, the court has to have regard to the wishes of the natural parents that is the biological parents,

In the event of a divorce then the court has to consider the conduct of both parents and determine firstly whether they live an immoral life. Secondly whether their conduct is cruel and thirdly whether the parents will have enough time to look after the child. The final consideration is that the courts in awarding custody prefer that all children go to one parent and are hesitant to divide the children among the parents. Common Law does not encourage split custody.

At Common Law parental custodial rights ceased to exist once a child has attained the age of discretion which was 18 years for girls and 15 years for boys.

DUTIES UNDER STATUTE

The key statute is now the Children' s Act 2001 although we have provisions in the Penal Code which touch on custody. Section 85 of the marriage Act 2014 provides that custody and maintenance of children shall be dealt with in accordance with the children Act.

The Penal Code also has provisions relating to custody in that it creates certain offences arising from interference with custody. Under Section 143 it is an offence for anybody to unlawfully take away an unmarried girl aged below 16 years from the custody or protection of their parents. Section 174 makes it an offence for a person to deprive a parent or guardian of the custody of a child aged under 14 years. This is referred to as child stealing.

CHILDREN ACT, 2001

This Act was enacted to consolidate all legislation that affects children and to give effect to certain international instruments which

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Kenya had ratified on the rights of children i.e especially the Convention on the Rights of the Child.

The Act provides for certain concepts which touch on rights and duties of parents over children

(a) Under Section 23, the Act provides for parental responsibility and it defines parental responsibility to mean all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child' s property. It further expounds on the duties and rights. On duties it includes the duty to maintain the child and in particular to provide him with an adequate diet, shelter, clothing, medical care and education and guidance. There is also a duty to protect the child from neglect, discrimination and abuse.

(b) The rights on the part on the parent include the right to give parental guidance in religious, moral, social cultural and other values. The right to determine the name of the child, the right to appoint a guardian in respect of the child, the right to receive administer or otherwise deal with the property of the child for the benefit of and in the best interests of the child. The right to arrange or restrict the immigration of the child from Kenya. Upon the death of the child the right to arrange for the burial or cremation of the child.

Under Sections 90 -101 of the Children Act - the presumption is that maintenance of children is the joint responsibility of both parents and maintenance orders under the Act can be made whether or not matrimonial proceedings have been filed.

Section 94 which provides for considerations that the court will take into account in making orders of maintenance of the child.

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Insofar as custody is concerned the Act recognises various apects of custody under Section 81

1. It provides for legal custody and legal custody is said to mean those rights and duties in relation to the possession of a child which are conferred upon a person by a custody order; in effect what legal custody does is to confer upon a person the right to make major decisions about the child' s health, education and welfare. All these duties and rights are given under legal custody.

3. It also recognises actual custody and this means the actual possession of a child.
4. Joint Custody – Act recognizes that the actual physical custody of a child can be shared with one or more persons. Also implied in that section is sole custody because it is quite possible under the Act for one person to have both the legal and actual custody of a child.
5. Care and control of a child – this is in respect of a person who is in actual possession of a child but who does not have legal custody over that child. The Act imposes an obligation on that person a duty to safeguard the interests and welfare of that child.

In addition to custody the court can make certain orders under the Act for example Access Orders and Resident orders under Section 114 of the Act.

An Access Order requires a person with whom a child is residing to allow the child to visit or to stay periodically with a person named in the order or to allow such person to have some other contact with the child. This is what is referred to as visitation rights in other jurisdictions. One proviso in the Act is that an access order shall not

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be made in relation to a child in respect of whom there is already a care order in place.
Care orders are given under Section 132 and what they basically do is to entrust the care and possession of a child to a person who is not the parent, guardian or custodian of the child or to an institution which is appointed by the court. This is usually for the protection of the child especially for those children who are in need of care and protection e.g. if they have been exposed to domestic violence, been subjected to female genital mutilation forced marriages and so forth.

Residence orders are given to a person and shall require the child to reside with that person and also provide for arrangements to be made to facilitate the residence of the child with that person. Such an order will impose certain conditions and define the duration of residence and so forth.

WHO CAN BE GRANTED CUSTODY UNDER THE ACT

Custody can be granted to parents of the child his, guardian or to any person who applies for custody with the consent of a parent or guardian but that person must have had actual custody of the child for a period of at least 3 months preceding the application.

In determining who should have custody, the court is required to have regard to certain factors or certain principles as follows:-

1. The conduct and wishes of the parent or guardian of the child;
2. the ascertainable wishes of the relatives of the child;
3. ascertainable wishes of any foster parent or any person who has had actual custody of the child for the last 3 years preceding the application;
4. ascertainable wishes of the child;
5. whether the child has suffered any harm or is likely to suffer any harm is the order is not made;

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6. Customs of the community to which the child belongs;
7. religious persuasion of the child;
8. whether any other order has been made in relation to the child such as a care order, supervision order, protection or exclusion order and whether that order remains in force;
9. the circumstances of any siblings of the child and of any other children of the home; and
10. The best interests of the child. What interests of the child entails is provided given under Section 4 of the Act. That section firstly says that in all actions concerning children the best interests of the child shall be of primary consideration and in subsection (3) it is stated that any action will be considered to be in the best interest of the child if it is calculated to firstly safeguard and promote the rights and welfare of the child. Secondly, if it is aimed at conserving and promoting the welfare of the child and thirdly, if it is aimed at securing for the child such guidance and correction as is necessary for the welfare of the child and in the public interest. This is a nebulous definition and leaves a lot to the discretion of the court to determine what is in the best interests of the child.

Under Section 83(3) in any case where a decree for judicial separation or divorce is pronounced, if the court pronouncing the decree finds the parent by reason of whose misconduct the decree has been given unfit to have legal custody, then the parent so declared unfit shall not upon the death of the other parent be entitled to legal custody of the child except with the leave of the court. In other words the conduct of parents just like under the common law is critical when deciding who to grant custody of children.

Read custody under customary law and custody of children under Islamic law

Janet Kabeberi

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