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COMMISSION ON THE LAW OF MARRIAGE AND DIVORCE

REPORT

TO HIS EXCELLENCY JOMO KENYATTA, PRESIDENT AND COMMANDER-IN-CHIEF OF THE ARMED FORCES OF THE REPUBLIC OF KENYA

MAY IT PLEASE YOUR EXCELLENCY,

We, the undersigned Commissioners, having been appointed by commission dated the 6th April, 1967,

"to consider the existing laws relating to marriage, divorce and matters relating thereto;

to make recommendations for a new law providing a comprehensive and, so far as may be practicable, uniform law of marriage and divorce applicable to all persons in Kenya, which will replace the existing law on the subject comprising customary law, Islamic law, Hindu law and the relevant Acts of Parliament and to prepare a draft of the new law;

to pay particular attention to the status of women in relation to marriage and divorce in a free democratic society".

humbly submit to Your Excellency the following Report.

J.F. SPRY — Chairman

PHOEBE ASIYO — Member

J. DE REEPER — Member

SHIRIN ESMAIL — Member

J.F.H. HAMILTON	Member
D.F. HEISEL	Member
M. JAHAZI	Member
MARGARET KENYATTA	Member
J.T. MPAAYEI	Member
THE REGISTRAR-GENERAL (D.J. COWARD)	Member
G.S. SANDHU	Member
A.R. TSALWA	Member
S. WARUHIU	Member
E. COTRAN	Member and Secretary

August, 1968

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INTRODUCTION

PROCEDURE

We held our first meeting in private on 6th April, 1967. We then decided to send out a questionnaire for distribution to religious and social organizations, representative bodies and individuals, inviting replies to some twenty-nine questions and suggestions for the improvement of the law relating to marriage, divorce and the status of women in matrimonial matters. 163 of these questionnaires were returned and the replies analyzed. A copy of this questionnaire appears as Appendix I to this Report. The names of the individuals and organisations who answered the questionnaire appear in Appendix II.

2. At a subsequent meeting, held on 12th July, 1967, we decided to hold public meetings in the following places: Nairobi, Mombasa, Malindi, Voi, Kitui, Machakos, Kajiado, Nyeri, Meru, Nakuru, Kericho, Eldoret, Busia, Kisii, Kisumu, Kakamega, Kapenguria, and Wajir. It was subsequently decided to hold public meetings also at Lamu, Garissa, Embu, Thika and Naivasha. We should have liked to visit other centres, but we felt that the time and expense involved would not warrant it. The object of these meetings was to enable submissions and arguments to be put to us orally. The response varied considerably, but in all we were addressed by 357 people, a large proportion of whom were representative of local or tribal communities or religious or social groups. The names of the individuals and associations that addressed us are given in Appendix III. All other meetings held by us were private.

3. As a result of press and radio publicity, we also received 146 memoranda, which were studied and analyzed. The names of individuals and associations that submitted memoranda are given in Appendix IV.

4. We should like to emphasize that in holding public meetings, distributing questionnaires and inviting memoranda, it was not our intention to conduct an opinion poll but merely to afford members of the public and interested associations the opportunity of putting their views forward in the manner they preferred. We are, therefore, not presenting the results in statistical form, which might be seriously misleading. We have, however, derived great assistance from the views expressed to us, mainly in the broad impression they gave of the way people are thinking and feeling in Kenya, but also from suggestions on matters of detail. It would be impracticable to deal with these at length but many of them are reflected in this Report.

5. We should stress also that while we listened, in the course of our public meetings, to many accounts of customary practices, it was not our purpose to collate tribal customs. This task had previously been undertaken on behalf of the Government of Kenya by Mr. E. Cotran, a Commissioner and our Secretary, assisted by local law panels (1).

GENERAL APPROACH

6. Immediately after we had completed our public meetings, we met to consider the general principles which we thought should govern our approach to our task.

7. We decided, in the first place, that changes in the law are necessary but that we could not recommend that marriage and divorce be treated as part of the ordinary civil law under a statute of national application, to the exclusion of personal law. We felt that we must look for some kind of compromise, with a uniform law regulating certain matters considered of national importance, while leaving the individual the choice of a civil, religious or customary marriage.

8. We thought that there should, if possible, be no exemptions from such uniform law as we might be able to recommend. If there were to be any, we thought they should be on a basis of tribal or religious community rather than on a geographical basis, although at the same time recognizing that any extended system of registration might have to be introduced by stages.

9. We thought that any such uniform law must be founded on the African way of life, always bearing in mind, however, that that way of life is rapidly changing and that urban and rural conditions are widely different: for these reasons, we thought that traditional rites and customs should not be codified, as to do so would impede natural and gradual change. The law must also in our opinion cater for non-African citizens and for residents who are not citizens and must be such that Kenyan marriages and divorces receive general international recognition.

10. We thought that such a law must recognize the existence of different ethnic and religious groups in Kenya but should contribute towards national unity by ensuring as far as possible equal rights and responsibilities for everyone. It should take into account economic conditions and the requirements of a modern nation.

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(1) Cotran, E. The Law of Marriage and Divorce : Restatement of African Law, Kenya, Vol. I. (Sweet and Maxwell, London 1968).

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11. We thought that there should be the minimum interference with religious and customary practices; in general, that no-one should be required by law to do anything which is forbidden by his religion or tribal custom; but we considered that the law may properly restrict or prohibit the doing of acts which religion or custom may allow.

12. We thought that the paramount consideration in all our deliberations should be the promotion of the stability of marriage and family life and therefore that divorce should not be encouraged. We thought that the law should always lean towards holding that a marriage is valid and that children are legitimate.

13. We thought that the law must be based on a recognition of human dignity, regardless of sex, and that matrimonial proceedings should be designed to cause the minimum of distress or humiliation.

14. We thought we should examine laws of other countries, particularly African and Muslim countries, to see whether they contained ideas that could usefully be applied in Kenya.

15. Finally, we thought that it was our duty to give due weight to the opinions expressed by the public but not to consider ourselves bound by public opinion, since it might be in the national interest to propose measures which would be unpopular. At the same time, we thought it would be wrong to recommend measures which were unlikely to be observed and incapable of enforcement. In recognizing that what can be achieved now falls short of what we think ultimately desirable, we have tried to indicate the direction which we think future development should take.

16. We believe these principles to underlie the recommendations which follow.

THE CONSTITUTIONAL BACKGROUND

17. The provisions of the Constitution of Kenya are relevant to the problems with which we are concerned in three respects; as regards citizenship, as regards the fundamental rights and freedoms of the individual, and as regards discrimination in legislation.

CITIZENSHIP AND MARRIAGE

18. As we understand the relevant provisions of Chapter I of the Constitution of Kenya:

(a) a woman who is a citizen of another country does not acquire Kenya citizenship upon marriage to a Kenya citizen but does become entitled on application to be registered as a Kenya citizen (1);

(b) a woman who is a citizen of Kenya does not lose her citizenship on marriage to a citizen of another country (2);

(c) a woman who is a citizen of Kenya married to a Kenya citizen does not lose her citizenship if her husband, whether voluntarily or involuntarily, ceases to be a Kenya citizen.

FREEDOM OF RELIGION

19. Every person in Kenya enjoys freedom of religion, which includes the right:

> "both in public and in private to manifest and propagate his religion or belief in worship, teaching, practice and observance (3)".

We do not think this provision is relevant to marriage or divorce in accordance with customary law, as these are not essentially religious in nature. It was, however, relied on by Muslims who addressed us, in support of their plea that there should be no interference with their personal law, and it is relevant, to a lesser extent, to Christian and Hindu marriages.

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(1) Section 5; and see also section 2(2)

(2) Section 12(3)(a)

(3) Section 22(1)

THE MUSLIM CASE

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(2) Cap. 144 (
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THE MUSLIM CASE [1]

20. It was submitted to us on behalf of the Sunni Muslims of the Coast and North-Eastern Provinces that Islam is a complete way of life, divinely ordained, and that the freedom of religion assured to them by the Constitution extends to cover the whole sphere of marriage and divorce. They asked that they should not be required to change anything at all in their way of life and one of their representatives went so far as to ask that the Guardianship of Infants Act [2] be disapplied to Muslims, as being an encroachment by the civil law into the sphere of personal law. Most other Muslims took a similar stand, although some were prepared to consider some measure of Government regulation, provided they were not required to do anything contrary to the Holy Quran, and to accept some administrative reforms to prevent abuse of the law.

21. While we respect the sincerity with which these submissions were made and are fully sensible of the difficulty in defining the sphere of religion, we are unable to agree. We do not think that section 22 of the Constitution, correctly interpreted, precludes the state from regulating marriage and divorce. We accept that Islam is a complete way of life and, indeed, it is for this reason that Kenya, like most other countries in the world, including Muslim countries, has already found it necessary to enact laws which restrict the application of Islamic law. We think that marriage and divorce and the structure of the family are matters which vitally concern the state and we do not think that the fact that they are also intimately bound up with religion would justify or excuse the state abdicating its responsibility.

22. It was argued before us that if there were any encroachment on the Islamic law, every Muslim would feel that he was being forced into sin. We do not consider this to be a valid argument because we do not think any of our recommendations, if accepted, would have the effect of compelling any person to do anything contrary to the Holy Quran, although some of them would be restrictive of the wide personal liberty enjoyed by men under Islamic law and others would impose obligations which do not exist under but are not contrary to that law.

---

(1) According to the General Census taken in 1962, only 3% of the African population of Kenya (excluding the Northern Province) were Muslim, while 58.9% were Christian. We should, however, record that representatives of Muslim associations who addressed us claimed that the proportion of Muslims is very much higher, and even suggested a figure approaching 25% : no statistics are available to support this claim.

(2) Cap. 144 (All references to Chapters in this Report, unless otherwise stated, are to the 1962 Revised Edition of the Laws.)

23. We should perhaps add here that we considered whether section 179 of the Constitution had the effect of entrenching in the Constitution those provisions of Islamic law which relate to personal status, marriage and divorce but we concluded that it has no such effect: we think that the only purpose of section 179 is to confer jurisdiction and that Kadhi's courts may enforce Islamic law in relation to those subjects only so far as it is applied or recognized as part of the substantive law of Kenya.

THE CHRISTIAN POSITION

24. The Christian position is essentially different from that of Muslims because, although the rules of the Anglican church clearly underlay much of the civil law, the ecclesiastical law was never recognized as part of the law of Kenya. In consequence, in spite of the civil law having a Christian basis, the Christian churches were in some respects at a disadvantage compared with other faiths, because in certain circumstances marriages which are invalid by ecclesiastical law may be valid under civil law and vice versa. This is particularly so where Catholics are concerned, because their faith forbids them to avail themselves of relief by way of divorce, which the civil law affords them, and does not recognize as valid marriages contracted by divorced persons.

25. There is also a material difference between the Christian and the Muslim conception of marriage in that, while both regard marriage as a contract, the Christian churches regard it as a particular kind of contract, having a sacred or sacramental element, unknown to Islamic law.

26. The Christian churches all over the world have, however, for some time past recognized the right of the state to regulate the civil contract of marriage by the civil law and they rely on conscience and church discipline to keep their members within the ecclesiastical as well as the civil rules. For this reason, none of the Christian communities invoked the provisions of the Constitution in their submissions to us.

THE HINDU POSITION

27. The Hindu community, like the Christian, made no claim to a privileged position by virtue of the fundamental rights provisions in the Constitution. In this connection, it may be observed that the Hindus have recently accepted major statutory interference in their

matrimonial affairs with the abolition of polygamy [1] and the bringing, with some qualifications, of their matrimonial causes under the Matrimonial Causes Act.

PROTECTION FROM DISCRIMINATION

28. We think we should also refer briefly to the question of discrimination in legislation. The general rule laid down in the Constitution is that:

> "no law shall make any provision that is discriminatory either of itself or in its effect [2]".

This provision is, however, qualified so as not to apply to any law so far as it makes provision:

> "(a) with respect to persons who are not citizens of Kenya;
>
> (b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; or
>
> (c) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons."

As we understand these provisions, they permit discriminatory legislation in relation to the subjects with which we are concerned, so far as they may be necessary or desirable in the circumstances of Kenya and its people but we think that any such discriminatory provisions should be the exception and that the broad aim of the Constitution is equal rights and obligations for all men and women.

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(1) Cap. 157, s.3(1)(a)

(2) Section 26(1)

THE EXISTING LAW

HISTORICAL DEVELOPMENT

29. The statute law of Kenya begins with the East Africa Order in Council, 1897, which applied certain Indian and certain British Acts to the East Africa Protectorate, as it was then called, provided for the future application of other Indian Acts and, subject thereto, applied "the common and statute law of England" in force at the commencement of the Order. The Order had only a limited application to Africans, cases against whom were, generally, to be brought in Native Courts and the Commissioner was given power, with the consent of the Secretary of State, to establish and abolish Native Courts, regulate their procedure and

> "alter or modify the operation of any native law or custom in so far as may be necessary in the interests of humanity and justice [1]".

30. The only applied Act relevant to the subjects with which we are concerned was the Indian Divorce Act [2] and that was applied

> "except so much as relates to divorce and nullity of marriage"

so that its application appears to have been limited to certain provisions relating to judicial separation, protection orders, restitution of conjugal rights and custody of children.

31. The Order was followed by the Native Courts Regulations, 1897 [3], which provided that:

> "Matters affecting the 'personal status' of non-Mahommedan natives shall be cognizable both in the Mahommedan coast region and beyond it by the ordinary Courts, which in regard to native Christians, shall apply the law for the time being in force in such cases in British India, and in regard to natives, not professing either the Christian or the Mahommedan faiths, the law of their caste or tribe so far as it can be ascertained, and so far as it is not, in the opinion of the Court, repugnant to natural morality [4]".

(1) Article 52(c)
(2) No. IV of 1869
(3) No. 15 of 1897
(4) Regulation 64

32. Islamic law was, of course, always recognized in the coastal strip, which, although administered as part of the Protectorate, was within the sovereignty of the Sultan of Zanzibar.

33. The East Africa Order in Council, 1902, provided that:

> "In all cases, civil and criminal, to which natives are parties, every Court shall be guided by native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any Order in Council or Ordinance, or any regulation or rule made under any Order in Council or Ordinance; and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay" (1).

That set a pattern which was followed in all subsequent constitutional instruments and is still preserved, substantially unchanged, in the Judicature Act 1967. (2)

34. The Order gave Her Majesty's Commissioner power to make Ordinances, subject to the qualification that in so doing

> "The Commissioner shall respect existing native laws and customs except so far as the same may be opposed to justice or morality (3)".

35. This power was exercised in the same year with the enactment of the Marriage Act (4), which is still in force, amended in various respects but not substantially changed. It was a statute of general application, not limited by race or religion. It provided for Christian (although the word was not used) and civil marriages and validated the Christian marriages that had already been celebrated. It provided for monogamous marriages only. It recognized customary marriages (5), made the existence of a customary marriage an impediment to a statutory marriage with any other person (6), and made it an offence for a person married under customary law to contract a marriage under the Act (7) or for a person married under the Act to contract a marriage under customary law (8).

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(1) Article 20

(2) No. 16 of 1967, s. 3(2)

(3) Article 12(3)

(4) Cap. 150 (All Ordinances subsisting on 12th December, 1963, were restyled Acts by L.N. 2 of 1964).

(5) Section 37

(6) Section 11(1)(d)

(7) Section 49

(8) Section 50

36. In 1904, the Native Christian Marriage Ordinance [1] was enacted. This applied only to the marriages of Christian Africans. It was really supplementary to the Marriage Act and was intended to relieve African Christians of the need to comply with all the formalities preliminary to marriage, if they so wished. It was replaced in 1931 by the African Christian Marriage and Divorce Act [2] which is applicable to marriages of Africans when either or both profess Christianity. It does not prevent Africans from contracting marriages in accordance with the Marriage Act.

37. In 1904 also, the Divorce Ordinance [3] was enacted, based on the Indian Divorce Act, 1869. This afforded reliefs in respect of monogamous marriages only. It was replaced in 1941 by the Matrimonial Causes Act [4], which was largely based on the English Supreme Court of Judicature (Consolidation) Act, 1925, and Matrimonial Causes Act, 1937. Additional relief, also limited to monogamous marriages, was afforded by the Subordinate Courts (Separation and Maintenance) Act [5].

38. The Mohammedan Marriage and Divorce Registration Act [6], which was enacted in 1906, provided for the registration of Islamic marriages. It empowered the Governor to apply its provisions

> "to any area or to any tribe sect or community within any area" [7].

This power was first exercised in 1907, [8] when the provisions of the Act were applied to:

> "all Native Mohammedans in the Mainland dominions of H.H. the Sultan of Zanzibar and the Sultanate of Witu".

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(1) No. 9 of 1904
(2) Cap. 151
(3) No. 12 of 1904
(4) Cap. 152
(5) Cap. 153
(6) Cap. 155
(7) Section 26
(8) By Proclamation dated 2nd December, 1907

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(5) Cap. 15
(6) No. 43

The provisions of the Act were progressively extended by districts, but always limited to Africans, until 1926, when the earlier proclamations were revoked and the Act applied

> "to all Mahomedans in the Colony and Protectorate of Kenya except the Northern Frontier Province and the Turkana District" (1)

The following year (2) that exemption was removed, so that the Act applied to all Muslims, but in 1928 (3) the members of the Khoja Shia Ith'nasheri, the Khoja Shia Ismailia Council and the Bohra Community were exempted from its operation.

39. For the present purpose, it will be sufficient to say of these three communities that they are all followers of the Shia School of Islam. The Khoja Shia Ith'nasheri recognize only the law of the Holy Quran and the traditions of the Prophet and the Twelve Imams. The Khoja Shia Ismaili, now known as the Shia Imami Ismailis, are governed by a Constitution, dated 26th June, 1962, ordained by His Highness the Aga Khan as Hazar Imam, which contains a code of personal law introducing considerable changes. The Bohra Community follow Islamic law as interpreted by His Holiness the Dai-el-Mutlaq.

40. In spite of the requirement that Islamic marriages be registered, it was held, in the case of Fatuma binti Athuma v. Ali Baka (4) that marriages valid under Islamic law, not being in accordance with the Marriage Act, were "not in accordance with the law of the Protectorate". It was presumably as a result of this decision that the Mohammedan Marriage, Divorce and Succession Act (5) was passed, under which, with retrospective effect, Islamic marriages were "to be deemed to be valid marriages throughout Kenya".

41. It was not until 1946 that Hindu marriages first received statutory recognition, when the Hindu (Marriage, Divorce and Succession) Ordinance (6) was enacted. This provided, again with retrospective effect, that marriages contracted in accordance with Hindu custom should be deemed to be valid marriages, and matrimonial reliefs were provided, generally by reference to the law of India.

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(1) Proclamation No. 1 of 1926
(2) Proclamation No. 34 of 1927
(3) By Proclamation No. 2 of 1928
(4) (1918) 7 E.A.L.R. 171
(5) Cap. 156
(6) No. 43 of 1946

This Ordinance was later replaced by the Hindu Marriage and Divorce Act [1] which, following changes that had taken place in India, required future Hindu marriages to be monogamous and extended to them the reliefs available under the Matrimonial Causes Act and the Subordinate Courts (Separation and Maintenance) Act.

42. The effect of these various enactments is that there are now five recognized forms of marriage in Kenya:

(a) Christian marriages under the Marriage Act or the African Christian Marriage and Divorce Act;

(b) Civil marriages under the Marriage Act;

(c) Hindu marriages under the Hindu Marriage and Divorce Act;

all of which are monogamous;

(d) Islamic marriages which are recognized under the Mohammedan Marriage, Divorce and Succession Act, which are potentially polygamous except among the Shia Imami Ismailis;

(e) African customary marriages which are polygamous.

The legal consequences of those marriages, that is to say, the rights and obligations of husband and wife, depend, generally speaking, on the form of the marriage but there is some uncertainty in the law in this respect, which it will be necessary to consider later [2].

43. The laws relating to divorce, separation, nullity and other matrimonial reliefs arising out of monogamous marriages are governed by the Matrimonial Causes Act, qualified, in certain respects, as regards African Christians, by the African Christian Marriage and Divorce Act, and as regards Hindus, by the Hindu Marriage and Divorce Act. Matrimonial causes arising out of "Mohammedan marriages" [3] are governed by Islamic law under the Mohammedan Marriage, Divorce and Succession Act. There is no written law regarding matrimonial causes arising out of marriages contracted under customary law, and these are themselves governed by customary law.

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(1) Cap. 157

(2) See paragraph 169 et. seq.

(3) See Mussa Ayoob v. Maleksultan Ayoob, C.A. No. 34 of 1967 (not yet reported)

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REGISTRATION

44. Marriages contracted under the Marriage Act and the African Christian Marriage and Divorce Act are compulsorily registrable under the provisions of those Acts but there is no provision for the registration of decrees of divorce or nullity granted under the Matrimonial Causes Act. Muslim marriages and divorces, save as exempted (1), are compulsorily registrable under the Mohammedan Marriage and Divorce Registration Act. Under neither system does registration or lack of registration affect the validity of a marriage. The Hindu Marriage and Divorce Act empowers the Minister to make rules requiring and prescribing the manner of registration of Hindu marriages but it appears that no such rules have been made. There is no provision in the national legislation for the registration of customary marriages, and certain attempts by local authorities to introduce such registration under by-laws have proved unsuccessful.

JURISDICTION

45. Jurisdiction under the Marriage Act, (2) the Hindu Marriage and Divorce Act (3) and the Matrimonial Causes Act (4) is vested in the High Court, except that for African Christians (5), as regards matrimonial causes, it is vested in magistrates' courts of the first class, while, without prejudice to the provisions of the Matrimonial Causes Act, subordinate courts of the first class have jurisdiction, under the Subordinate Courts (Separation and Maintenance) Act (6), to make orders regarding cohabitation, custody of children and maintenance. There is concurrent jurisdiction in the High Court and kadhi's courts in matrimonial causes arising out of Muslim marriages (7). Jurisdiction in matters arising out of marriages under customary law is vested in district magistrates' courts under the Magistrate's Courts Act (8), although the High Court, as a court of unlimited jurisdiction (9) has, of course, concurrent jurisdiction.

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(1) See paragraph 38 above
(2) Sections 16, 17, 18 and 22
(3) Cap. 157, s. 2
(4) Cap. 152, s. 3
(5) Cap. 151, s. 14
(6) Cap. 153, s. 2 and s. 13
(7) Cap. 156, s. 3; No. 14 of 1967 s. 5
(8) No. 17 of 1967, s. 10
(9) The Constitution, s. 171(1)

46. We have not thought it necessary to set out in any detail the contents of the statutes referred to in the preceding paragraphs, nor have we dealt with various related statutes: to have done so would greatly have increased the length of this Report. Many of their provisions will, however, be considered in later paragraphs. A list of all the Kenya statutes which we have thought it particularly necessary to examine appears as Appendix V.

UNSATISFACTORY FEATURES OF THE LAW

47. Much of the existing statute law has its roots in English law, which, being founded on the canon law where marriage and divorce are concerned, only recognized as a marriage the voluntary union for life of one man with one woman to the exclusion of all others. The result is that although the law recognizes polygamous marriages, both Islamic and customary, they have tended to be treated as inferior to the monogamous marriage. This appears from decisions of the courts (1) and from the fact that the African Christian Marriage and Divorce Act provides for the conversion (2) of customary into statutory marriages and the Marriage Act appears to contemplate (3) the conversion of Islamic as well as customary marriages into marriages under the Act. Moreover, the Mohammedan Marriage, Divorce and Succession Act appears to contemplate (4) the conversion of customary into Islamic marriages. In none of these cases is there any provision for the opposite process. We regard this as most unsatisfactory: the purpose of a marriage ceremony is to bring into being the marital status and we think that all forms of marriage allowed by law should be equally effective in law.

48. It is also noteworthy that the English law of divorce, upon which the Kenya law is based, has itself been subject to severe criticisms in recent years and proposals for changes in England are under consideration (5).

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(1) Notably R. v. Amkeyo (1917) 7 E.A.L.R. 14

(2) Cap. 151, s. 9

(3) Cap. 150, s. 11(1)(d)

(4) Cap. 156, s. 6

(5) See Report of the Royal Commission on Marriage and Divorce 1956, Cmnd. 9678; Putting Asunder, A Divorce Law for Contemporary Society, (Report of a Group appointed by the Archbishop of Canterbury in January 1964) (London, S.P.C.K. 1966); The Law Commission, Report on Reform of the Grounds of Divorce, 1966, Cmd. 3123.

49. There is also what may be termed an internal conflict of laws. The spheres of statute law and personal law are not clearly defined and the extent to which a person can change his personal law on a change of religion is uncertain. There is also doubt how far Africans who marry under religious or civil law retain rights and remain subject to obligations under customary law. There are also problems that arise on the intermarriage of persons from different tribes, communities or religions.

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

51. Doubts have been expressed as to which of the constituent elements of a customary marriage are essential to the validity of the marriage and at what point the marriage is complete. We think it of the greatest importance that there should, as far as possible, be certainty in all matters of marital status.

52. The traditional African view of marriage was that it was less a union of individuals than a union of families. Moreover, in the past, the unity and numerical strength of the clan were of paramount importance. Today, people move about far more than formerly, mixed communities are growing and, while tribal loyalties continue, there is now a new allegiance to the State. These changes have made some of the former practices inappropriate or inconvenient.

53. We should briefly mention here the subject of dowry (1), with which we shall have to deal more fully later. For the present purpose, it will be sufficient to say that there are allegations that the practice of requiring dowry, which has a deep significance in African society, is being commercialized. Also, there are wide differences between tribal laws on the subject and this tends to lead to uncertainty.

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(1) As to the use of the word "dowry", see paragraph 110

54. It would be wrong to generalize on the status of women under customary law as there are considerable differences between the customs of the various tribes and even within the tribes. It is perhaps sufficient for the present purpose to say that there are some features in the customary laws of some tribes which we regard as derogating from the dignity and status to which women are entitled: to give three examples, we are told that in one tribe a girl may be compelled by her parents to marry against her will, in some tribes a widow has no choice but to join the household of a brother or other relation of her late husband, and in some tribes a widow is precluded from remarrying.

55. On the breakdown of a marriage, also, women in some communities are in a position greatly inferior, as regards obtaining relief, to that of their husbands.

56. We consider it unsatisfactory, also, that the right to maintenance of women who are divorced or separated from their husbands should vary as greatly as it does according to the community or religion of the parties. This is anomalous from the point of view of the individual and, so far as destitution has to be relieved out of public funds, unfair on those sections of the community that contribute to those funds but accept also the liability to pay maintenance.

57. We believe also that the fact that customary marriages are not registered leads to difficulty in proving such marriages, particularly when matrimonial proceedings are taken in an area other than that in which the parties were married.

58. Finally, we would remark that we have observed many defects of detail in the drafting of the statutes relating to marriage and divorce. It would not be profitable to detail these, since, as will appear, we think that what is required is not the patching of the present law but a completely fresh approach.

THE CONTRACTING OF MARRIAGE

THE NATURE OF MARRIAGE

59. We would define marriage as the voluntary union of a man and a woman, intended to last for their joint lives. We think that definition would apply to marriage as ordinarily understood in civil and customary law, as well as to the followers of all the main religions. We think the only exception is the Khoja Shia Ithna-Asheri community, which recognizes mutaa, or temporary marriage for a period of fixed duration. This does not accord with our idea of marriage and we do not consider it in the public interest. We do not think that any such relationship should be regarded as a marriage.

Recommendation No. 1

> We recommend that only voluntary unions between a man and a woman, intended to last for their joint lives, be recognized as marriages.

A MINIMUM AGE FOR MARRIAGE

60. At the present time, no person may contract a marriage under the Marriage Act if he or she is under the age of sixteen years, and if either party to a marriage is under that age, the marriage is null and void (1). These provisions are imported, by reference, into the African Christian Marriage and Divorce Act (2). For marriages between Hindus, the minimum ages laid down by the Hindu Marriage and Divorce Act are eighteen years for the male and sixteen years for the female (3). There is no statutory minimum age for any person marrying under Islamic law or under customary law. Under Islamic law, a person may not enter into a contract of marriage below the age of puberty, which is generally assumed to be about fifteen years for a male and nine for a female, but a contract of marriage may be entered into on behalf of a child below that age by his or her guardian. In customary law, the age for marriage was traditionally linked with circumcision ceremonies but these, at least in some areas, are tending to die out. Most tribes did not allow marriage before the age of puberty.

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(1) Cap. 150, s. 35(2)

(2) Cap. 151, s. 4

(3) Cap. 157, s. 3(1)(c)

61. We have found, except among Sunni Muslims, a general acceptance of the idea that there should be a statutory minimum age. In rural areas, in particular, we were frequently told that people are marrying younger than formerly and this is regarded as a cause of unstable marriages. Widely different views were expressed as to the ages that should be fixed, partly, we think, because of some tendency to confuse the legal minimum with the normally desirable age for marriage. From the views expressed to us, orally or in writing, it would seem that most people think the minimum age should be higher for males than for females, and most people would fix ages between eighteen and twenty-one for males and between sixteen and eighteen for females.

62. The reasons given for fixing these ages were generally that, allowing for more education, these were the lowest ages at which a man was likely to be in a position to support a wife and at which a woman would have the experience needed to run a household, and at which people generally have the maturity of judgment to choose a partner for a life-long union. With this we agree.

63. We do not overlook the fact that child marriages are recognized as permissible in certain circumstances both under Islamic law and under the customary laws of some tribes but we consider them wrong in principle and contrary to the best interests of Kenya.

Recommendation No. 2

We recommend that the law prescribe minimum ages for marriage, to apply to all communities, of eighteen for males and sixteen for females.(1)

64. We have given considerable thought to the question whether the courts should be given a discretion to allow a person to marry below the minimum age in extraordinary circumstances. The main reason for giving the courts such a power would be to enable children to be born in wedlock and to relieve families from distress and humiliation. The objection is that it might seem to be giving a licence to young people to indulge in sexual intercourse. We feel also that a marriage where either party is below the minimum age is likely to lack the necessary ingredients for stability and may not, therefore, always be in the best interests of the State or of the parties or of the unborn child. We finally came to the conclusion that whereas it was desirable to give a court such a power where the girl was pregnant, it should not be given as of course and in no case should it be given where either party was below the age of fourteen.

(1) This Recommendation complies with Resolution 2018 (XX), adopted by the General Assembly of the United Nations on 1st November, 1965

Recommendation No. 3

> We recommend that the courts be given power to permit the marriage of a person below the minimum age recommended above, such a power to be exercised in the discretion of the court in the light of all relevant circumstances, as an extra-ordinary measure, and only where neither party is below the age of fourteen years and where the girl is pregnant.

65. We considered whether a ceremony performed where either party is below the minimum age should be a nullity, as at present, or should result in a voidable marriage. The suggestion that such ceremonies should result in voidable marriages was made with the object of making the children of such unions legitimate. We felt, however, that much of the purpose of prescribing a minimum age would be likely to be defeated, if marriages in contravention of it were recognized as valid. We thought that the position of the children would be sufficiently protected if it were provided by statute that such children were to be deemed to be legitimate. At present, children are deemed to be legitimate only where a decree of nullity is granted under the Matrimonial Causes Act in respect of a voidable marriage (1) but we see no good reason why children should not similarly be protected where a ceremony is a nullity, whether or not a decree of nullity is obtained.

Recommendation No. 4

> We recommend that a ceremony purporting to be a marriage should be a nullity if either party is below the statutory minimum age and the permission of the court, suggested in Recommendation No. 3, has not been obtained. We further recommend that any children of such a void union should by statute be deemed to be legitimate.

66. We are unanimously of the opinion that it should be an offence knowingly to participate in such a ceremony, but we think this should apply only to the parties and to those people who take an active part in the ceremony.

Recommendation No. 5

> We recommend that it be made an offence knowingly to take part in a ceremony purporting to be a marriage which is void on account of the age of

(1) Cap. 152 s. 14(2)

either party. For the purpose of this Recommendation we suggest that to take part should be defined to mean:

(a) being a party to such a ceremony;

(b) officiating thereat as a minister of religion or registrar;

(c) purporting to give consent thereto; or

(d) signing a marriage certificate as a witness thereto.

67. It follows, we think, from the foregoing recommendations, which would preclude marriage in any circumstances under the age of fourteen, that it should no longer be a defence to a charge brought under section 145 of the Penal Code [1], which makes defilement of girls under fourteen an offence, that the person charged believed the girl to be his wife.

Recommendation No. 6

We recommend that section 145 of the Penal Code be amended by the deletion from the proviso thereto of the words "or was his wife".

PROHIBITED DEGREES OF KINDRED AND AFFINITY

68. Under the Marriage Act [2] and, apparently, under the African Christian Marriage and Divorce Act [3], the prohibited degrees of kindred and affinity are those for the time being applying in England. Islamic law has its own rules on this subject, which it may be observed, are not greatly different from those of English law. The prohibited degrees for Hindus are set out in the Hindu Marriage and Divorce Act [4], with the qualification that two persons may marry within those degrees if the customs governing each of them permit the marriage. The customs of the African tribes vary greatly but generally it may be said that the prohibited degrees under customary law are far wider than those recognized under the Christian or Muslim rules: some tribes go so far as to prohibit a marriage where any connection by blood can be shown.

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(1) Cap. 63
(2) Cap. 150 s. 35(1)
(3) Cap. 151 s. 4
(4) Cap. 157 s. 3

69. We think the present position is unsatisfactory. In the first place, it appears that the capacity of the parties to marry may depend on the form of marriage they choose: this, we think, is clearly wrong. Secondly, the prohibition of marriage where there is a remote blood relationship may lead to uncertainty as to the validity of a marriage: such a relationship may be unknown to the parties and may only be discovered long after the marriage. We think it is of the greatest importance that there should be certainty as to marital status. Moreover, we understand that marriages in contravention of the more strict rules, though regarded as irregular, are not always held to be invalid.

70. We think it desirable that there be a single, uniform rule, applying to members of all communities, prescribing the degrees of relationship within which marriage is forbidden by law. Obviously, such a rule must only specify those relationships that are prohibited by all communities alike and will, therefore, be more tolerant than the rules of any particular community. We realize that many people will regard such a rule as unduly liberal but we think that the consciences of individuals and the social pressures within communities will generally ensure compliance with religious and traditional rules, without the need for legal sanctions. We think that our proposals would lead to certainty as to the legal position, and flexibility as regards religious and customary rules.

Recommendation No. 7

We recommend that the prohibited degrees of kindred and affinity within which marriage is not permitted be laid down by statute and be the same for everyone, regardless of race, tribe or religion. We suggest that the prohibited degrees should be as follows:

(a) No person shall marry his or her grandparent, parent, child or grandchild, sister or brother, great-aunt or great-uncle, aunt or uncle, niece or nephew, great-niece or great-nephew, as the case may be;

(b) No person shall marry the grandparent or parent, child or grandchild of his or her spouse or former spouse;

(c) No person shall marry the former spouse of his or her grandparent or parent, child or grandchild;

(d) No person shall marry a person whom he or she has adopted or by whom he or she was adopted;

(e) For the purposes of this Recommendation, relationship of the half blood is as much an impediment to marriage as relationship of the full blood and it is immaterial whether a person was born legitimate or illegitimate.

71. We are of the opinion that any ceremony purporting to be a marriage where the parties are within the prohibited degrees should be a nullity. At the same time, we would, as in the case of purported marriages of people under age (1), provide that any children of such a void union should be deemed to be legitimate.

Recommendation No. 8

We recommend that [redacted] a ceremony purporting to be a marriage should be a nullity if the parties are within the prohibited degrees of kindred or affinity. We further recommend that any children of such a void union should by statute be deemed to be legitimate.

72. We are unanimously of the opinion that it should be an offence knowingly to participate in such a ceremony.

Recommendation No. 9

We recommend that it be an offence knowingly to take part in a ceremony purporting to be a marriage which is void by reason of the parties being within the prohibited degrees. For the purpose of this recommendation, "to take part" should have the same meaning as in Recommendation No. 5.

MONOGAMY AND POLYGAMY

73. Traditionally, all the tribes of Kenya were polygamous (2), without any limit on the number of wives a man might take, other

(1) See paragraph 65

(2) To be more correct, polygynous. We have, however, throughout this Report used the word polygamous, as being more in accord with common usage. Polyandry is not practised in Kenya.

than what he could afford. Those Africans who have adopted Islam are, of course, limited to four wives and those who have adopted Christianity are required to be monogamous. We have said earlier, however, that it is not uncommon for Africans who have contracted a Christian marriage, subsequently, and while that marriage is subsisting, to contract another marriage under customary law, although to do so is not only contrary to the rule of the Church but also constitutes a criminal offence. We understand that polygamy is usual among Muslim Arabs and Somalis but that Muslims from India and Pakistan are usually monogamous in practice, although their personal law allows polygamy. The Ismaili community, however, are monogamous by virtue of their Constitution. Other immigrant peoples are generally monogamous.

74. It was represented to us by the National Council of Women and other women's organizations that the traditional basis of African polygamy has now largely gone. Formerly, additional wives were brought in to help in the work of the shamba; they were introduced with the consent of, and indeed often by, the first wife, who enjoyed a special position of respect. Now, it was submitted, the first wife is often neglected, while the husband lavishes his attention on the younger woman, particularly in those cases where the first wife is left to look after the shamba while the young wife is kept in a town house.

75. We are satisfied that there is a considerable body of opinion in favour of retaining polygamy. We found opinion on this subject very sharply divided, with the main support for polygamy coming from Muslims and from traditionalists in rural areas and the main opposition from Christians, from the women's organizations and from the more educated members of the younger generation. We found many people, both among those who favour and those who oppose polygamy, who thought that the practice would inevitably die out under the pressure of social and economic change, particularly the cost of educating children and, in some areas, the dwindling reserves of land. Many of those opposed to polygamy expressed the opinion that it is unnecessary, and that it would be unwise, to prohibit the practice.

76. The main argument advanced in favour of polygamy was based on a belief that prostitution is increasing; a belief which we found, wherever we went, to be a major subject of concern. It was argued that a man who is permitted to take a second wife is less likely to divorce the first and that polygamy absorbs the excess of women over men in the population. In this connection, we found a widespread belief that women greatly outnumber men in Kenya; in fact, such information as is available shows this belief to be unfounded (1). It was particularly urged that a man should have the right to take a second wife where his first marriage was without issue. As regards the domestic aspect, it was stressed by Muslim speakers that Islam requires a man to accord equal treatment and affection to all his wives.

77. The main argument for monogamy, apart from that based on religious teaching, was that it is only in the union of one man and one woman that it is possible to find the mutual love and trust that are essential to a stable and happy home. It was strongly urged that children suffer under polygamy because, human nature being what it is, the children of one wife will, in practice, be preferred to the children of another and therefore that many children are very likely to grow up in an atmosphere of jealousy and discord. It was also argued that since Kenya's population was expanding rapidly, one way to restrict it would be by abolishing polygamous unions. (2)

78. We think polygamy will die out and that it is in the national interest that it should. Rising standards of living and the cost of bringing up and educating children will, almost certainly, contribute to this end. Diminishing land reserves and increased mechanization in farming will tend to remove the traditional rural justification for it. Furthermore, the education

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(1) According to the General Census taken in 1962, the overall ratio of men to women in Kenya (excluding the Northern Province) was 96.9 : 100. The sample Census taken during the same year shows an even narrower margin, 98.9 : 100. There are, of course, local variations mainly due to concentrations of men residing in areas where employment is available.

(2) There is in fact, so far as we are aware, no evidence that polygamy results in a higher birth-rate than monogamy.

and emancipation of women, a process well under way, will, we think, mean that women will, in the future, be less willing to form part of a polygamous household.

79. We do not think polygamy should be prohibited by law. We think that any law which attempted to do this at the present time would cause considerable social disruption, without being really effective. It would probably lead to an increased number of unions not constituting lawful marriages and hence to an increase in the number of illegitimate children.

80. Equally, we cannot accept a suggestion put to us that all marriages should be made potentially polygamous. We think this would be a retrograde step and offensive to a large part of the population.

81. We believe that the law should do everything reasonably possible to discourage the practice of polygamy. Our recommendations in this part, therefore, while preserving the possibility of a man taking a subsequent wife or wives, are designed to render this difficult in circumstances where it is clear that it is undesirable that he should do so.

Recommendation No. 10

> We accordingly recommend that the law should recognize two distinct types of marriage: the monogamous and the polygamous or potentially polygamous (1).

82. At the present time, the character of a marriage, i.e. whether it is monogamous or polygamous, is determined according to the form in which it is contracted. It is monogamous if contracted under the Marriage Act or the African Christian Marriage and Divorce Act or the Hindu Marriage and Divorce Act, and polygamous if contracted under customary or Islamic law. We consider that in future the character of a marriage should not depend on the form of marriage or the personality of the parties, but upon their express agreement. We accordingly take the view that when two parties embark upon marriage, they should expressly declare, when giving notice of intention to marry, whether their

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(1) For the sake of brevity, we shall hereafter in this Report use the expression "polygamous marriage" to cover both polygamous and potentially polygamous marriages.

marriage is to be monogamous or potentially polygamous, and that such declaration should be binding. We believe this innovation will remove many of the difficulties that now arise, and is fair to the wife in that it gives her an opportunity to ensure - if she so wishes - that her marriage will be monogamous.

Recommendation No. 11

> We recommend that when giving notice of intention to marry, the parties should declare whether their marriage is to be monogamous or potentially polygamous, and that such declaration, subject to Recommendation 12 below, should be binding during their lifetime and whilst the marriage subsists.

83. This recommendation if adopted would lead immediately to the question whether a person who has contracted a monogamous marriage should be able, while that marriage subsists, to convert it into a polygamous one. As the law stands at present, there is express provision in the African Christian Marriage and Divorce Act (1) for the conversion of marriages contracted under customary law into statutory marriages and it seems to be implicit in the Marriage Act (2) that an Islamic marriage may similarly be converted. It would also seem to be implicit in the Mohammedan Marriage, Divorce and Succession Act (3) that a customary marriage may be converted into an Islamic one. There is, however, no provision for the conversion of monogamous marriages into Islamic or customary ones (4).

84. We think it would clearly be wrong to allow a change in the character of a marriage to be brought about by the unilateral action of either party. The more difficult question is whether it should be permitted by mutual consent. Such a change might be desired where the parties have changed their religion, or, in the case of persons following no recognized faith, a change of opinion on the subject, possibly inspired by the ill-health of the wife or her incapacity to bear children. The danger, of course, would be that a husband anxious to marry a second wife, might bring pressure on his wife to agree and if she refused to agree,

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(1) Cap. 151, s. 9

(2) Cap. 150, s. 11(1)(d)

(3) Cap. 156, s. 6

(4) See Mussa Ayoob v. Maleksultan Ayoob C.A. No. 34/67 (not yet reported)

that this would imperil the marriage, as the husband would see the wife as the obstacle to his happiness. We think, therefore, that it would be necessary to ensure that any such consent was freely given.

85. The same problems do not arise where a man with one wife whose marriage was potentially polygamous wishes to convert it into a monogamous one, because it would only be in very exceptional circumstances that a wife would object. Such a situation would probably only arise on a change of religion. We think, however, that, as a matter of principle, the same rule should apply as for the conversion of monogamous into polygamous marriages. There can be nothing to prevent a man deciding, or even promising, not to take another wife, but if the nature of the marital status is to be changed, we think it should only be by mutual act.

Recommendation No. 12

> We recommend that the unilateral action of one party or a change of faith or religion of one or both parties to a marriage, should not, in itself, change the character of a marriage. We recommend, however, that it be permitted to convert a potentially polygamous marriage into a monogamous one, or a monogamous marriage into a potentially polygamous one, by a joint declaration of husband and wife freely made in the presence of a registrar and recorded in writing at the time of making.

86. It was suggested to us that where a man has more wives than one, the first should enjoy a status higher than the other or others. This was argued from two points of view. On the one hand, it was said that in the traditional African society, the senior wife had some measure of authority over, and was entitled to the respect of, the other wives and it was argued that it was proper that this should continue. On the other hand, opponents of polygamy favoured discrimination as a means of discouraging women from accepting the status of junior wives. We would agree that in a polygamous establishment, the senior wife should enjoy a special position, but we think this should be accorded as a matter of respect and courtesy. So far as legal rights and status are concerned, we think all wives should be equal and, as a corollary, that the children of polygamous wives

should rank equally amongst themselves. The National Council of Women and others, suggested that the law should provide for the registration of the first wife only, (1) but as we have said, it is our opinion that all wives should rank equally in law.

Recommendation No. 13

> We recommend that where a man has two or more wives, there should be complete equality of legal status and legal rights between such wives.

87. We considered further whether the law should require a man polygamously married to accord equal treatment to his wives but we felt that this was a domestic matter, where it is neither desirable nor practicable for the law to interfere. We are proposing (2) that a wife, polygamous or monogamous, who is seriously neglected or ill-treated should have a right of recourse to the courts. Social custom and religion may also play a part in regulating these relationships.

Recommendation No. 14

> We recommend that the law should not attempt to regulate polygamous households, as for example by requiring the husband to accord equality of treatment to his wives.

88. It is generally accepted, both under Islamic and under customary law, that a man should not take a second wife unless he has the means adequately to support both wives. We are recommending the setting up of marriage tribunals (3) and we have considered whether every man who proposes to take a second or subsequent wife should first have to satisfy a tribunal that he has the means to justify so doing.(4) Although in principle we would favour such a requirement, we are not recommending it, because we think it would impose an excessive burden on the tribunals and hence tend to detract from the performance of their main function, the attempt to reconcile matrimonial differences.

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(1) As suggested in Ghana and Uganda, but not yet implemented.

(2) See paragraph 171

(3) See paragraph 252

(4) As has been introduced in certain Islamic countries e.g. Pakistan and Syria.

89. We considered also whether a man proposing to take a second or subsequent wife should be required to obtain the consent of his existing wife or wives. We think this would be unreasonable, because it would enable a wife to go back on her acceptance, at the time of her marriage, of the principle of polygamy. At the same time, we think such wives should have the right to be heard. What we suggest is that a wife who, having accepted the principle of polygamy, objects to her husband taking another wife either on the ground that it is likely to cause financial hardship in the household or on grounds personal to the proposed new wife, such as notorious immorality, should be entitled to lodge a notice of objection with the local registrar or chief, whose duty it would then be torefer the question to a marriage tribunal. We think there should be no appeal from the decision of the tribunal, although an aggrieved party should have the right to apply to the court for relief similar to the prerogative ordersif the tribunal were to misconduct itself.

Recommendation No. 15

> We recommend that a wife by a polygamous marriage who objects to a proposed subsequent marriage by her husband, either on the ground that such marriage is likely to cause financial hardship in the household or because of the personal unsuitability of the proposed wife, be entitled to lodge a notice of objection with the registrar to whom notice of the proposed marriage has been given, whose duty it would then be to stay the proposed marriage and refer the objection to a marriage tribunal. We recommend further that there be no appeal from the decision of the tribunal.

90. We have considered whether there should be a statutory limit to the number of wives a man may have. No such limit is known in customary law but Islam imposes a maximum of four. We do not think this question is of great practical importance because, as we have said, we think social and economic factors will lead to the decreasing practice of polygamy. We think also that a statutory maximum might be interpreted as legislative approval of the contracting of marriages up to that number.

Recommendation No. 16

> We recommend that no statutory limit be imposed restricting the number of wives a man may take under the polygamous system.

91. We think that it would be futile to provide by law for a monogamous system of marriage without providing sanctions.

Recommendation No. 17

> We recommend that if a man who has contracted a monogamous marriage goes through a ceremony, purporting to be a marriage, with another woman while his wife is alive and his marriage has not been dissolved and its character has not been converted as suggested in Recommendation No. 12, the later ceremony should be a nullity. Similarly, where a woman who has a husband living and has not obtained a declaration from the court that he is to be presumed dead goes through a ceremony, purporting to be a marriage, with another man, that ceremony should be a nullity. At the same time, we would, as in the case of purported marriages of people under age[1], provide that any children of such a void union should by statute be deemed to be legitimate.

92. From the criminal aspect, bigamy is already an offence under thePenal Code[2], while it is an offence under the Marriage Act[3] for an unmarried person to go through a ceremony of marriage with a person whom he or she knows to be married to a third person. We think these provisions should be consolidated and somewhat widened, and since the offences would spring from prohibitions in the proposed new law, we think the penal provision should be included in that law, rather than in the Penal Code.

93. We think it should be a good defence to a person charged with such an offence, that he or she believed, on reasonable grounds, that his or her spouse was dead, or that the marriage had been dissolved.[4]

Recommendation No. 18

> We recommend that it be made an offence knowingly to take part in a ceremony purporting to be a marriage which is void on account of either party thereto having a living spouse. We recommend

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(1) See paragraph 65

(2) Cap. 63, s. 171

(3) Cap. 150, s. 42

(4) In this respect, see Reg. v. Gould (1968) 2 W.L.R. 643

further that it should be a good defence if a person charged with such an offence can satisfy the court that he or she believed, on reasonable grounds, that such spouse was dead, or that the marriage had been dissolved. For the purpose of this recommendation, "to take part" should have the same meaning as in Recommendation No. 5. We recommend that this offence be included in the proposed new law and that section 171 of the Penal Code be repealed.

CONSENTS TO MARRIAGE

94. We are emphatically of the opinion that the consent, freely given, of both parties should be essential to the validity of every marriage.(1) It is at present essential to every Christian and civil marriage and apparently to every Hindu marriage, and to every Islamic marriage where the parties have attained the age of puberty; the consent of the spouses is required by the customary law of all tribes with one or two exceptions(2). So far as any religious or customary law at present allows parents to force a child into marriage, we think it is wrong and should be abrogated.

95. In this respect, we think that the English law regarding consent is not entirely logical. For example, where there is ignorance or mistake as to the nature of a ceremony which purports to be a marriage, the ceremony is void, but, if the consent of either party is vitiated by intoxication, it would seem that a marriage is merely voidable. We do not consider this satisfactory and we think every ceremony should be void if the consent of either party was induced by coercion, fraud, or mistake, or was vitiated by insanity or intoxication or was in any other way less than fully and freely given.

Recommendation No. 19

We recommend that the consent of both parties freely given be essential to the validity of a marriage.

96. It follows, we think, that any ceremony purporting to be a marriage where either party does not give his or her consent or gives consent under coercion should be a nullity. We would, however, as in the case of purported marriages of people under age(3)

(1) This accords with Resolution 2018(XX) referred to in footnote (1) to Recommendation No. 2.

(2) e.g. The Masai

(3) See paragraph 65

provide that any children of such a void union should be deemed to be legitimate.

Recommendation No. 20

> We recommend that a ceremony purporting to be a marriage should be a nullity if the consent of both parties thereto is not freely given. We further recommend that any children of such a void union should by statute be deemed to be legitimate.

97. We have considered what other consents, if any, should be required. Under the Marriage Act, parental consent is required to the marriage of any person under twenty-one years of age (1) and under the Hindu Marriage and Divorce Act to the marriage of a female between the ages of sixteen and eighteen (2). Under Islamic law, where a person is under incapacity, his or her Wali, or marriage guardian, is a necessary party to his or her marriage, while according to the Maliki and Shafei schools, even an adult woman must give her consent through her Wali. The general rule under customary law is that the consent of parents is essential to the first marriage of a person, while other members of the family are consulted; consent is not generally required to the marriage of a person who has previously been married. This is a subject on which we have met a wide divergence of opinion. Most people who expressed opinions favoured parental consent at least up to the age of twenty-one and many would like to see a higher age fixed or even require such consent regardless of age.

98. While we think parental advice is always desirable, regardless of age, we do not think it would be reasonable to make parental consent a legal requirement where a person is over twenty-one years of age. We think it is a proper requirement up to that age, even though we are recommending (3) that eighteen should be the age of majority. We see nothing illogical in this. A person of eighteen may well be old enough to enter into ordinary contracts but marriage is a very special kind of contract which may affect the whole course of a person's life, and one which calls for maturity of judgement more than intelligence.

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(1) Cap. 150 ss. 19 - 22

(2) Cap. 157 s. 3(1)(d)

(3) See Recommendation No. 91

99. This does raise one problem, because, if eighteen is to be the age of majority, there will be people between eighteen and twenty-one who have no legal guardians. Our suggestion is that the basic requirement should be the father's consent. If the father is dead, the mother's consent should be required. If the father and the mother both died before the person attained eighteen, we think the consent should be required of whoever was his or her guardian - often an uncle or a grandparent, who has brought the person up. If, however, the person's parents died after he or she attained eighteen, we would not stipulate for any consent.

100. We think also that where consent is unreasonably withheld or where it is impracticable to obtain it, as, for example, where a father's whereabouts are unknown, the court should have discretion to give consent.

101. It was suggested to us that where the parties are above the age at which parental consent is necessary, evidence should be required of consultation with the parents, so as to ensure that parents know of a proposed marriage and have the opportunity of expressing their views. In our opinion, whatever the merits of such a proposed procedure, it would not be practicable legally to enforce it. We also think that the provisions we suggest regarding the giving of notice (1) should ensure generally that parents at least know of an intended marriage.

102. We have considered whether the parental consent which we recommend should be waived in the case of persons who have already been married and whose marriage has been determined by death or divorce or where a man who has contracted a polygamous marriage wishes to take a second wife, while still under the age of twenty-one. We see no good reason to make such a dispensation and we think that there should be no exception to the rule that consent is required up to the age of twenty-one.

Recommendation No. 21

> We recommend that the consent of the father of any person who has not completed his or her twenty-first year be required to the marriage of that person or if he is dead, the mother, or if both died before that person attained the age of 18, of whoever was his or her guardian,

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(1) See paragraphs 123 - 124

subject to the proviso that consent may be given by the court, if the court is satisfied that such consent is being withheld unreasonably or that it is impracticable to obtain it.

103. The question whether the consent of the existing wife or wives should be required to the taking of a further polygamous wife has already been dealt with in paragraph 89 above.

104. Under the Marriage Act, lack of parental consent does not invalidate a marriage (1) and this would appear to apply also in respect of the African Christian Marriage and Divorce Act (2). Under the Hindu Marriage and Divorce Act, the procuring by force or fraud of the consent of the guardian in marriage is a ground for obtaining a decree of nullity (3); the Act is silent as to the effect of not obtaining such consent and presumably this does not invalidate a marriage. Under Islamic law, the absence of a guardian, where a guardian is required, would invalidate a marriage, at least unless it is subsequently ratified by the guardian. No single rule can be laid down regarding the effect of lack of consent under customary law. However, under most customary laws, lack of consent by the parents usually results in the elopement of the parties. The matter is usually later regulated by the payment to the girl's father of a customary amount by way of compensation for the elopement.

105. In our view, lack of consent (other than the consent of the parties themselves) should not invalidate a marriage but we think that the court should have power to annul such a marriage on the application of an interested person so long, and so long only, as one party to the marriage is under twenty-one years of age.

Recommendation No. 22

We recommend that no marriage should be a nullity on account of the lack of consent of the parent or former guardian of either party but that the court should have power to annul a marriage contracted without consent, if in all the circumstances it considers it just to do so, on the application of any interested person, provided the application is made while at least one party to the marriage is under the age of twenty-one.

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(1) Cap. 150 s. 35(4)

106. Once again, we think sanctions must be imposed.

Recommendation No. 23

We recommend that it be made an offence knowingly to take part in a ceremony of marriage or a ceremony which purports to be a marriage, to which any consent is required and has not been freely given. For the purpose of this recommendation, "to take part" should have the same meaning as in Recommendation No. 5.

DOWRY

107. Under all the customary laws of Kenya (1) marriage is preceded, accompanied or followed by a payment or payments by the bridegroom or his family to the bride's family. The payment was traditionally made in cattle or other livestock, but sometimes partly in produce, honey or beer. Nowadays, money is often given in lieu or in addition. Generally, it is not necessary that it be paid in full before the marriage: indeed more often there is only an initial, possibly a token, payment, followed by payments over the years as and when the husband can afford or the wife's family may need a further instalment. Amongst most tribes, it is open to the wife's father to waive the payment, if he so wishes. With a few exceptions (2), the amount to be paid is not fixed by custom, but is a matter for negotiation between the families.

108. A question, which has occasioned much difficulty amongst judicial and administrative officers and amongst academic writers, is the significance of the payment, and the difficulty of finding a suitable English term to describe the institution. The European view in the past was that the payment was nothing but a price for "buying" a woman, hence the term bride price. Many of the witnesses we heard around the country were at great pains to explain that the payment implies no such thing and this was a Western misconception. We agree that the term is unfortunate. Other suggestions that have been put to us, and also put forward by various writers, regarding the significance of the payment are: that it is in the nature of a bond uniting the two families; that

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(1) Traditionally, the Elgeyo, Marakwet and Tugen did not pay dowry as such, but the custom has now been copied from their neighbouring tribes, principally the Nandi.

(2) e.g. The Meru, Taita and the Masai have a fixed dowry.

it is a mark of the man's respect for his wife; that it is merely a symbol or token to seal the marriage contract; that because of the liability to repayment on divorce, it acts as a deterrent to misconduct on the part of the wife; and that it is the price for the children resulting from the marriage.

109. We do not think any useful purpose will be served in ascertaining which of these suggestions is the more appropriate or correct one. It may well be that some of these theories are correct for one tribe or a group of tribes, but it is very difficult to generalize. Suffice it to say that the payment played and continues to play a very significant part in African customary marriages.

110. As regards terminology, we have preferred to use the word "dowry" rather than other expressions such as "bride price", "bride wealth", "marriage cattle", "marriage payment", "child price" etc., because, although the practice in African society is the reverse of that in Europe, i.e. it is given by the bridegroom or his family to the bride's family and not vice versa, we believe that the expression is the most neutral one. We also note that the Kenya legislation has recently switched from the use of the term bride price (1) to dowry (2).

111. Under Islamic law, the dowry (mahr) is strictly payable to the bride, although with her consent it may be handed to her parents. It need be of no commercial value but the giving of at least a token is regarded as essential to the validity of a marriage.

112. The payment of dowry is not required under the Hindu Marriage and Divorce Act, but we understand that it is a social custom among the Hindus in Kenya.

113. We have considered whether the legal validity of marriage should depend on the payment of dowry and we have concluded that it should not. It would clearly be undesirable to make dowry essential in some cases and not in others, and we do not think any useful purpose would be served by making dowry compulsory if it involved no more than a token. Moreover, there are material differences in the customary laws of the various tribes regarding payment and repayment of dowry, while in some areas at least the custom seems to be

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(1) e.g. in section 13(2) of the African Christian Marriage and Divorce Act.

(2) e.g. in section 2 of the Magistrate's Courts Act 1967.

changing. To embody all the existing customs in the new law would preserve all the present complications and would impede change and we consider the standardization of those customs to be impracticable.

114. We do not think that the payment of dowry should be abolished, because we believe that it is a factor making for stability in marriage but we think it should be a matter for arrangement between the two families and not a requirement of law.

115. We are not oblivious to the fact that in many customary laws, the payment of dowry is regarded as a legal essential, but in view of the complications to which we referred above, and also to the fact that dowry is often dispensed with altogether, we think that the custom is losing much of its legal significance and is becoming, like the European dowry, a social custom.

Recommendation No. 24

We recommend that the legal validity of marriage should not depend on dowry having been paid or promised.

116. It is sometimes alleged that the dowry system is being commercialized and exploited, and that young men are unable to marry because of their inability to raise the necessary amount. There may be such cases, but we are not convinced that there is any general public evil. Comparatively few complaints of such a nature were made to us in the course of our public meetings. Furthermore, as we have already said, it is usually sufficient to make a small initial payment. Moreover, if our recommendations are accepted (1), parties of full age would be able to marry even without the consent of their parents, and in the case of a girl under twenty-one the demanding of a manifestly excessive dowry might be held to be an unreasonable withholding of consent.

117. We have considered whether the law should set limits to the amount of dowry that may be paid, or whether local authorities should be empowered to set limits, and our conclusion is that this would be undesirable. We appreciate that there are tribes where the amount of the dowry is fixed by custom but this appears to be the exception. We think it would be impracticable to enforce rules limiting dowry and we understand that attempts in the past by local authorities to do so have failed (2). Generally, we think

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(1) See paragraph 98

(2) e.g. in the Kisii District. We understand that similar attempts in other parts of Africa e.g. Nigeria, have met with equal failure.

the amount of dowry asked is bound to vary according to the wealth and standing of the bride's family. As on the question whether or not dowry should be paid, so also on the question of the amount to be paid, our view is that the matter is one to be arranged between the families concerned.

Recommendation No. 25

> We recommend that the law should not regulate or empower the regulating of the amount of dowry but that this should be left to agreement between the families concerned.

118. We have considered whether, as at present, it should be possible to sue for outstanding dowry and we think it should, as a contractual obligation for which the marriage provides the consideration. We think, however, that limitation of such actions is desirable. At present, the rule in most tribes is that on the death of a wife, the husband ceases to be under any obligation to contribute any further dowry, while the wife's family is usually under an obligation to return a proportion of the dowry, the amount depending on the number of children she has borne. Where the husband dies first, his family is usually liable to provide the balance of the dowry, and this obligation may continue as long as the wife lives. We think these obligations are unduly onerous. Whatever system is adopted, there are bound to be cases which excite sympathy, but after weighing the various considerations, we think it would be fairest if the obligation to contribute dowry were to cease on the death of either the husband or the wife and if there were no obligation to return any part of the dowry on the death of the wife. When we speak here of an obligation, we mean an obligation enforceable through the courts: it is, we think, very likely that existing customs will continue to be followed voluntarily by many families. We do not propose to speculate on the possible effects of such a change on family negotiations regarding dowry and would merely remark that we think they may be minimal since, as we have said, we think dowry is increasingly being regarded as a social custom rather than a matter of law.

Recommendation No. 26

> We recommend that outstanding dowry be recoverable as a contractual debt, subject to the limitation that no action should be brought on an agreement to provide dowry after the death of the husband or the wife, whoever shall die first. We recommend further that no action should lie for the return of

119. The rule under most customary laws is that dowry is partly or wholly returnable to the husband or his family on divorce, the amount returnable, as in the case of the death of the wife, depending on the number of children and their sex. Under some customary laws, the divorce only becomes legal when the dowry has in fact been returned. As we have said earlier, we think that matters relating to dowry should continue to be regulated by custom and agreement, and we would extend this to the question of return of dowry on divorce. However, just as we think that the payment of dowry should no longer affect the validity of a marriage, so too, its return should not affect the legality of a divorce. Further, we think that there should be a period of limitation for actions for return of dowry after a divorce, and we suggest, for this purpose, a period of three years.

Recommendation No. 27

We recommend that -

(a) the validity of a divorce should not depend on the return of any dowry to the husband or his family;

(b) the return of any dowry on divorce should be regulated by the custom of the community to which the parties belong and by any agreement between the parties or their families, and that an action for such return be enforceable in the courts:

Provided that no action for the return of dowry after a divorce shall be instituted more than three years after the date of the decree.

120. We also suggest that other matters relating to dowry, such as the replacement of dead animals or those that do not produce, the return of the progeny, the method of payment, should continue to be governed by custom and agreement.

Recommendation No. 28

We recommend that matters relating to dowry, other than those covered by Recommendations 24 - 27 above, should continue to be regulated by custom and agreement.

121. On a matter of detail, we do not think it necessary or desirable for the amount of the dowry to be shown in the marriage register or on the marriage certificate.

PRELIMINARIES TO MARRIAGE

122. Under the Marriage Act (1), public notice must be given for at least twenty one days of an intended marriage, although the Minister is given power (2), by special licence, to dispense with the giving of notice. This is not required under the African Christian Marriage and Divorce Act, although the priest celebrating a marriage must be satisfied that adequate notice has been given (3), which is normally by the calling of banns. There is no statutory requirement of notice preliminary to Islamic, Hindu or customary marriages.

123. In principle, we think that secret marriages should not be allowed and that the giving of public notice is most desirable, mainly so that steps may be taken to prevent the ceremony taking place where there is any lawful impediment to marriage. We think notice is particularly important before civil marriages, because that is the form usually adopted when marriages are contracted without the knowledge of relations or friends. Where marriages are celebrated in accordance with the rites of any of the recognized religions, we think it can be left to the priests or religious leaders to ensure that notice is given in the manner best suited to the way of life of the particular community. Where a marriage is to be contracted under customary law, we think the fact will generally be well known but nevertheless, we think previous notice should be given to the local chief or sub-chief or any other suitable person. (4) This would have the added advantage of ensuring the subsequent registration of the marriage. We think twenty one days is a reasonable period for such notice.

124. We do not suggest that it be laid down in the law precisely what action is to be taken by registrars and chiefs when they receive such notice because we think that this could better be dealt with by rules, and that pending the making of rules should be governed by administrative instructions and we would strongly urge that instructions be issued to ensure, as far as practicable, that the intention of the parties to marry is made known in the places where their parents ordinarily reside. We do not think that the present practice of simple exhibiting notices outside the District Commissioner's Office is sufficient.

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(1) Cap. 150 ss. 8 - 11

(2) Section 14: this power has been delegated to the Registrar General by L.N. No. 138 of 1963.

(3) Cap. 151, s. 7

(4) We suggest below that these be appointed registration officers, see Recommendation No. 40 and paragraph 156.

Recommendation No. 29

> We recommend that the parties to an intended marriage be required to give at least twenty one days' notice of their intention before the date fixed for the marriage; that such notice be given to a registrar (ministers of religion and kadhis being registrars) or to the local chief or sub-chief and that it be made the duty of such registrar or chief to cause the fact of the intended marriage to be made known locally and, so far as practicable, where the parents of the parties reside elsewhere, in the places where they ordinarily reside.

125. We would, as in the Marriage Act, give a power, for good reason, to dispense with the giving of notice, although we think this power should be sparingly used. The present exercise by the Registrar General of this power appears satisfactory and we suggest that the power be conferred on him direct.

Recommendation No. 30

> We recommend that the Registrar General be given power, in extraordinary circumstances, to dispense with the need to give notice of intended marriage.

126. Under the Marriage Act, it should be impossible for a marriage to take place without notice having been given or the Minister's licence obtained, but if this should take place, the ceremony would be a nullity (1). Lack of notice does not, however, invalidate any other form of marriage. We think this is a matter in which there should be uniformity. There must be a sanction to ensure compliance with the requirement of notice, but we do not think that failure to give due notice, which may be the result of ignorance or mistake, should invalidate a marriage. We would rather make wilful default an offence.

Recommendation No. 31

> We recommend that failure to have given due notice should not invalidate a marriage but that it should be an offence to take part in a marriage knowing that notice has not been given. For the purpose of this recommendation, "to take part" should have the same meaning as in Recommendation No. 5.

(1) Cap. 150 s. 35(3)

127. The giving of notice under the Marriage Act is a preliminary step to obtaining the registrar's certificate, which may be issued not less than twenty one days after the notice has been given and which must be obtained before the marriage may be celebrated. The other preliminary is the swearing of an affidavit as to certain matters (1): these are, first, that one of the parties has been resident in the marriage district for at least fifteen days; secondly, that the parties are of full age or have obtained the necessary consent; and, thirdly, that there is no impediment of kindred or affinity to the proposed marriage.

128. As regards the residential qualification, there is no similar requirement in relation to the other forms of marriage and we doubt if it serves any useful purpose. Even under the Marriage Act, the fact that neither party has been so resident does not invalidate the marriage. Moreover, a Minister's licence obviates the need for the residential qualification. We think this requirement might be omitted.

Recommendation No. 32

We recommend that there be no requirement in the law of a residential qualification before marriage.

129. We are inclined also to dispense with the affidavit, as such, because it may present difficulty for people in remote rural areas. Also, we are well aware that, in practice, the swearing of affidavits is all too often treated as a casual matter. On the other hand, we think the registrar or chief to whom notice is given must be satisfied as to the ages of the parties, that any necessary consents have been given, that the parties are not within the prohibited relationships, that the woman is not already married and, when the marriage is to be monogamous, that the man is not married. This information should be furnished by both parties and it should be an offence knowingly to make a false statement. When the registrar or chief has any reason to doubt the truth of any statement made to him, it should be part of his duty to make all reasonable enquiries.

Recommendation No. 33

We recommend also that it be made an offence, when giving notice of intended marriage, knowingly to make any false statement.

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(1) Cap. 150, s. 11

130. We think that anyone who knows of any legal impediment to a proposed marriage, or believes that any such impediment exists, should be entitled to give notice of objection to the registrar or chief to whom the notice of intention to marry was given and that it should then be the duty of the registrar or chief to refer the matter to the court and to take all practicable steps to ensure that the ceremony does not take place pending the court's decision. If this duty is placed on registrars and chiefs, we think it would be possible to dispense with the registrar's certificate.

131. We may remark here that we feel very much concerned to keep to a minimum the formalities that must be complied with. In principle, we do not think people should be required to comply with formalities unless they really serve a useful purpose and in practice, we think that if the formalities are too complicated, they will tend to be ignored and there will be numerous irregularities.

Recommendation No. 34

> We recommend that anyone who believes that there is any legal impediment to a proposed marriage should have the right to give notice of objection to the registrar or chief to whom the notice of intention to marry was given and that the registrar or chief should then refer the objection to the court. We recommend also that it should be the duty of the registrar or chief to take such action as is practicable to prevent a ceremony of marriage being performed while an objection is outstanding.

132. There may, of course, be cases where, in spite of the precautions we recommend, a marriage ceremony takes place when an objection is outstanding. In such a case, we do not think the fact that the objection was outstanding should affect the validity of the marriage, which will really depend on whether or not the objection related to a matter going to validity and was, or was not, well founded. We think, however, that it should be an offence to take part in a ceremony knowing that an objection is outstanding.

Recommendation No. 35

> We recommend that it be an offence to take part in a ceremony of or purporting to be a marriage knowing that an objection is outstanding but that the fact that an objection is outstanding should not, of itself, affect the validity of the ceremony.

THE CELEBRATION OF MARRIAGE

133. We considered whether to recommend a requirement that all marriages be contracted by a simple civil ceremony, allowing the parties any additional religious or customary ceremonies they might wish, but so that the legal validity of the marriage depended solely on the civil ceremony. Such a system would have much to commend it and is indeed followed today in numerous European countries. It would have the merits of simplicity and uniformity, with the minimum of doubt as to the validity of marriage, and would facilitate the extension of registration to cover all marriages. We concluded, however, that in the present circumstances of Kenya, such a change would be impracticable. We think it would be a considerable time before the people, particularly in rural areas, came to realize that customary ceremonies were ineffectual by themselves to create the marriage bond: consequently, it is likely that for some years to come people would go through the customary ceremonies and believe themselves to be married, while in the eyes of the law they would be unmarried. Moreover, we think there would be great resentment, particularly among Muslims and traditionalists, at the refusal of the law to recognize as marriages, ceremonies which they believe to be in proper form. We think that, at least for the time being, it is better to retain the existing forms of marriage, religious, civil and customary, while defining statutorily the essentials of marriage and providing that ceremonial irregularities are not to invalidate marriages. This decision accords with our general approach to the question of form of marriage (1).

Recommendation No. 36

We recommend that marriages should in future, as at present, be capable of being contracted:

(a) in civil form; or

(b) by a religious ceremony; or

(c) in Islamic form where the husband is a Muslim; or

(d) by rites recognized by customary law.

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(1) See paragraph 7

134. We should perhaps explain that we have not included marriages in Islamic form under religious ceremonies, because marriage is, to Muslims, a civil contract, not a sacrament, and need not be contracted in the presence of any religious official.

135. We appreciate that our proposals make it theoretically possible for two persons, neither of whom is ordinarily subject to African customary law, to contract a marriage in customary form but we do not think this will raise any difficulty, because we do not think it would be possible, in practice, for such a marriage to take place unless one, at least, of the parties had a real and substantial connection with the community under whose customs it was proposed to marry.

136. We would leave the conduct of religious marriages entirely to the organization of the religion, or the particular denomination or sect concerned, but we think there must be some control over the religions permitted to celebrate marriages. We think the tests should be whether a religion has a reasonably large following in Kenya and has such an organization that it can ensure compliance by its ministers with the law. We think that any religion which wishes to celebrate marriages in Kenya should be required to satisfy the Minister on these points.

Recommendation No. 37

We recommend that the right to conduct religious marriages be restricted to such religions as may be approved for this purpose by the Minister.

137. We think that, as at present under the African Christian Marriage and Divorce Act (1), ministers of religion should be licensed. Such a licence should be issued on the application of a responsible authority of a religion which has been approved by the Minister and should be liable to be cancelled either at the request of the responsible authority of that religion or for non-compliance with or breach of the provisions of the marriage laws. We think that this would serve three purposes: first, there would be a permanent record of the ministers entitled to perform marriages, secondly, it would assist in ensuring that the law is complied with and, thirdly, it would prevent off-shoots from recognized religions performing marriages without first obtaining approval. To avoid unnecessary applications in the initial stages, we suggest that all ministers licensed under the African Christian Marriage and Divorce Act should be deemed to be licensed under the new law.

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(1) Cap. 151, s. 6

Recommendation No. 38

We recommend that ministers of religion be required to be licensed individually, on the application of the responsible authorities of their religion, before they would be entitled to celebrate marriages and that such licences should be liable to be revoked.

138. Where a ceremony is performed by an unlicensed minister, we think it should be a nullity if both parties were aware that he was unlicensed, but not otherwise.

Recommendation No. 39

We recommend that a ceremony purporting to be a marriage be a nullity if, to the knowledge of both parties, it is performed by a minister who is not licensed in that behalf.

139. We considered also whether it would be possible to insist on the presence of a registrar at every ceremony of marriage but again we felt it to be impracticable. At present, civil ceremonies are conducted by registrars, while ministers act as registrars at religious ceremonies, but to require the presence of registrars at Islamic and customary marriages would involve the appointment of a large number of additional registrars. It would not be easy to find sufficient people, qualified and willing to act and it would, we think, be impossible to ensure, in rural areas, that a registrar was available whenever a marriage was to be celebrated. We think, therefore, that the presence of registrars at marriages is to be encouraged but not insisted upon. It follows, of course, that we think the help of ministers and kadhis as registrars should continue to be sought.

Recommendation No. 40

We recommend:

(a) that religious ceremonies of marriage be conducted by, or in the presence of, a licensed minister or other religious leader and that the law should recognize such ministers and other religious leaders as ex officio registrars of marriages;

(b) that civil ceremonies be conducted, as at present, by registrars;

(c) that kadhis be ex-officio registrars of marriages; and

(d) that marriages in Islamic or customary form be contracted so far as is practicable and convenient, in the presence of a registrar or registration officer, but so that the presence of a registrar or registration officer would not be legally essential to such marriage.

To assist both in the preliminaries to marriage and in the registration of marriages, we recommend that there be registration officers and that until any appointments are made, chiefs and sub-chiefs be ex-officio registration officers.

140. It would appear that under English law (1), although two witnesses are required at a marriage, the lack of witnesses does not invalidate a ceremony, and the position would appear the same in Kenya under the Marriage Act (2) and the African Christian Marriage and Divorce Act (3). Witnesses, as such, do not appear to be essential to a Hindu marriage, but under Islamic law a valid marriage cannot be contracted without witnesses. There are invariably witnesses to a marriage according to customary rites.

141. As we have said, we consider secret marriages undesirable. Moreover, the evidence of witnesses may be most valuable at a later date if the validity of a marriage is challenged. We think there should be at least two witnesses to every marriage and that they should be adult, sane and sober. We regard this as so important that we would make it essential to the validity of a marriage.

Recommendation No. 41

We recommend that a ceremony purporting to be a marriage should be a nullity unless at least two witnesses are present. We recommend that it be an offence to take part in such a ceremony but that any children of such a void union should by statute be deemed to be legitimate.

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(1) Wing v. Taylor (1861) 2 Sw. & Tr. 278

(2) Cap. 150, ss 35(4) and 36

(3) Cap. 151, s. 4

142. We do not favour marriage by proxy, although we are aware that it is permitted in many legal systems, because it seems to us impossible to be certain that, at the moment when the marriage is contracted, there is that full and free consent of the absent party that we regard as an essential of marriage.

Recommendation No. 42

We recommend that the law prohibit marriage by proxy in Kenya.

CONSULAR MARRIAGES

143. The Marriage Act also contains provisions (1) enabling marriages to be contracted under Kenya law before a consular or other public officer in any foreign country, where at least one of the parties is a Kenya citizen. It has long been recognized that marriages may be contracted under foreign laws in embassies, because it is an accepted fiction that an embassy is outside the territory in which it is physically situate and notionally part of the country it represents. The position regarding consulates is more obscure, because the fiction of exterritoriality does not apply to them. Under English law, the matter is regulated by statute (2), on which the Kenya provisions would appear to be based.

144. These provisions are liable to give rise to considerable difficulties because it may well be that a marriage which is valid according to the national law of one of the parties is invalid according to the national law of the other (3). In an attempt to avoid this situation arising, the English Act permits a marriage officer to refuse to solemnize or to permit the solemnization of a marriage if in his opinion "the solemnization thereof would be inconsistent with international law or the comity of nations" (4). This power was not included in the Kenya Act. Moreover, regulations have been enacted in England, inter alia, precluding consular marriages which would be invalid according to the law of the country in which the consulate is situate if either party is a citizen of that country. No such regulations exist in Kenya.

145. Another aspect of the matter is that consular marriages are related to nationality, whereas most other matrimonial questions turn on domicil. This means that it is possible for a person to be married according to the law of his nationality but unmarried by the law of his domicil.

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(1) Cap. 150, ss 5(2) and 38A

(2) The Foreign Marriage Act, 1892

(3) See, for example, Hay v. Northcote (1900) 2 Ch. 262

146. In this connection, we note that attempts to resolve these problems by international convention have been remarkably unsuccessful.

147. We think marriages in Kenya Embassies, High Commissions and consulates abroad should be permitted only where at least one of the parties is a Kenya citizen and only in countries which are prepared, in principle, to recognize such marriages. We think that before consular officers in any foreign country are permitted to conduct marriages, it should be ascertained through diplomatic channels that such marriages will not be invalid under the laws of that country and that the names of the countries which have given such assurances should be gazetted. In seeking such assurances, it would, of course, be proper to draw attention to the provisions of the Kenya law of marriage and in particular to the fact that it recognizes both monogamy and polygamy. We think this practice should be followed in relation to marriages in Embassies as well as to those in consulates.

Recommendation No. 43

We recommend that diplomatic and consular officers be permitted to conduct civil marriages in Kenya Embassies, High Commissions and consulates abroad if, but only if -

(a) one party to the proposed marriage is a Kenya citizen; and

(b) the Minister has signified by notice in the Gazette that the Government of the country in which the Embassy, High Commission or consulate is situate has signified that such marriage will not be invalid according to the law of that country.

148. Since our aim is to avoid the conflict of laws in matrimonial matters, we do not suggest restricting in any comparable manner the recognition of marriages in foreign Embassies, High Commissions or consulates in Kenya or requiring reciprocal arrangements. We think the law of Kenya should recognize such marriages regardless of their form subject to the basic requirements that one party be a citizen of the country whose Embassy, High Commission or consulate it is, that each party has capacity to marry the other under the law of his or her domicil and that each party expresses his or her free consent to the marriage.

Recommendation No. 44

> We recommend that the law of Kenya recognize as valid any marriage in a foreign Embassy, High Commission or consulate where at least one of the parties is a citizen of the country whose Embassy, High Commission or consulate it is, in a form recognized by the law of that country, where each party has capacity to marry the other according to the law of his or her domicil and provided that each party expresses his or her free consent to the marriage.

FOREIGN MARRIAGES

149. We think marriages contracted in foreign countries should be regarded as valid for the purposes of Kenya law provided that the form of the marriage was one permitted by the law of the country in which the marriage took place and provided that each of the parties had the capacity to marry the other according to the law of his or her domicil. We think that is the law of Kenya today and we think that is what the law should be.

Recommendation No. 45

> We recommend that the law recognises as valid any marriage contracted outside Kenya if the form of the marriage is one permitted by the law of the country in which it is contracted and if the parties have capacity to marry each other according to the laws of their respective domicils.

150. Under the laws of some countries, a non-national wishing to marry is required to produce a certificate from the appropriate authority in his own country that there is no legal impediment to the proposed marriage. Such a certificate goes to the capacity to marry. The Marriage Act (1) contains provision enabling the Registrar-General to issue such certificates and we are informed that a substantial number are in fact being issued.

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(1) Cap. 150, s. 38B

151. Before issuing such a certificate, the Registrar-General is required to make full inquiry, and while it may not be possible in present circumstances for these inquiries to be conclusive, we understand that they do, occasionally, bring impediments to light. In these circumstances, we think that this facility, which does appear to meet a public need, should be maintained. We note, incidentally, that the Kenya provision differs from the corresponding English provision (1) in that the former requires a "full inquiry in regard to the applicant" whereas the latter is based on the publication of notice and the oath of the applicant. It will, of course, be necessary, if our recommendations are accepted, to have two forms of certificate, according to whether the proposed marriage is to be monogamous or polygamous.

Recommendation No. 46

> We recommend that the Registrar-General continue to have power to issue certificates of no impediment to persons wishing to marry in foreign countries.

REGISTRATION OF MARRIAGES

152. As we have already stated (2), there are at present two separate systems of registration, one for Christian and civil marriages and one for Islamic marriages, and potentially a third system, for Hindu marriages. We see no reason for this separation. The registration of marriages is a civil, not a religious, matter.

153. We are unanimously and strongly of the opinion that all marriages ought to be registered and that they should be registered under a single system applying to everyone. (3)

Recommendation No. 47

> We recommend that all marriages be required to be registered and that there be a single system of registration applying to all persons, regardless of race, religion or community.

154. We have given much thought to the question whether a ceremony of marriage should be invalidated by failure to register.

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(1) The Marriage with Foreigners Act, 1906, s. 1

(2) See paragraph 44

(3) This accords with Resolution 2018 (XX) referred to in footnote (1) of Recommendation No. 2

At present, lack of registration does not go to validity. It has been argued that it is only by invalidating unregistered marriages that it will be possible to make compulsory registration effective. We take a different view. We think it will take time before any new statutory requirements are fully observed and in the meanwhile, we would not wish to see marriages invalidated for failure to comply with formal requirements. As we said earlier (1), we think the law should always lean towards holding marriages to be valid, where they are contracted in good faith and there is no lack of capacity.

Recommendation No. 48

> We recommend that the validity of a marriage should not depend on registration.

155. Where a marriage is celebrated by or in the presence of a registrar, we think the responsibility for ensuring that the marriage is registered should be his. We think that where no registrar was present at a marriage, the parties should be required to apply for registration within ten days, but there should be provision for late registration. However, where notice of an intended customary marriage has been given to a chief, it should be part of his administrative duty to ensure that the marriage is registered.

Recommendation No. 49

> We recommend that where a marriage is celebrated by or in the presence of a registrar, it should be the duty of the registrar to ensure that the marriage is registered and that in all other cases it should be the duty of the parties to apply within ten days for registration. We recommend further that failure to perform that duty be made an offence. We would, however, make provision for late registration.

156. We have already recommended (2) that chiefs should be appointed as registration officers. We are strongly of the opinion that if the registration of all future marriages is to become a reality, the facilities for registration must be brought

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(1) See paragraph 12

(2) See Recommendation No. 40

nearer to the people by decentralization. At present, the chiefs appear to be the only available officers who could assume these duties. We are advised by the Provincial Commissioners that they agree with this view and that they believe that, generally speaking, chiefs are capable of carrying out these duties, subject, in some cases, to being given clerical assistance. We are not recommending that chiefs be made registrars, first, because it is important that the registers be kept to a standard that will enable them to be accorded international recognition and, secondly, because we do not think all chiefs have suitable accommodation for safe-keeping of marriage certificates and registers. What we propose is that chiefs should act as agents of the district registrars, furnishing them with the information to enable registration to be effected and making any necessary inquiries and investigation. We think also that it should be their duty, so far as is reasonably practicable, to attend marriages of which they have been given notice and to ensure that registration results.

157. It may be appropriate to add here that we are informed that in some districts, members of the Registrar-General's department have been appointed district registrars, taking over the registration duties formerly performed by district commissioners. We think this is desirable, because we think these duties are sufficiently responsible and are likely to become too onerous for district commissioners to be able to perform them in addition to their many other functions. Moreover, we think it desirable that the officers concerned with registration should be directly responsible to the Registrar-General.

158. We considered whether the law should require the registration of all existing marriages but we decided that this was impracticable. We think, however, that such marriages should be capable of registration and that registration should be encouraged. Very great care will have to be exercised where both parties are not available to acknowledge the marriage.

Recommendation No. 50

We recommend that the new law should permit the registration of existing, unregistered, marriages and that the registration of such marriages be encouraged, but that it be not made compulsory.

159. Where a Kenya citizen marries abroad under foreign law, we think either party to the marriage should be entitled to register the marriage in Kenya, provided that the marriage would be recognized in Kenya (1).

Recommendation No. 51

We recommend that the law permit the registration of marriages contracted abroad under foreign law where either party is a Kenya citizen, provided that the marriage would be recognized by Kenya law.

BREACH OF PROMISE

160. Under the applied English law of contract, an action may be brought for damages for breach of a promise of marriage, and such damages are not limited to pecuniary loss but may include, among other factors, an element for injured feelings and may be exemplary. Such an action cannot be brought against a person who, at the time of the promise, was not of full age, because contracts made by minors are voidable. No action based on breach of promise to marry exists, so far as we are aware, in Islamic or in customary law.

161. It may be argued that such a right of action is not in the public interest because the fear of such proceedings may induce a person to proceed with a proposed marriage although he or she has come to doubt whether it will be a happy one. On the other hand, it seems only fair that a person who has incurred expenditure in reliance on a promise should be able to recover the amount of his loss if that promise is broken. Moreover, it may be argued that just as the possibility of such an action may discourage the breaking of an engagement, so also it may discourage impetuous and ill-considered proposals of marriage.

162. The conclusion we have reached is that the law should permit actions for damages for breach of promise of marriage but that the damages recoverable should be limited to pecuniary loss from actual expenditure.

163. We think that such a right of action should be equally available to men and women.

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(1) See Recommendation No. 45

Recommendation No. 52

We recommend that an action should lie for damages for the breach of a promise of marriage but that the quantum of damages should be limited to actual pecuniary loss resulting from wasted expenditure.

164. We have not thought it necessary to include in the above recommendation any reference to the recovery of dowry in the event of a marriage not taking place, because we think such dowry would be recoverable by an action for money had and received for a consideration which has failed, not by an action for breach of contract.

165. It would appear that under applied English law gifts may be recoverable on the breaking of an engagement. This applies only to valuable gifts and only where it can be implied that they were made conditionally on the marriage being performed, and a party in default cannot claim the return of gifts made by him or her. From a purely logical point of view, these principles have much to commend them, but when they come to be applied, it is apparent how much uncertainty there is in them. We are inclined to the view that, on balance, it would be better to provide that a gift is not recoverable, except where it can clearly be shown to have been made conditionally.

Recommendation No. 53

We recommend that gifts made in contemplation of marriage should not generally be recoverable, the only exception being where they are proved to have been made conditional on the marriage being performed.

166. It would seem that where the betrothal of young people has been arranged by their parents and subsequently one of the young people refuses to proceed with the marriage, the parent of the other has no right, arising out of the refusal, to claim damages (1). We think this is as it should be, if only for the reason that otherwise a parent might be tempted to bring pressure on his child to go through with the marriage and we think this would be wrong, since the basis of marriage should be the free consent of the parties.

167. On the other hand, we think it would be reasonable where one party to a proposed marriage is under age and the other of full age and the engagement is broken by the party of full age, to allow the parent or guardian of the person under age to recover actual, wasted, expenditure. The parent or guardian is not a party to the

(1) Vishram Dhanji v. Lalji Ruda (1957) E.A. 110

contract and would not normally have been acting as the agent of his child and so, in the absence of special provision, would have no locus standi, but he would be the person in such circumstances most likely to have incurred the expenditure. We see no reason why expenditure so wasted should not be recoverable as much as if it had been incurred by the minor party to the engagement.

Recommendation No. 54

> We recommend that the parent or guardian of a person under the age of eighteen be given the same right as that person to recover damages for actual expenditure wasted as the result of a breach of promise of marriage.

168. So far as an action lies in Kenya for breach of promise of marriage, jurisdiction is, as in any other action in contract, based on the amount claimed. We see no reason to suggest any change.

THE EFFECT OF MARRIAGE ON STATUS AND LEGAL RIGHTS AND OBLIGATIONS

PERSONAL RELATIONS

169. We have considered whether the law should define marital duties, such as the duty to co-habit, and consequential questions such as whether there should be a right to decide where the matrimonial home is to be. The argument in favour of so doing is not based on any wish to interfere in the privacy of ordinary domestic relations but to obviate uncertainty in the unhappy event of dispute. We have, however, come to the conclusion that this is a subject which it would be difficult to regulate and where any attempt to do so might cause more problems than it solved. We think it is generally accepted that the husband is the head of the household but that a successful marriage can only come from agreement and co-operation between husband and wife and that, in the main, marital relations must be based on ordinary good sense. We shall, of course, have to return to the matter of matrimonial duties to a limited extent and in a negative way when considering matrimonial reliefs.

Recommendation No. 55

> We recommend that marital duties be not defined by law.

170. We think that the provisions of the Penal Code relating to assaults apply to any serious blows inflicted by a husband on his wife or by a wife on her husband but we are aware that there is a belief, particularly in rural areas, that a husband has customarily the right to inflict corporal punishment on his wife and it might be argued that local custom brings the matter within the ambit of section 241 of the Code. We are aware, also, that the beating of wives is all too common, not infrequently with tragic consequences.

Recommendation No. 56.

> We recommend that the law provide expressly that no-one has the right to inflict corporal punishment on his or her spouse.

MAINTENANCE DURING MARRIAGE

171. We think the law should make it clear that, except where there has been separation by agreement or order of court, a husband is under a legal duty to maintain his wife or wives and, as a necessary consequence, that a wife should be able to obtain relief from the court in the form of an order for maintenance if her husband unreasonably refuses or neglects to provide for her. Such is, by statute (1), the present position in regard to monogamous marriages. Under Islamic law, also, a wife has generally a right to maintenance. Under most customary laws, a wife has the right to be maintained by her husband only so long as she is living with him, and not otherwise. As regards the standard or extent of such maintenance, we think the only test that can be applied is what is reasonable, having regard to the husband's means and way of life.

Recommendation No. 57

> We recommend that it be stated expressly in the new law that except where there has been a separation by agreement or by order of court, a husband is under a duty to maintain his wife or wives according to his means and station in life. We recommend further that where a husband unreasonably refuses or neglects to provide for his wife, the court should have power, on her application, to grant her an order for maintenance.

172. We considered also whether there should be a corresponding duty on the wife to maintain her husband, where the occasion arises. It would appear that no such duty is at present recognized by the law in Kenya. On a purely logical basis, such a duty would seem reasonable. On the other hand, to recommend it would be to ignore the fact that it is generally accepted, in all communities, that the primary responsibility for supporting the household rests upon the man. Our conclusion is that there should be a duty on the wife to support her husband in case of need but that that duty should be limited to circumstances where she has the means and her husband is incapacitated by mental or physical ill health. Such a duty would be meaningless unless it could be enforced, and we think the court should be empowered to make the appropriate maintenance orders.

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(1) Matrimonial Causes Act (Cap. 152) s. 26;
Subordinate Courts (Separation and Maintenance) Act (Cap. 153) s. 4(c)

Recommendation No. 58

> We recommend that there be a duty on a wife reasonably to provide for her husband where she has the means to do so and where he lacks means and is incapacitated by mental or physical ill-health. We recommend further that the court be given power to make orders to give effect to this recommendation.

173. Under section 239 of the Penal Code, it constitutes an offence if a person who is under a duty to provide for another "the necessaries of life", without reasonable excuse fails to do so, endangering the life or health of that person. Section 216 imposes a duty on every person "having charge of another who is unable by reason of age, sickness, unsoundness of mind, detention or any other cause to withdraw himself from such charge, and who is unable to provide himself with the necessaries of life" to provide such necessaries. It would seem that this would cover minor children and wives in certain circumstances. We think these provisions should be amended so as to make it clear that the duty referred to in section 239 includes the duty to maintain wives and children in all circumstances except, as regards wives, where there has been a separation, and, as regards children, where the custody of them has been given to someone else. Any duty of maintenance in those cases will, of course, be by agreement or by order of court.

Recommendation No. 59

> We recommend that section 239 of the Penal Code, or possibly section 216, be amended to provide that the offence created by section 239 includes failure to provide necessaries for a wife, except where there has been a separation by agreement or by order of court, and for children, except where custody of them has been given exclusively to some other person.

MARRIAGE AND THE LAW RELATING TO PROPERTY, CONTRACT AND BANKRUPTCY

174. We are not aware of any judicial decision on the question whether the English Married Women's Property Act, 1882, applies in Kenya under the Judicature Act (1) as a statute of general application. Some provisions of our law, notably section 29 of the Matrimonial Causes Act, might raise an inference that the Act does not apply, but others suggest the reverse. We are told that applications are sometimes made to the High Court under section 17

(1) No. 16 of 1967, s. 3(1)(c)

of the Act and that no such application has been challenged on the ground that the Act is not in force. In the absence of authority, we incline to the opinion that it does so apply, subject, of course, to the proviso that it applies

> "so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary."

The application of the Act would also, in appropriate cases, be subject to customary law.

175. The main effect of the Act, briefly, was to entitle married women to acquire and hold their own separate property and to confer on them the same right to contract and the same remedies for the protection of their property as if they were unmarried.

176. Moreover, the legislature of Kenya has expressly made married women capable of contracting, and suing and being sued in contract, by the Law of Contract Act (1).

177. The present position in Kenya appears to be that English law, so far as it applies, and Islamic law, both recognize the right of husband and wife to retain and to acquire separate property. The extent to which the Hindu law of property, with its conception of the joint family, applies in Kenya has never been judicially decided but even under Hindu law a married woman may retain certain individual property. The position under most customary laws is that a wife retains, as her separate property, any property she acquired before marriage, e.g. gifts from her own family, such as clothing, cooking utensils, household furniture or cattle. Under the traditional system, a wife would rarely acquire any property of her own after marriage, though the husband was required to allocate land or cattle to her for her use. This traditional pattern is quickly changing and some African wives (especially in the urban areas) are now self-earning. In present conditions, we understand that African wives do in many cases retain their own separate property acquired after marriage through their own efforts, although in normal cases the husband would be the overall manager of such property.

178. We have given much thought to the question whether, in the absence of agreement to the contrary, a husband and wife should on marriage each retain his or her separate property and whether property acquired after marriage should be individual or joint.

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(1) Cap. 23, s.2 and Schedule, applying certain provisions of the English Law Reform (Married Women and Tortfeasors) Act, 1935.

179. At first sight, there is much that is attractive in the idea of community of property between husband and wife, particularly as regards property acquired during the marriage. In urban society, both husband and wife may be wage-earners and even where the husband is the sole wage-earner, any savings may be largely attributable to the industry and prudence of the wife in running the household. In rural society, the wife usually does much of the work of the shamba. It seems fair, therefore, that the wife should share in the fruits.

180. There are, however, both practical and theoretical objections. In the first place, there is the question of management, which may be almost as important as that of ownership. If the husband alone administers the property, the theoretical equality of husband and wife is unreal. On the other hand, joint administration is difficult to work and may prove a source of discord. Secondly, judging by the experience of other countries, community of property seems to involve highly complex laws which are undesirable anywhere and particularly so in the present circumstances of Kenya. Thirdly, statutory community of property may lead to injustice where either the husband or the wife is lazy, extravagant or irresponsible. Fourthly, we think community of property would be unacceptable in some areas if it meant the possibility of land passing out of the control of the clan. Finally, and perhaps most serious, we think it would lead to great difficulties, and possibly great injustices, in polygamous households. For these reasons, but subject to the qualifications in the following paragraphs, we think that husband and wife should retain as his or her separate property whatever he or she owned at the time of the marriage or may acquire thereafter.

181. The first, and most obvious, qualification is that the parties should be free to make any other arrangement they may wish, whether for complete community of property, the joint ownership of specific property or otherwise.

182. Secondly, we think that the house which constitutes the matrimonial home should be treated in a special way, in that where it is owned by either the husband or the wife, he or she should not be permitted to alienate it without the consent of the other spouse.(1) This should apply as regards sales, gifts, mortgages and leases. We appreciate that it would be difficult wholly to prevent evasion but we think a substantial measure of protection could be afforded. We think the other

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(1) cf. The English Matrimonial Homes Act 1967

spouse should be regarded as having an interest in the property sufficient to support a caveat, under the Government Lands Act (1), the Registration of Titles Act (2) or the Land Titles Act (3), an objection to registration, under the Registration of Documents Act (4) or a caution, under the Registered Land Act (5) and also the right to apply to the court for an injunction to prevent, or impose conditions concerning, a proposed disposition. It would become the practice for requisitions on title to be directed to this subject and a purchaser might receive notice of a spouse's interest through inspection of the property or constructive notice through failure to inspect.

183. We considered whether special provision should be made regarding the contents of the matrimonial home, wedding presents, crops or cattle. We concluded in relation to all these that special provisions were undesirable: we think the complexities that any such provisions would entail and the practical difficulties that would result would outweigh any possible advantages.

184. We should perhaps make it clear that in these paragraphs we have been dealing with the ownership of property during the subsistence of marriage. We have not concerned ourselves with what should happen on death, because another Commission has been appointed (6) by His Excellency the President to consider the law of inheritance. The arrangements to be made on separation or divorce are considered later (7).

185. We would expressly add that we think that a husband and wife should have the same rights of action against each other for the protection or recovery of property as if they were not married but we do not favour any special procedure for such actions (8), because a cheap and summary procedure might lead to their proliferation, and hence to the disruption of marriages, which would not be in the public interest.

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(1) Cap. 280, s. 116

(2) Cap. 281, s. 57

(3) Cap. 282, s. 72

(4) Cap. 285, s. 23

(5) Cap. 300, s. 131

(6) L.N. No. 1095 of 1967.

(7) See paragraphs 269 and 338 et. seq.

(8) Such as the summary procedure provided by the Married Women's Property Act, 1882, s. 17.

Recommendation No. 60

> We recommend that it be stated expressly in the new law that married women are to be in exactly the same position as unmarried women and men as regards the right to acquire and hold property, the right to enter into contracts and the right to sue and the liability to be sued in matters relating to property or contract.

Recommendation No. 61

> We recommend that, in the absence of any agreement to the contrary between husband and wife, each should retain as his or her separate property whatever he or she owned before marriage or acquires after marriage. We recommend, however, that no husband or wife should, without the consent of the other, be permitted to sell, give away, mortgage, lease or otherwise dispose of the house they occupy as the matrimonial home or its curtillage. For the purposes of this last recommendation we consider that the spouse should be deemed to have an interest capable of protection by caveat or caution in the immovable property, arising at the time of the marriage or the acquisition of the property, whichever is the later.

186. Under the English rules of equity, which apply in Kenya under the Judicature Act, 1967, where property is purchased by a man in the name of his wife or intended wife, there is a rebuttable presumption that the property is to be hers.(1) Where, however, property is purchased in the name of the husband with money belonging to the wife, there is a rebuttable presumption of a resulting trust in favour of the wife. Where husband and wife have a joint bank account, they are presumed to be entitled to it in equal shares, and where investments are bought out of such an account in the name of the husband, he will be held to be a trustee for his wife as to a half share.(2) Similarly, where the purchase price for the

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(1) Silver v. Silver (1958) 1 All E.R. 523 (It may be noted that in this case the court reached its conclusion only with reluctance.)

(2) Jones v. Maynard (1951) Ch. 572.

matrimonial home is paid partly out of moneys belonging to the husband and partly out of moneys belonging to the wife: if the property is transferred into the name of the wife, she will be presumed entitled to it but if it is transferred into the name of the husband, or into their joint names, the court will lean towards holding that they are entitled in equal shares, even though their contributions were unequal, although in appropriate circumstances a pro rata division may be made (1).

187. In all these cases of rebuttable presumptions, the court looks to what were the intentions of the parties, although this tends to lead into the realm of fiction, because the question of ownership usually only arises in circumstances that the parties are unlikely to have anticipated, that is to say, the break-up of the marriage. Various factors may affect the decision whether to put any property in the name of either spouse or in their joint names, but in these days, the most likely factor influencing such a decision is the wish to minimise liability to taxation.

188. We think these presumptions of resulting trusts are unreal and inconsistent with the legal relationship of husband and wife which we are suggesting. We think there should be a general but rebuttable presumption that any property belongs to the person in whose name it stands and, where it is in joint names, that it is shared equally. It would be open to either party to satisfy the court that there had been some other intention, or that the person with the legal title to the property was in fact a trustee, or that the transfer of the property to the person with the legal title had been procured by fraud or duress. We qualify these remarks to a limited extent when dealing with the division of property on divorce (2).

Recommendation No. 62

> We recommend that the equitable rules presuming resulting trusts in favour of a wife be abolished. We recommend further that where, during the course of a marriage, property is purchased in the name of husband or wife the rebuttable presumption be that it is his or hers absolutely and where it is purchased in their joint names, that it is theirs in equal shares, and is held in joint tenancy.

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(1) Re Rogers' Question (1948) 1 All E.R. 328; Rimmer v. Rimmer (1952) 2 All E.R. 863; Cobb v. Cobb (1955) 2 All E.R. 696.

(2) See paragraphs 338 et. seq.

189. We note that while the Indian Transfer of Property Act, 1882, as applied to Kenya (1), contains (2) a general avoidance of conditions in transfers restraining alienation, there is a proviso to the effect that a transfer of property to or for the benefit of a woman (not being a Hindu, Muslim or Buddhist) may contain a provision preventing her during her marriage transferring or charging it. We think that such a restraint on alienation is out of date and in any case is of little significance in the circumstances of Kenya.

Recommendation No. 63

We recommend that the Indian Transfer of Property Act, 1882, as applied to Kenya, be amended by the repeal of the proviso to section 10.

190. If, as we recommend, the separate ownership of property by husband and wife is recognized, the extent to which either is regarded as the agent of the other may be important. This is, at present, governed by English law, by virtue of the Law of Contract Act. We do not propose to set out the general principles of the law of agency, under which, like any other persons, a man may be the agent of his wife or a woman of her husband, either by express appointment or by the implied agency known as an agency of estoppel. We must, however, examine briefly those rules of agency which are peculiar to the relationship of husband and wife, and enable a wife to pledge her husband's credit for necessaries suitable to the style in which they live.

191. Marriage itself gives the wife no such authority. If, however, husband and wife are living together, the fact of cohabitation raises a presumption of authority and, as regards the bare essentials of life, there may also be an agency of necessity (3). The presumption of authority can be negatived by the husband if he proves that he had expressly warned the tradesman not to supply goods on credit, that the wife already had enough of the goods in question, that the wife was receiving a sufficient allowance or had sufficient means, that he had expressly forbidden her to pledge his credit or that the goods bought were excessive in quantity or extravagant having regard to the husband's means. These defences, apart from the first, are good even though the facts were unknown to the tradesman at the time when he gave the credit.

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(1) By the East Africa Order in Council, 1897, Article 11(b).

(2) In section 10

(3) Miss Gray Ltd. v. Cathcart (1922) 38 T.L.R. 562.

192. Where husband and wife are not living together, the wife has normally no authority to pledge her husband's credit, but there are two exceptions to this. The first is where they have separated by mutual consent and there is an agreement for maintenance with which the husband has failed to comply (1). The second is where the husband has deserted his wife or by his misconduct compelled her to leave him, and in this case the presumption of authority is irrebuttable. In neither of these cases, however, has the wife any authority if she is living openly in adultery, and it is immaterial that this was not known to the tradesman.

193. These rules go back historically to the days when on marriage all a woman's property passed to her husband and she had no means of providing for herself. They are, therefore, to a certain extent obsolete and inconsistent with the newer relationship of husband and wife. On the other hand, it is probable that the majority of married women in Kenya have no private means and since the wife normally manages the household, it is natural and convenient that she should be able to use her husband's credit within reasonable limits.

194. The existing rules may seem somewhat unfair on the tradesman, who takes a risk when he gives credit to a married woman in the belief that he can recover from the husband, when in fact the husband is not liable for reasons not known to the tradesman. We see no satisfactory alternative, however, and the matter is not as serious as it might seem, because, where there is regular dealing with a tradesman, he would in any case normally be able to rely on an agency of estoppel. We would, however, exclude the two defences based on express prohibitions by the husband, because we do not think a husband who has failed to provide his wife with the bare necessaries of life should be entitled to prevent her from obtaining them on credit.

195. For these reasons, we do not think any substantial change in the law is required but we think that the rules of agency peculiar to the marital relationship should be set out in the new law and we think that in doing this it should be possible to make the position clearer and simpler than it is under English law, which is derived from case law built up over a very long period.

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(1) Beale v. Arabin (1877) 36 L.T. 249.

196. The rules with which we have been dealing relate only to the pledging of credit. It would appear, though it is not entirely certain, that similar rules apply to the borrowing of money for the purchase of necessaries. We think this should be so, and we think also that a wife should be entitled to use her husband's money or even to convert movable property to raise money for this purpose, where the circumstances demand it.

Recommendation No. 64

> We recommend that the law should provide that a wife is presumed to have authority to pledge her husband's credit, or to borrow money in his name, or to use his money, or to convert into money his movable property, so far as may be necessary for the purchase of necessaries for herself and the children of the marriage. We recommend that this presumption only lie when the husband and wife are living together, or when they have separated by mutual consent under an agreement providing for maintenance and the husband has failed to comply with that agreement, or when the husband has deserted his wife or by his misconduct has compelled her to leave him, and that no such presumption should lie where the wife is living openly in adultery. We recommend further that defences should be available to a husband as under the existing law but excluding those based on his express prohibitions, but should be set out in the proposed new law.

197. We note that married women are subject to the law of bankruptcy in the same way as unmarried women (1) and we think this is as it should be. We note also that the claims of relatives by consanguinity or affinity are postponed to those of other creditors (2): this would include a claim by a wife against the estate of her bankrupt husband and vice versa. Again, we see no reason to suggest any change.

Recommendation No. 65

> We recommend that no change be made in the law of bankruptcy so far as it concerns married women or the relationship of husband and wife.

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(1) Bankruptcy Act (Cap. 53), s. 117

(2) Cap. 53, s. 41

MARRIAGE AND THE LAW OF TORT

198. It would seem [1], although there is remarkably little authority on the subject, that the law of tort in Kenya is the law as it was in England on 12th August, 1897 [2], subject to the modifications introduced by statute [3]. On this basis, it would appear that, subject to certain exceptions, a married woman may be sued alone in tort, while her husband is liable to be sued jointly with her, but not separately, for any tort she commits during the marriage, subject to the qualification that his liability ceases on her death, or on a decree of divorce or judicial separation, if judgment has not already been given. A husband may, of course, also be liable for the torts of his wife when she is shown to have been acting as his agent. A husband cannot sue his wife for a tort committed during the marriage nor, with limited exceptions, can a wife sue her husband.

199. In customary law, liability for tort was closely connected with the vicarious liability of the clan or family for the torts of its members. Under this system, the head of the family would be liable for the wrongs of his wives and children, with a corresponding obligation on the clan members to contribute to the damages payable. We think that the traditional vicarious liability of the clan or family is fast dying out, and we believe that with the gradual loosening of the community feeling and the growth of individualism, liability in tort should be individual rather than communal. Furthermore, we feel that the customary notion that a wife remains, during the marriage, under the guardianship of her husband, is fast disappearing.

200. In England, the law was changed in 1935 [4], when a husband ceased to be liable for the torts of his wife merely by reason of being her husband. This change was not followed by the legislature of Kenya. We think that this change should now be made. We think it follows naturally from the change of approach of regarding husband and wife not as one person but as two persons in partnership, and that it accords with the trend of customary law.

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(1) Friedman v. Njoro Industries Ltd. (1954) 21 E.A.C.A. 172

(2) Judicature Act, 1967 (No. 16 of 1967) s. 3

(3) e.g. Law Reform Act, (Cap. 26); Fatal Accidents Act, (Cap. 32)

(4) Law Reform (Married Women and Tortfeasors) Act, 1935, s. 3

Recommendation No. 66

We recommend that the law be changed to provide that a husband should not, by reason only of being her husband, be liable for the torts of his wife.

201. A further change was made in the English law of tort in 1962, when it was provided (1) that husband and wife should have the like right of action against each other as if they were not married. We suggest that this change also should be adopted in Kenya.

Recommendation No. 67

We recommend that the law be changed to provide that a husband and a wife should have the like right of action in tort against each other as if they were not married.

202. Again, under English law (2), and therefore presumably under Kenya law, a person who by his negligence or breach of duty causes injury to or the death of a wife may be liable in damages to the husband for his loss of consortium, that is, for the loss of her company and assistance, but a wife has no equivalent right in respect of injury to her husband. The English courts have taken the view that this right to damages for loss of consortium enjoyed by a husband is an archaic survival from the days when a husband was regarded as having a proprietory interest in his wife, and they have refused to extend the right to wives. We think this position is not only anomalous but clearly wrong. We have considered whether to recommend extending the right to wives or abolishing it in the case of husbands. We incline to the latter, because we think the value of consortium is too indefinite to be assessed in damages.

Recommendation No. 68

We recommend that the law of tort as extended to Kenya be amended to exclude any claim to damages for loss of consortium arising out of a negligent act or breach of duty.

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(1) Law Reform (Husband and Wife) Act, 1962

(2) Best v. Samuel Fox & Co., Ltd. (1952) A.C. 716

ADULTERY AND ENTICEMENT

203. The Matrimonial Causes Act (1) gives a husband a right of action for damages against any person with whom his wife has committed adultery. Such a claim may, but need not, be included in a petition for divorce or judicial separation. Customary law also recognizes a right to damages for adultery committed by a married woman, but Islamic law does not, regarding it as exclusively a criminal matter.

204. We think that the law should recognize a right to damages for adultery and that it should relate to all communities alike. We base this both on the principle that where there is a wrong there should be a remedy and on the assumption that the liability to such proceedings will have some deterrent effect, however slight. We would, however, qualify this in two ways. First, we think that a husband should have no right to damages where he has consented to or connived at the adultery. Secondly, we think it should be a good defence to such an action for the defendant to prove that he did not know and had no reason to believe that the woman was married, with the onus of proving this on the defendant.

Recommendation No. 69

> We recommend that a husband should have a right of action for damages against a man with whom his wife has committed adultery, provided that he has not consented to or connived at that adultery. We recommend further that it should be a good defence to such an action if the defendant can satisfy the court that he did not know and had no reason to believe that the wife was a married woman.

205. Under English law (2) on which the Matrimonial Causes Act was based, which would probably be followed in Kenya (we are not aware of any decision on the question), such damages should be compensatory, not exemplary or punitive. Under customary law, the amount of the damages is commonly fixed. We think that the quantum of damages for adultery should be left to the discretion of the court. We appreciate how very difficult it is for a court to assess in terms of money the measure of such a wrong but in a society where there is a wide disparity of wealth, any fixed measure of damages must inevitably be unreal. We think the discretion of the court should,

(1) Cap. 152, s. 23

(2) Butterworth v. Butterworth (1920) P. 126; Pritchard v. Pritchard (1966) 3 All E.R. 601

however, be limited in two ways. First, we think the law should provide expressly that such damages are not to include any exemplary or punitive element; as will be seen below [1], we are recommending that adultery be made a criminal offence and if this is accepted, it would clearly be wrong if a person were liable to be punished twice for the same offence. Secondly, we think the court, in assessing damages, should be required to take into account any customs of the community to which the parties belong.

206. The Matrimonial Causes Act [2] empowers the court, in awarding damages, to direct that the whole or any part of them be settled for the benefit of children of the marriage or as a provision for the maintenance of the wife and we think that this power should be preserved.

Recommendation No. 70

> We recommend that the measure of damages for adultery be in the discretion of the court, subject to provisoes, first, that such damages are not to include any exemplary or punitive element and, secondly, that in assessing damages the court is to have regard to the relevant custom (if any) of the community to which the parties belong.

207. It may be added that in English law [3], and, therefore, presumably under the Matrimonial Causes Act, the fact that husband and wife are separated does not deprive the husband of his right to damages against anyone committing adultery with her, but it is a factor to be taken into account when damages are assessed and may result in the damages being reduced or even in no damages being awarded. We think this is reasonable and should be included in the new law.

Recommendation No. 71

> We recommend that the law provide that the fact that husband and wife are separated should not disentitle the husband from recovering damages for adultery but should be a factor to which the court should have regard in assessing those damages.

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(1) See Recommendation No. 75

(2) Cap. 152, s. 23(2)

(3) Gardner v. Gardner and Bamfield (1901) 17 T.L.R. 331

208. It would seem that at the present time a wife in Kenya has no right of action for damages against a woman with whom her husband has committed adultery. We see no logical reason for this distinction nor any grounds for treating adultery by a man any differently from adultery by a woman. It may well be that such actions are less likely to be brought, if only because the likelihood of recovering damages would usually be less, but we do not think that that is any ground for discrimination in the law.

Recommendation No. 72

> We recommend that a wife should have a right of action for damages against a woman with whom her husband has committed adultery and that the provisions of Recommendations 69, 70 and 71 should apply mutatis mutandis to such actions.

209. Under the Matrimonial Causes Act (1), a husband may include a claim to damages for adultery in a petition for judicial separation or divorce, making the person claimed against a co-respondent, or may bring a separate action for such damages. Under English law (2), and presumably under the Matrimonial Causes Act, where the claim is included in a petition for divorce and the petition is rejected, the claim to damages automatically fails with it.

210. We see no reason why a claim against a co-respondent to damages for adultery should not be included in a petition for divorce but we do not favour allowing such a claim in a petition for separation. When a petitioner goes to court for divorce, the process of attempted reconciliation will have failed, but where a petition is for separation there is still the hope of reconciliation. We think this hope of reconciliation might be prejudiced by the joining of a co-respondent.

211. In view of our recommendations (3) regarding the grounds for divorce, we see no reason to maintain the rule that a claim against a co-respondent fails if the petition is dismissed. There may well be cases where adultery is proved but the court is not satisfied that the marriage has irrevocably broken down. In such a case, the petition will be dismissed but there seems no reason why the claim to damages should not be disposed of and it is the general policy to avoid multiplicity of actions.

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(1) Cap. 152, s. 23

(2) Hyman v. Hyman and Goldman (1904) P. 403

(3) See Recommendations Nos. 114 - 115

Recommendation No. 73

We recommend that the law permit a claim against a co-respondent to damages for adultery to be included in a petition for divorce but not in a petition for separation. We recommend further that where such a claim is included in a petition and the petition is dismissed as against the respondent, the claim against the co-respondent should not necessarily fail.

212. Under the English law of tort, as applied to Kenya, (1) a husband or a wife has a right of action for damages against any person who induces his or her spouse to desert him or her. The "enticement" of a wife or husband may or may not be associated with adultery. It is a defence to such an action that the conduct of the plaintiff has been such as to justify his or her spouse in leaving him or her. No such action is known to Islamic law, but it is part of most customary laws of Kenya. We think that this right of action should be maintained and expressly applied to all communities. As in actions based on adultery, we think the damages should be in the discretion of the court.

Recommendation No. 74

We recommend that an action for damages for enticement of a husband or wife should continue to lie and should be expressed in the new law to apply to members of all communities. We recommend that it should be a good defence to such an action that the conduct of the plaintiff had been such as to justify or excuse his or her spouse leaving the matrimonial home. We recommend further that the assessment of damages be on the same principles as those set out in Recommendation No. 70

213. The survival of causes of action is dealt with in the Law Reform Act (2), which provides that causes of action based on enticement or adultery are not to survive the death of either party. We see no reason to recommend any change.

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(1) See paragraph 198

(2) Cap. 26, s. 2

214. Both adultery and enticement are regarded as criminal offences under the customary laws of all the tribes of Kenya (1), but neither is an offence under the Penal Code. Adultery is a serious criminal offence in Islamic law. We consider that both adultery and enticement should be made criminal offences, subject to the qualification that no prosecution should be instituted except on the complaint of the aggrieved spouse (2). We think this qualification is essential to avoid unwarranted interference in domestic matters. As in civil proceedings we see no reason to distinguish between adultery by men and women and we think the law should be the same for both. Equally, we see no reason to distinguish in any way between the parties to the act of adultery. We think it should be a good defence, where the charge is adultery, that it was consented to, connived at or condoned by the complainant or, where the charge is enticement, that the behaviour of the complainant had been such as to justify or excuse desertion by his or her spouse. In accordance with general principles, the onus should be on the prosecution to prove that one party to the adulterous act was married and that the other party was either married or knew or had reason to believe that the first party was married.

Recommendation No. 75

> We recommend that it be an offence to commit adultery, which offence might be defined to mean the act of sexual intercourse by a married person with a man or woman not her husband or his wife, as the case may be, or by an unmarried person with a man or woman whom she or he knows or has reason to believe to be married. We recommend that no prosecution be instituted for this offence except on the complaint of the aggrieved spouse. We recommend also that it be a good defence if it be shown that adultery has been consented to, connived at or condoned by the complainant.

(1) Cotran, Report on Customary Criminal Offences in Kenya, Government Printer, Nairobi, 1963

(2) This was recommended by Mr. E. Cotran, a Member of this Commission and our Secretary, in his Report on Customary Criminal Offences in Kenya referred to in footnote (1) above. It may also be observed that both adultery and enticement were criminal offences in Kenya until 1930 when the Indian Penal Code was replaced by the present code. So far as the Asian community is concerned it should be noted that both adultery and enticement are criminal offences under the present Indian Penal Code and the Pakistan Penal Code. Adultery and enticement are also criminal offences by the Penal Code of Uganda (see sections 121A and 150A).

Recommendation No. 76

> We recommend that it be an offence to entice or induce a husband or wife to leave his or her spouse. We recommend that no prosecution be instituted for this offence except on the complaint of the aggrieved spouse. We recommend also that it be a good defence if it be shown that the behaviour of the complainant has been such as to justify or excuse desertion by his or her spouse.

215. In order to avoid multiplicity of actions, we think a court convicting a person on a charge of adultery should have power at the same time to award damages to the person aggrieved but that the amount capable of being so awarded should be limited by statute and any amount so awarded should be taken into account in any subsequent civil action arising out of the same act. We would suggest one thousand shillings as the maximum amount to be awarded as compensation in criminal proceedings: we think that where a greater amount is claimed as damages, it should be by civil suit.

Recommendation No. 77

> We recommend that the court be given power on convicting any person of adultery to award damages to the person thereby aggrieved, such damages not to exceed the sum of one thousand shillings and to be taken into account in any subsequent civil proceedings arising out of the offence.

MARRIAGE AND CRIMINAL LIABILITY

216. The relationship of husband and wife affects criminal liability in various ways.

217. In the first place, coercion by her husband is a good defence for a woman charged with any offence other than treason or murder (1). We think this provision should be left unchanged, because we think that, even with the emancipation of women, the husband is likely to remain the dominant partner in the average home.

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(1) Penal Code (Cap. 63) s. 19

218. Also, neither a husband nor a wife is guilty of being an accessory after the fact to an offence committed by the other by reason of receiving or assisting her or him, to enable her or him to escape punishment [1]. Again, we think this provision should be left unchanged, because we do not think the law should impose a duty directly conflicting with the essential marital duty of husband and wife to succour and help each other.

Recommendation No. 78

> We recommend that no change be made in section 19 or 396(2) of the Penal Code.

219. On the question of conspiracy, we take a rather different view. This offence is dealt with in sections 393 - 395 of the Penal Code, which contain no express exception in favour of husband and wife. It has been held [2], however, that section 3 of the Code imports the English rule that a husband and wife cannot be guilty of conspiring together. This was based on the fiction that husband and wife were one person. Our recommendations generally are based on a different approach and we can see no reason in principle why a husband and wife who conspire to commit an offence should be exempt from liability, nor do we think a change in the law in this respect would do anything to weaken the matrimonial bond.

Recommendation No. 79

> We recommend that section 393 of the Penal Code be amended to provide that notwithstanding any English rule of interpretation to the contrary, a husband and wife may be found guilty of conspiracy.

220. The Penal Code does not expressly deal with the question whether one spouse can be guilty of stealing from the other, but it appears to be implicit in section 274 that such an offence does not lie. On the other hand, if, as we think, the English Married Women's Property Act, 1882, applies to Kenya [3], then it would appear that a husband may be charged with stealing from his wife if they are separated, but not in respect of any act done when they

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(1) Cap. 63, s. 396(2): we have not thought it necessary to set out or even fully to summarize the provisions of these sections.

(2) Laila Jhina Mawji v. The Queen (1956) 23 E.A.C.A. 609.

(3) See paragraph 174.

were living together, unless it were done in the course of deserting his wife [1]. We think the law on this subject should be made clear and we are inclined to recommend that there be no exception in the general law of theft in relation to husband and wife. We do not think there is any serious danger that this would lead to trivial and vexatious proceedings.

Recommendation No. 80

> We recommend that the Penal Code be amended to provide that a husband may be guilty of stealing from his wife and a wife from her husband and that the necessary consequential amendment be made to section 274.

MARRIAGE AND THE LAW OF EVIDENCE

i. Competence and Compellability

221. Under the Evidence Act [2], a husband is a competent witness in civil proceedings for or against his wife and vice versa. This provision was taken from the Indian Evidence Act, 1872, which was, itself, substantially based on English law. In England, and, apparently, in India, the general rule is that a witness who is competent is also compellable. This may also be true in Kenya, but it is unfortunate that the provisions relating to criminal proceedings, which do not follow the Indian Act, speak both of competence and compellability, from which the inference might be drawn that in civil proceedings the spouse is not compellable.

222. In criminal proceedings, the husband or wife of the person charged is a competent witness for the defence [3], but not for the prosecution. Here again there is unfortunately some doubt whether such a witness is also compellable. This provision, which first appeared (with limited application) in the Criminal Procedure Ordinance, 1913 [4], seems to have been taken from English law, and even in England the position is uncertain, although the general view there seems to be that, notwithstanding the general rule, such a witness is not compellable.

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(1) Married Women's Property Act, 1882, s. 12

(2) Cap. 80, s. 127(1)

(3) Cap. 80, s. 127(2)

(4) No. 6 of 1914, s. 355

223. In relation to certain specific offences, that is to say bigamy and offences under Part XV of the Penal Code (offences against morality), and generally in relation to offences based on acts or omissions against the person or property of a spouse or child, the spouse is both competent and compellable (1). We think this is proper, but we would suggest that in such cases, where there will almost inevitably be ill-will, an accused person should not be convicted on the uncorroborated evidence of his or her spouse.

224. The Matrimonial Causes Act also deals with the competence of husband and wife as witnesses, but only in relation to proceedings instituted in consequence of adultery (2), and provides that they are competent witnesses. The relevant section was taken virtually word for word from an English statute (3), on which there is a judicial decision (4) that husband and wife are not only competent but compellable (though privileged not to answer certain questions), and it is most likely that this would be followed by the Kenya courts. Incidentally, we think it unfortunate that the wording of the English statute was followed, because in its context it tends to cast a doubt on the competence of husband and wife in other matrimonial proceedings.

225. We think that all doubt regarding the competence and compellability of husband and wife as witnesses should be removed. We think the rule in civil cases should be that the husbands and wives of the parties should be competent and compellable witnesses for either side. In criminal cases generally, we think it right that the husband or wife of the accused person should be incompetent to give evidence for the prosecution but we see no reason why he or she should not be compellable as well as competent to give evidence for the defence. We would leave unchanged the special provisions making husband and wife competent and compellable for prosecution or defence in regard to particular offences, to which adultery and enticement will have to be added if they are to be made criminal offences although the question of compellability will be of no significance if, as we recommend, no prosecution may be instituted except on the complaint of the spouse (5).

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(1) Cap. 80, s. 127(3)

(2) Cap. 152, s. 36

(3) Supreme Court of Judicature (Consolidation) Act, 1925, s. 198

(4) Tilley v. Tilley (1948) 2 All E.R. 1113

(5) See Recommendations 75 and 76

Recommendation No. 81

> We recommend that section 127 of the Evidence Act be amended to provide that the husbands and wives of the parties are competent and compellable witnesses for any party in any civil proceedings; that in criminal proceedings generally the husband or wife of the accused person is not competent to give evidence for the prosecution but is competent and compellable as a witness for the defence; and that as regards certain specified offences, as at present, to which adultery and enticement should be added, a husband or wife should be competent and compellable, but that a conviction should not be based on his or her evidence without corroboration. We recommend also that this subject be not dealt with in the proposed new law, but exclusively in the Evidence Act.

226. Incidentally, the definitions of "husband" and "wife" in sub-section (4) of section 127 of the Evidence Act will require amendment to accord with the proposed new law. This and other consequential amendments appear in the Second Schedule of the draft Bill attached to this Report (Appendix VIII) and do not, we think, call for any special comment.

ii. Privilege

227. Under the Evidence Act (1), no-one can be compelled, except in certain special circumstances, to disclose any communication made to him by his wife, or to her by her husband, during their marriage. The purpose of this rule was to allow complete confidence between husband and wife and we recommend that it be left unchanged.

Recommendation No. 82

> We recommend that the privilege for communications between spouses be preserved.

228. Under the Matrimonial Causes Act (2), no witness in proceedings instituted in consequence of adultery may be asked any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery. This rule is derived from

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(1) Cap. 80, s. 130

(2) Cap. 152, s. 36

English law and there would seem no good reason for retaining it. It seems illogical that the rule applies only in proceedings "instituted in consequence of adultery" and equally illogical that there should be a privilege for adultery which does not exist for other torts or crimes.

Recommendation No. 83

> We recommend that the privilege contained in section 36 of the Matrimonial Causes Act be abolished.

229. Section 37 of the Matrimonial Causes Act, while permitting a husband or a wife to give evidence as to whether or not sexual intercourse took place between them during any period, provides that they shall not be compelled to give such evidence. We think this privilege should be continued, although we think it might perhaps more appropriately be included in the Evidence Act.

Recommendation No. 84

> We recommend that the privilege contained in section 37 of the Matrimonial Causes Act be retained.

iii. Presumptions

230. Under section 118 of the Evidence Act, there is a conclusive presumption of legitimacy where a child is born during a marriage or, the mother remaining unmarried, within two hundred and eighty days of its dissolution, unless non-access is proved. This section was derived from the Indian Evidence Act, 1872. Since that Act was passed, considerable scientific progress has been made and it is now possible in some cases to prove by blood tests that the husband of a woman could not have been the father of her child.(1) In these circumstances, we think the presumption of legitimacy should be a rebuttable one.

Recommendation No. 85

> We recommend that section 118 of the Evidence Act be amended to make the presumption of legitimacy rebuttable.

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(1) See Re L. (1967) 2 All E.R. 1110; (1968) 1 All E.R. 20; F. v. F. (1968) 1 All E.R. 242

231. Section 113 and 114 of the Evidence Act deal with the burden of proof when the question arises whether a person is alive or dead. Section 113 provides that where a person is shown to have been alive within the last thirty years, the burden of proof is on any person who alleges that he is dead. This is subject to section 114, which provides that where none of the persons who would naturally have heard from the missing person has heard of him for seven years, the burden of proof is on the person who alleges that he is alive. There is also a presumption, under the Matrimonial Causes Act [1], that a petitioner's spouse is dead if he or she has been absent from the petitioner for at least seven years and the petitioner has no reason to believe that he or she has been alive within that time. Apart from these specific provisions, we have no doubt that the court would use its more general powers under the Evidence Act, to be satisfied by circumstantial evidence of death after a much shorter period, where there is evidence that points sufficiently strongly towards it, as, for example, where a ship has been lost at sea. We think these provisions are unnecessarily complex and confusing, and although it might appear that a decree presuming death can be obtained more easily in matrimonial than in other proceedings, we think that in practice the court's requirements would be the same. We think that section 119 of the Evidence Act sufficiently empowers the court to make a finding of death where it is satisfied that the evidence points sufficiently strongly towards it, and we suggest that all that is required is a single provision raising a rebuttable presumption of death where a person has not been heard of for seven years.

Recommendation No. 86

> We recommend that sections 113 and 114 of the Evidence Act and section 22(2) of the Matrimonial Causes Act be replaced by a single provision raising a rebuttable presumption of death where a person has not been heard of for seven years by those who might be expected to have heard from him if he were alive.

232. As we have said earlier, [2] we do not recommend that the validity of a marriage should depend on registration, but we do think that registration should raise a presumption of validity.

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(1) Cap. 152, s. 22(2)

(2) See Recommendation No. 48

Recommendation No. 87

We recommend that it be provided that in any proceedings, a marriage registered under the provisions of the new law, or any previous law requiring registration, is to be presumed valid, unless the contrary is proved.

233. Finally, where people have lived together as husband and wife, we think there should be a general presumption of marriage. Some such presumption exists in various systems of law (1) and is, to some extent, implicit in section 119 of the Evidence Act. We think, however, that something more explicit is desirable. We think a reasonable basis would be co-habitation for at least a year, in such circumstances as to have acquired the reputation of being husband and wife. Such a presumption would, of course, be rebuttable, and should in any case have no application in proceedings based on alleged bigamy, adultery or enticement, when the marriage should be strictly proved.

Recommendation No. 88

We recommend that it be provided that where a man and a woman have co-habited for one year or upwards, in such circumstances as to have acquired the reputation of being husband and wife, it is to be presumed that they were married, unless the contrary is proved. We recommend, however, that no such presumption should be drawn in criminal proceedings on a charge of bigamy, adultery or enticement or in civil proceedings for damages for adultery or enticement.

CITIZENSHIP AND DOMICIL

234. As we stated earlier (2), the effect of marriage on a woman's citizenship is governed by the Constitution. We see no reason to recommend any change and we are not including any provision on this subject in our draft Bill as we think duplication undesirable.

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(1) As to the presumption in English law, see Re Taplin (1937) 3 All E.R. 105

(2) See paragraph 18

235. It would appear from the Matrimonial Causes Act [1], and it has always been accepted in matrimonial proceedings arising out of monogamous marriages, that the law of domicil in Kenya is the same as that in England [2], although a somewhat different law has limited application in matters of succession under the applied Indian Succession Act, 1865 [3]. Put very simply, a person acquires at birth the domicil of his father. A person of full age, other than a married woman, may change his or her domicil by going to live in another country with the intention of making it his or her permanent home. A woman on marriage takes the domicil of her husband and so long as the marriage subsists, she has no power to change her domicil. The domicil of a married woman changes automatically with that of her husband and that of a child normally changes with that of his father.

236. The principle that a married woman's domicil must be the same as that of her husband is another relic of the old idea of husband and wife as one person. In the ordinary way, of course, since people marry with the intention of living together, it is reasonable that their domicil should be the same. The principle may, however, lead to absurd results, as for example where a husband deserts his wife and goes to live at the opposite side of the earth: the result may be that the wife is held to be domiciled in a country she has never seen and never intends even to visit. In the leading case on this subject [4], it was said not only that there was no authority for holding that husband and wife could have distinct domicils, but that to permit it would produce extraordinary consequences, in that proceedings for dissolution of the marriage might then be brought in different jurisdictions. From this point of view, the situation has changed radically, since today a woman may [5] petition for divorce on the basis of residence as opposed to domicil and therefore proceedings may now be brought in different jurisdictions. From the more general point of view, we think the modern conception of marriage is one of individuals retaining their individuality, while co-operating in a particular kind of partnership, rather than the more mystical concept of merger into a single legal personality. We see no reason why, in the appropriate circumstances, husband and wife should not have different domicils [6].

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(1) Cap. 152, s. 3

(2) e.g. Field v. Field (1964) E.A. 43

(3) Act X of 1865, ss 5 - 19

(4) Lord Advocate v. Jaffrey (1921) 1 A.C. 146

(5) e.g. Cap. 152, s. 5

(6) It may be observed that this was recommended in England by the Royal Commission on Marriage and Divorce 1956, Cmnd. 9678.

Recommendation No. 89

> We recommend that the law of Kenya be changed so as to recognize that husband and wife may have separate domicils. We suggest that a woman should on marriage take the domicil of her husband but that if he subsequently adopts a new domicil of choice, her domicil should not necessarily change. We suggest also that a married woman who is living apart from her husband should be capable of changing her domicil.

237. In this connection, at the risk of going outside our terms of reference, we think it proper to recommend the enactment of a local statute defining the law of domicil for Kenya. In the first place, there is, we think, at least an element of uncertainty as to what law applies. Secondly, it is unsatisfactory to have to refer to the law of another country. Thirdly, the English law of domicil is itself uncertain and being case law, is always liable to change. Indeed, since the English law that applies generally in Kenya is that of 1897, there may well already have been divergence. If the law is to be changed in the manner we have suggested in the preceding paragraph, we think the opportunity should be taken to restate the whole law.

238. One respect in which Kenya law probably differs from English law is on the question whether an expressed intention to leave a country in certain circumstances negatives the adoption of a domicil of choice. (1)

239. Under English law, if a person abandons a domicil of choice, the abandonment operates to revive his domicil of origin. In this respect, we understand that English law differs from that of most European countries and of the United States and this is one respect in which the Indian Succession Act departs from English law. We think this doctrine of the revival of the domicil of origin is illogical and we would not follow it.

Recommendation No. 90

> We recommend the enactment of a statute setting out the law of domicil for Kenya and we append, as Appendix VI a draft Bill for this purpose.

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(1) Thornhill v. Thornhill (1965) E.A. 268, a Court of Appeal decision from Uganda which would probably be followed in Kenya; contrast Moorhouse v. Lord (1863) 10 H.L.C. 272.

MARRIAGE, MINORITY AND GUARDIANSHIP

240. It would seem that generally speaking a person does not cease to be under incapacity as a result of marrying below the age of majority, although there are statutory exceptions to this. For example, under the Marriage Act (1) a widow or widower does not need consent to marry although under the age of twenty-one years: we have already (2) recommended that this be changed. The definition of "child" in the Immigration Act, 1967 (3), excludes a married woman; but this we think not unreasonable because the Act is concerned with dependency rather than with incapacity. There may be exceptions under applied English law, and it is normal conveyancing practice in preparing wills and settlements, when dealing with the acquiring of vested rights, to refer to persons attaining twenty-one years of age or "being female marrying under that age." We think that as a general rule marriage should not change the incapacity of minority, but we recognize that there are matters which call for special consideration and which should, we think, be statutory exceptions to a general rule.

241. The age of majority varies in Kenya according to the community to which the individual belongs. Under the Age of Majority Act (4), Europeans attain majority at twenty-one and non-European non-Africans at eighteen, except where a guardian has been appointed by a court. The Act does not apply to Africans for whom there is no statutory age of majority. Under customary law, majority was associated with circumcision ceremonies.

242. For the purposes of the law of Kenya, we think there should be one age of majority for everyone, regardless of sex or race. We appreciate that it is not always easy to prove age, but this difficulty will gradually diminish as registration of births becomes general. We think the appropriate age is eighteen years. If this is accepted, minor consequential amendments will be required to various statutes. (5)

243. Minority is mainly important in relation to the capacity to contract, the capacity to make a will, and the institution and defending of suits. Specific ages are, of course, appointed by particular statutes as determining capacity and responsibility for the purposes of these statutes, and these would not be affected by a general change in the law of majority. In this connection, consideration might be given to amending Chapter 1 of the Constitution of Kenya and the Kenya Citizenship Act by substituting 18 for 21 years.

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(1) Cap. 150, s. 19

(2) See paragraph 102

(3) No. 25 of 1967, s. 2(1)

(4) Cap. 33

(5) See Recommendation No. 152

Recommendation No. 91

> We recommend that the Age of Majority Act be repealed and replaced by an Act making the age of majority eighteen years for everyone regardless of age or sex. We recommend further that the incapacity resulting from minority should not be affected by marriage, save as expressly provided in any written law. We append as Appendix VII, a draft Bill for this purpose.

244. Under the Guardianship of Infants Act (1), the term "infant" is defined to mean a person under twenty-one years of age who is not and has not been married. This appears to produce the anomalous position that there may be a minor who lacks the capacity to contract generally but for whom a guardian (other than a guardian ad litem (2)) cannot be appointed by reason of his or her being married. We suggest that the Act be amended by making the term "infant" apply to any person under the age of eighteen, whether or not married. At the same time, it will, we think, be necessary to provide for the appointment of guardians for persons over the age of eighteen where they are under any special statutory incapacity (3).

Recommendation No. 92

> We recommend that the Guardianship of Infants Act be amended to make references to infants apply to all persons under eighteen years of age (whether or not married) and to empower the court to appoint guardians for persons over that age where they are under any statutory incapacity.

THE STATUS OF WIDOWS

245. Under the customary law of most tribes in Kenya, the death of a husband does not automatically terminate a marriage. Traditionally, the widow could not remarry an outsider, and if she cohabited with such a person, no matter how long after the death of her husband, any children resulting from such a union were regarded as the children of her deceased husband or his family.

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(1) Cap. 144

(2) Civil Procedure (Revised) Rules, 1948, O.IX, r. 2 and O.XXXI.

(3) e.g. The Constitution of Kenya, s. 2(1)

246. On the other hand, all customary laws recognized institutions, intended traditionally to protect the widow or to make use of her capacity to produce more children. Some tribes recognize what are known as "levirate unions", by which the widow cohabits with a brother or other relative of her deceased husband, any children resulting from the union being regarded as those of the deceased husband. Other tribes recognize a similar form of union, sometimes referred to as "widow-inheritance", which again involves cohabitation with some member of her late husband's family, but with the difference that the children of the union are regarded as those of the real father. Finally, certain tribes provide that a widow who is childless and whose late husband has left her enough property should be able to "marry" a wife by the payment of dowry to her father, and by appointing a man to cohabit with this "wife" in order to produce children, who will be regarded as those of the widow [1].

247. Many of these customs are gradually dying out, and their traditional significance of providing protection or security for the widow has gone today. We think that in any case they are wrong and should be changed. Some people may, of their own free will, choose to follow them and we would not seek to prevent this by legislation. We think, however, that marriage, as a civil status, should end on death, that widows should be free to re-marry, if they so wish, and that no widow should be forced against her will to live with anyone. The last of these suggestions has, since 1931, applied [2] to African women married under the Marriage Act, the Native Christian Marriage Ordinance (now repealed) or the African Christian Marriage and Divorce Act. We think all these principles should be made to apply generally.

Recommendation No. 93

> We recommend that the new law should provide that the marriage status ends on the death of either party to the marriage. We recommend also that the law provide that a widow has the right to decide where she will live and to remarry or not as she chooses.

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(1) This institution is commonly known as "woman-to-woman" marriage

(2) African Christian Marriage and Divorce Act (Cap. 151) s. 13

MATRIMONIAL CAUSES

JURISDICTION OF COURTS

248. We have already set out (1) the existing jurisdiction in matrimonial causes. We think it wrong that jurisdiction should vary as greatly as it does according to the nature of the marriage ceremony, regardless of the means of the parties or the gravity of the proceedings. Matrimonial causes often present difficult problems, which call for experience as well as legal knowledge. On the other hand, it would be unrealistic and unfair to require the ordinary people of Kenya, many of whom have very limited means and some of whom live in remote places, to employ advocates and to take proceedings in the High Court. After weighing these considerations, we think it would be best if concurrent jurisdiction in matrimonial causes and all other matters dealt with in this Report (other than criminal offences) were given to the High Court and to magistrates' courts of the first class. The only exception that we would make is where the marriage was contracted in Islamic form, when we think there should be concurrent jurisdiction in the High Court and in kadhis' courts. This would mean some extension of the jurisdiction of kadhis' courts, which at present only administer Islamic law. Formerly, however, kadhis' courts had magisterial powers outside Islamic law (2) and we see no reason why this should necessarily present any serious difficulty.

Recommendation No. 94

We recommend that concurrent jurisdiction in all matrimonial causes and matters be conferred:-

(a) where the parties were married in Islamic form, on the High Court and on kadhis' courts; and

(b) in all other cases, on the High Court and on magistrates' courts of the first class,

with appropriate provisions for transfer and appeal.

249. We are, however, advised that at the present time the number of magistrates' courts of the first class is so limited that they would be unable to dispose of the business likely to result from the foregoing recommendation and that people in the more remote areas would have to travel unreasonably great distances in order to

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(1) See paragraph 45

(2) Under the Courts Act (Cap. 10), now repealed

seek relief from those courts. In these circumstances, we have no alternative but to recommend, reluctantly, that as a temporary measure the Chief Justice be given a wide discretion to confer jurisdiction on any magistrates personally. This would enable him to make only such appointments as from time to time he considered necessary and to select those magistrates whose qualities and experience showed them to be most suitable. We think this preferable to conferring jurisdiction on subordinate courts as a whole. In this connection, without seeking in any way to fetter his discretion, we would suggest that the Chief Justice might consider restricting such appointments, as far as practicable, to magistrates who had attended a special course which it might be possible to arrange at the Kenya Institute of Administration.

Recommendation No. 95

> We recommend, with reluctance, that the Chief Justice be given power to confer jurisdiction in matrimonial causes on any magistrate personally.

250. It has been held that the High Court has power to make declaratory judgments in proceedings under the Matrimonial Causes Act and in respect of Islamic marriages (1). Both the High Court and subordinate courts have power under Order II, rule 7, of the Civil Procedure (Revised) Rules, 1948, to give declaratory judgments in suits. So far as we are aware, it has never been decided whether kadhis' courts have such a power. We think it desirable to make it clear beyond all doubt that all courts may make declaratory judgments in matrimonial matters, because of the great importance of certainty in all matters of personal status.

Recommendation No. 96

> We recommend that the new law contain an express provision that in any proceeding under the new law the court shall have power to make a declaratory judgment or order.

251. It will be necessary to make provision for the transfer of proceedings initiated in a magistrate's court or a kadhi's court either to another subordinate court or to the High Court. We think it desirable to empower subordinate courts to state cases to the High Court. It will be necessary also to provide for appeals. In this

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(1) Mussa Ayoob v. Maleksultan Ayoob C.A. No. 34/67 (not yet reported)

connection, we think that all appeals in matrimonial causes from subordinate courts, of whatever class, should be direct to the High Court. We think, also, that there should be a right of appeal from the High Court, whether in its original or in its appellate jurisdiction, to the Court of Appeal for East Africa.

Recommendation No. 97

We recommend that the new law provide -

(a) for the transfer of proceedings initiated in subordinate courts;

(b) for the stating of cases by subordinate courts to the High Court; and

(c) for appeals from all subordinate courts direct to the High Court and for appeals from the High Court to the Court of Appeal for East Africa.

MARRIAGE TRIBUNALS AND OTHER CONCILIATORY BODIES

252. It may be convenient at this point to consider what conciliatory bodies should be established or recognized. In the first place, we think there should be marriage tribunals set up at either divisional or locational level. We suggest that the chairman of each tribunal should be nominated by the District Commissioner and that the members of the tribunal should be drawn from a panel also nominated by the District Commissioner. We think tribunals should be small: we suggest a minimum of three members and a maximum of five, one of whom should, whenever possible, be a social worker. In choosing the members of the panel, we think the aim should be to find people of experience who command local respect as well as people with training or experience in social work. We do not think it necessary that they should have any legal knowledge, because they will be concerned with human, not legal, problems, nor would it be necessary for them to be highly educated. We think such service must be entirely voluntary, partly because the cost of a paid service would, we think, impose an excessive strain on the country in its present state of development and partly because we think a paid service might attract people not really suited to this kind of work. We hope such a service would attract responsible people and that it would be regarded as a matter of honour to be selected for membership of a tribunal. It cannot, we think, be too strongly emphasised that these bodies must, if they are to serve any useful purpose, be sympathetic, not autocratic, in their approach.

Recommendation No. 98

We recommend that a marriage tribunal be set up for each division or location, consisting of a chairman and a panel of members nominated by the District Commissioner. We recommend that this be a voluntary service. We recommend that not less than three nor more than five members, including the chairman, sit at any time, and that, whenever possible, one of these be a social worker.

253. We do not consider that advocates should be permitted to appear before marriage tribunals. We do not think it necessary, since, as we have said, these tribunals will not be concerned with questions of law, and we think the presence of advocates would tend to introduce formality into what should be informal proceedings. Obviously, some people will need help, particularly young women who are married to men older than themselves, but we think this help should come from older members of their families or clans, and we would not allow other representatives except by leave of the tribunal.

Recommendation No. 99

We recommend that -

(a) advocates be not permitted to appear before marriage tribunals; and

(b) that no party should be represented by anyone other than a member of his or her family or clan except by leave of the tribunals.

254. We think the duties of marriage tribunals should be three. First, they should be empowered to decide objections raised by wives under polygamous marriages to the taking by their husbands of other wives (1). Secondly, they should be empowered to act as conciliators on the application of a deserted spouse seeking the return of her husband or his wife, as the case may be (2). Thirdly, we think they should be conciliatory bodies for the purposes of divorce (3). There is no reason why marriage tribunals should not, in time, take on other functions, such as pre-marital advice to young people. We think, however, that it would be unwise to over-burden these tribunals, particularly in their early stages, and we would stress that, in our view, their main function should be attempted reconciliation in the hope of obviating divorce.

(1) See paragraph 89

(2) See Recommendation No. 102

(3) See Recommendation No. 113

Recommendation No. 100

We recommend that initially the duties of marriage tribunals should be three:-

(a) dealing with objections by wives married under polygamous marriages to the taking by their husbands of other wives;

(b) attempting reconciliation in cases of desertion;

(c) attempting reconciliation where divorce is contemplated.

255. Although we have suggested that reconciliation to obviate divorce should be the principal duty of marriage tribunals, we do not suggest that they alone should perform this function. We think that many people may prefer to go to tribunals of their own choice, particularly religious organizations and councils of local elders. These would usually function at, or nearer to, village level. We see no objection to people choosing their own tribunals and much to commend it, because we think that where both parties freely choose to go before a tribunal, it will have the best possible opportunity of effecting a reconciliation. There are other bodies, notably the Family Service Council of Kenya, that might also assist. The Council is a young body and is at present devoted to the prevention of broken homes by education and guidance. It will be for consideration in the future whether it should be given a statutory function but for the moment we think it should merely be recognized as one of the conciliatory bodies available to married couples in need of help. If the parties are unable to agree on a tribunal, they should then have to go before a marriage tribunal.

256. Where divorce is concerned, we are recommending (1) that reconciliation proceedings should in every case precede the filing of a petition and this requirement would be ineffectual unless reference had to be made to some responsible body. We think certain classes of body might automatically qualify for this purpose: these would be, in addition to the marriage tribunals, councils set up by the religions authorized by the Minister to celebrate marriage (2) and also councils of elders recognized as arbitrators in customary or Islamic communities. Any other bodies should, we think, require the specific recognition of the Minister as conciliatory bodies for purposes of divorce.

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(1) See Recommendation No. 113

(2) See Recommendation No. 37

Recommendation No. 101

We recommend that the only bodies to be recognized as competent to conduct conciliation proceedings before divorce be -

(a) marriage tribunals;

(b) councils set up by religions authorized to celebrate marriage;

(c) councils of elders recognized as arbitrators in customary or Islamic communities; and

(d) such other bodies as may be expressly approved for that purpose by the Minister.

DESERTION AND RESTITUTION OF CONJUGAL RIGHTS

257. Prior to 1884 (1), the courts in England had power to compel a wife to live with her husband or vice versa. Since that date, however, a decree for the restitution of conjugal rights may be made but cannot, as such, be enforced. This position has been reproduced in Kenya in the Matrimonial Causes Act, and the only consequences of such a decree are, that if it is not complied with, the petitioner may found a petition for judicial separation on the default, and, where the decree is obtained by the wife, that an order for maintenance may be made in her favour (2).

258. There is, so far as we are aware, no action under Islamic law equivalent to the petition for restitution of conjugal rights, although such a provision is included in the Constitution of the Shia Imami Ismailis in Africa (3), with disciplinary action as the sanction. Under customary law, a wife who has left her husband may be compelled to return to him, usually after attempts at conciliation by the families of the parties and the local elders.

259. We think it is undesirable for the law to contain provision for compelling one person to live with another, because any effective sanction would be harmful to the marriage which it is desired to preserve. Any attempt at such enforcement is likely to be ineffectual and would probably aggravate an already unhappy situation. We think

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(1) Matrimonial Causes Act, 1884, s. 2

(2) Cap. 152, ss 17, 20 and 21

(3) Articles 294 - 297

this is a sphere where more good can be achieved by religious leaders and by elders, and where recourse might usefully be had to a marriage tribunal. The function of these tribunals would be to reconcile the parties wherever it is possible, not to compel them to live together. We would, therefore, abolish the decree for restitution of conjugal rights. We are recommending alternative provisions regarding maintenance (1) and these would enable an order to be made in the case of wilful desertion.

Recommendation No. 102

> We recommend that the court should cease to have the power to order a husband to live with his wife or a wife to live with her husband, and that the only course open to an aggrieved party be a reference to a marriage tribunal, whose only power should be to attempt reconciliation.

260. We note that this proposal, if accepted, will entail the amendment of Order XXI, rule 28 of the Civil Procedure (Revised) Rules, 1948, and the revocation of rule 29.

261. We think also that a deserted wife should have the right to remain in the matrimonial home, even where it is owned by the husband alone, subject, of course, to the rights of third parties lawfully acquired (2).

Recommendation No. 103

> We recommend that a deserted wife should have the right to remain in the matrimonial home, subject to any rights, lawfully acquired, of third parties.

SEPARATION

262. So far as monogamous marriages are concerned, the parties may legally separate, while remaining married, in any of three ways:-

(a) by agreement; or

(b) by obtaining a separation order under the Subordinate Courts (Separation and Maintenance) Act; or

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(1) See Recommendation No. 130

(2) See Recommendation No. 61

(c) by obtaining a decree of judicial separation under the Matrimonial Causes Act.

It would appear that agreements to live apart are governed by English law, as applied by the Law of Contract Act, and are, in general, valid and enforceable, although certain provisions, even though embodied in a deed, may be over-ridden by the court in subsequent proceedings. We do not think it necessary to set out in detail the highly technical rules relating to such agreements.

263. A separation order may be made on the application of a wife where the husband has been guilty of desertion, cruelty or other offences or is an habitual drunkard or drug-taker, but is not generally available to a wife who has been guilty of adultery. It relieves the wife of the duty to cohabit with her husband and may include provision for maintenance and the custody of children. Separation orders, apart from certain orders made on the application of the Attorney-General, may only be made if one of the parties has his or her usual residence in Kenya.

264. Decrees of judicial separation may be made on the application of either husband or wife on grounds which include the grounds for divorce and also failure to comply with a decree for restitution of conjugal rights. The reliefs that may be ordered are substantially similar to those available on a separation order. Applications for decrees of judicial separation may be made:-

(i) where either party has his or her usual residence in Kenya;

(ii) if the marriage was solemnized in Kenya.

265. Separation orders are in essence protection orders and the proceedings are of a quasi-criminal nature. Proceedings for judicial separation are entirely civil, and while not dissolving the marriage, have the effect of altering the wife's status, (1) a subject which is not mentioned in the Subordinate Courts (Separation and Maintenance) Act. Generally speaking, a decree for judicial separation, while leaving the marriage technically intact, puts the parties in much the same position as if they had been divorced, except, of course, that neither can re-marry. The main reasons for applying for judicial separation rather than divorce are:-

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(1) Cap. 152, s. 18(1)(b)

(a) where the applicant's religion does not permit divorce;

(b) where the applicant wishes to secure his or her position but still hopes for reconciliation; and

(c) where the applicant wishes to bring an end to the marriage but is determined to prevent the re-marriage of his or her spouse.

266. It should be remarked here that while the Matrimonial Causes Act applies to Hindus, there are certain special provisions relating to them, including a provision that desertion for two years is a ground for judicial separation.

267. There are no statutory provisions relating to separation where the marriage was contracted under Islamic or customary law, and Islamic law contains no provision for separation. Under customary law, the distinction between separation and divorce is not clearly defined. The general view is that, traditionally, it was separation and not divorce that was recognized, because it is not unusual when the children of a broken marriage are grown up for them to bring their mother back and provide her with a hut in the family homestead. The question of re-marriage does not arise where the husband is concerned, since all customary marriages are potentially polygamous. The customs of most tribes permit the re-marriage of the wife if the dowry is repaid and this may be regarded as the factor which distinguishes divorce from separation.

268. We think that separation is a subject in relation to which the law should be the same for everyone, regardless of the kind of marriage or the manner in which it was contracted.

269. We think the parties to a marriage should, as at present, be at liberty to agree to live apart and to make their own arrangements as regards property, maintenance and the custody of children. Such agreements may not only avoid expense, but also much of the bitterness that court proceedings tend to induce, and may, therefore, make it easier for the parties to come together again. We would, however, give the court a general power to vary or set aside any such arrangement where it can be shown that the circumstances have changed in any material respect.

270. We see no good reason to retain both the separation order and the decree of judicial separation and we are anxious that the new law should be as simple as may be possible. We suggest, therefore, that there be only a single form of separation by the court.

Recommendation No. 104

We recommend in relation to all marriages that:-

(a) the parties to a marriage be at liberty to separate by agreement, making their own arrangements as regards the disposal of property, maintenance and the custody of children, subject to a provision giving the court power to vary or set aside any such arrangement where the circumstances have changed in any material respect;

(b) that there be a single form of separation by decree of the court.

271. We considered whether, as at present, the necessary qualification for obtaining such a decree should be residence, as under the Subordinate Courts (Separation and Maintenance) Act; residence or the fact that the marriage was contracted in Kenya, as under the Matrimonial Causes Act; domicil; or citizenship. Generally, we thought the qualifications in the Matrimonial Causes Act should be retained but we thought it undesirable that bare residence should be enough. We appreciate that there may be cases where the relationship between persons genuinely, but only recently, resident here has deteriorated suddenly, but on the other hand we do not wish to encourage persons, possibly from neighbouring countries, to take up residence temporarily and for the sole purpose of seeking relief from Kenya courts that might not be available to them in their own countries. We suggest, therefore, that the residence should have continued for at least one year and that the actual presence of the applicant within the jurisdiction should always be required.

Recommendation No. 105

We recommend that no-one be eligible to apply for separation by the court unless he or she is present in Kenya and

(a) he or she has been resident in Kenya for at least one year immediately preceding the petition; or

(b) his or her marriage was contracted in Kenya.

272. We considered also whether the grounds for seeking separation by the court should be those on which separation orders are now made, or those on which decrees of judicial separation are made, with or without modification, or whether there should be a new approach, with a single, general, ground that there exists a state of affairs between husband and wife which one party cannot reasonably be expected to endure, or, in other words, that the marriage has broken down. We favour the single, general ground, because we think that separation by the court should not be obtainable as of right but should be in the discretion of the court in the light of all the circumstances. The fact that a single matrimonial offence has been committed is not necessarily a ground for separation, but a combination of circumstances may make life together unbearable for either or both parties to the marriage. We think that in many, perhaps in the majority of cases where a marriage breaks down the fault is not entirely on one side; for this reason, we think the proceedings should be of a wholly civil nature, not quasi-criminal. It is perhaps not inappropriate to draw an analogy with the law of tort, where in actions for negligence the court had formerly to lay the blame squarely on one party or the other but now has power to apportion it. We shall revert to these arguments later in dealing with grounds for divorce (1).

273. We think, however, that an applicant should be required in his or her petition to specify the main allegations on which the petition is based and that the law might, without restricting the general discretion of the court, set out the main considerations which the court should take into account. We shall deal with these considerations in detail later in relation to divorce (2).

Recommendation No. 106

> We recommend that the basis of separation by the court should not be specific matrimonial offences but the general ground that the marriage has broken down. We recommend, however, that the main factors which the court may take into account, be set out in the new law (see Recommendation No. 115) and that a petitioner be required to specify the main allegations on which he or she relies.

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(1) See paragraphs 289 - 298

(2) See paragraphs 299 - 305

274. We think the law should include provision for the setting aside of decrees for separation, either by consent or, for good reason, on the application of either party. The court should also, we think, have power to vary such decrees.

Recommendation No. 107

> We recommend that the law provide for the setting aside or variation of decrees for separation either by consent or, for good reason, on the application of either party.

NULLITY

275. We have recommended above that certain ceremonies purporting or intended to constitute marriages should be void. These are where the parties are under age (1) or within the prohibited relationships (2), where the marriage is bigamous (3), where the consent of either party was not freely given (4), where, to the knowledge of the parties, a religious marriage is performed by an unlicensed minister (5) and where at least two witnesses are not present (6). In such cases, there never is a marriage. It is open to either of the parties to obtain a declaratory judgment, if he or she wishes, so as to remove any doubt and avoid possible future embarrassment, but there is no need to do so.

276. Under the Matrimonial Causes Act (7), certain marriages are voidable. These marriages are good unless and until one or other of the parties moves the court for a decree of nullity. It is, however, unfortunate that the Act does not distinguish clearly between void and voidable ceremonies. It would appear (8) that marriages are voidable on the following grounds:-

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(1) Recommendation No. 4

(2) Recommendation No. 8

(3) Recommendation No. 17

(4) Recommendation No. 20

(5) Recommendation No. 39

(6) Recommendation No. 41

(7) Cap. 152, s. 14

(8) Since the Act is, by section 3, to be applied in accordance with English law. As regards the English law relating to these matters -

as to (a), see A. v. B. (1868) L.R. 1 P. & D. 559
as to (b), see Ross-Smith v. Ross-Smith (1963) A.C. 280
as to (e), see observations in Parojcic v. Parojcic (1959) 1 All E.R. 1
(f), (g) and (h) were introduced following the English Matrimonial Causes Act, 1950, s. 8(1) in which these matters were expressly said to make a marriage voidable.

"(a) that either party was permanently impotent, or incapable of consummating the marriage, at the time of the marriage; or

(b) that the marriage had not been consummated owing to the wilful refusal of the respondent to consummate the marriage; or

.....

(e) that the consent of either party to the marriage was obtained by force or fraud in any case in which the marriage might be annulled on this ground by the law of England; or

(f) that either party was at the time of the marriage of unsound mind or subject to recurrent fits of insanity or epilepsy;

(g) that the respondent was at the time of the marriage suffering from venereal disease in a communicable form; or

(h) that the respondent was at the time of the marriage pregnant by some person other than the petitioner:"

but as regards the last three of these grounds, there is the qualification that relief will be refused unless the court is satisfied -

" (i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) that proceedings were instituted within a year from the date of the marriage; and

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds of decree."

277. The Hindu Marriage and Divorce Act [1] contains grounds similar to (a), (e), (f), (g) and (h) above.

278. Islamic law also regards certain marriages as voidable; the main grounds are where there has been a change of religion; where the husband is impotent; in case of certain diseases, such as leprosy; certain cases where minors have been married; in relation to certain marriages contracted by agents and in cases where there has been deception. Under customary law, the distinction between dissolution, void and voidable marriage, is not clearly defined. Most cases of what may be termed a "voidable" marriage turn on the question of completing the payment of dowry, but in view of our recommendation that dowry no longer be an essential prerequisite to marriage, we need not deal with the matter.

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(1) Cap. 157, s. 11(1)(b)

279. We are inclined substantially/to preserve, as grounds for avoiding a marriage [1], those shown under (a), (b), (f), (g) and (h) above, qualified as at present as regards the last three. We would add to these, as a discretionary ground for annulment, the fact that an infant has married without the consent of his or her guardian [2]. We would not include force, fraud or deception, because we think that these go to the fundamental question whether there was full and free consent by both parties: if there was not, we think the marriage should be utterly void. We do not think a change of religion should enable a marriage to be avoided, although we think that in certain cases it may be a material factor in the breakdown of a marriage [3]. The other circumstances envisaged by the Islamic law will not, we think, arise if our recommendations are adopted.

280. Neither under Christian nor Islamic law nor most customary laws is infertility a ground for a declaration of nullity but under Islamic and customary law the fact that a woman cannot bear children justifies her husband taking another wife. Having regard particularly to the fact that people do, not uncommonly, have children after years of childless marriage, we do not consider that infertility should make a marriage voidable.

Recommendation No. 108

We recommend that the court be given power to annul a marriage on the following grounds:-

(a) that either party was permanently impotent, or incapable of consummating the marriage, at the time of the marriage; or

(b) that the marriage had not been consummated owing to the wilful refusal of the respondent to consummate the marriage; or

(c) that either party was at the time of the marriage ~~of unsound mind or~~ subject to recurrent fits of insanity or epilepsy; or

(d) that the respondent was at the time of the marriage suffering from venereal disease in a communicable form; or

(e) that the respondent was at the time of the marriage pregnant by some person other than the petitioner:

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(1) As regards eligibility to move the court, see paragraph 284

(2) See Recommendation No. 22

(3) See Recommendation No. 115(i)

provided that in the cases specified in paragraphs (c), (d) and (e), the court shall not grant a decree unless it is satisfied -

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) that proceedings were instituted within a year from the date of the marriage; and

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds of decree;

(f) where a party has married without the consent of his or her guardian and the court is satisfied that there is good reason for setting the marriage aside and the proceedings are instituted while the party is below the age of twenty-one years.

281. It seems clear from the Matrimonial Causes Act itself that where a marriage is voidable, a decree of nullity puts the parties in the same position as if they had never been married. At the same time, it does not mean that, as regards anything done between the marriage and the decree, the parties are not regarded as having been validly married (1). This is particularly important as regards the law of evidence. Moreover, the children of an annulled marriage are deemed to be legitimate (2). If the law is as we understand it to be, we do not suggest any change, though we think it should be set out explicitly.

Recommendation No. 109

We recommend that the law provide that where a marriage is annulled, the parties be put in the same position as if they had not been married but not so as to affect any liability or penalty incurred during or any privilege arising out of the marriage. We recommend further that the children of such a marriage be deemed legitimate.

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(1) Re Algar (1953) 2 All E.R. 1381, an English decision which would probably be followed in Kenya.

(2) Cap. 152, s. 14(2)

DIVORCE

(i) Extra Judicial Divorce

282. At present, Christian, Hindu and civil marriages may only be dissolved by decree of a court which may be granted on the petition of either party. The Constitution of the Shia Imami Ismailis in Africa (1) provides that Ismaili marriages may only be dissolved by order of an Ismaili Provincial Council. Where the other Muslim communities are concerned, divorce is normally a unilateral act on the part of the husband who pronounces three talakas, or it may be by consent. No reference to a court is necessary for such a divorce. A wife has a limited right to seek divorce, by application to a kadhi's court. Under customary law, divorce is generally a matter of arrangement between the families and clan elders and is commonly dependent on the repayment of dowry.

283. We do not favour divorce by consent nor do we think divorce should be made easy. We think there should always be attempts at reconciliation before divorce proceedings are begun: we shall deal with this more fully later (2). For these reasons, we think it essential that no marriage should be dissolved, except by death, without the decree of a court.

Recommendation No. 110

> We recommend that there be no divorce except by the decree of a court of competent jurisdiction.

(ii) Right to Invoke Jurisdiction

284. Under the Matrimonial Causes Act (3), a decree of divorce may only be granted to a petitioner who is domiciled in Kenya or, where it is the wife who is the petitioner, if her husband has deserted her or been deported and has since changed his domicil or if she is resident in Kenya and has been ordinarily resident there for three years. If, as we recommend (4), a change of domicil by a husband does not automatically operate to change the domicil of his wife, no special provision will be necessary for jurisdiction in such cases.

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(1) of 26th June, 1962

(2) See paragraphs 287 and 288

(3) Cap. 152, ss 4 and 5

(4) See Recommendation No. 89

It might also be argued that jurisdiction based on residence will also be unnecessary. On the other hand, the founding of jurisdiction on domicil goes back to a time when it was not as common as it is now for people to reside for long periods or even indefinitely in countries where they are not domiciled. In this respect, we think the law is out of touch with reality. Although in theory a person can always return to the country of his domicil in order to take proceedings for divorce, it may be impracticable on financial or other grounds. We think, therefore, that the jurisdiction should be enlarged to allow petitions by persons who have been ordinarily resident in Kenya for at least two years at the time when the petition is presented. We would apply the same test to petitions for decrees of nullity. We do not think that this would lead to abuse, as we think it unlikely that anyone would come to Kenya and reside here for two years, solely to apply to the Kenya courts for a decree of nullity or divorce. We may add that it has been suggested that jurisdiction in divorce should be founded on citizenship, but we can see no merit in that suggestion, which might operate to deprive some persons of any forum.

Recommendation No. 111

We recommend that the court be given power to entertain a petition for a decree of nullity or divorce from any person who

(a) is domiciled in Kenya; or

(b) at the time of the presentation of the petition has been ordinarily resident in Kenya for not less than two years.

(iii) Prerequisites for Divorce

285. We have said that we do not think divorce should be made easy, and in this respect, we think it of the greatest importance that provision be made to ensure that petitions are not presented impetuously, because once a matrimonial dispute reaches the court, the chances of a reconciliation are greatly reduced.

286. Under the Matrimonial Causes Act [1], no petition for divorce may be presented until three years have passed since the date of the marriage, although the court has a discretion to allow a petition within that time where exceptional hardship is being suffered by the petitioner or where exceptional depravity on the part of the respondent is shown. There is no corresponding rule under Islamic or customary law. We think this rule is salutary and should apply to all marriages, however contracted.

Recommendation No. 112

> We recommend that no-one be permitted to petition any court for divorce within three years of his or her marriage except by special leave of the court granted on the ground of exceptional hardship suffered by the petitioner.

287. Moreover, we do not think anyone should be permitted to petition for divorce unless an attempt to reconcile the parties has been made by some responsible body and has failed. At present, there is no such requirement in the Matrimonial Causes Act, but a regular process of attempted reconciliation is usual before the dissolution of an Islamic or a customary marriage. We think this requirement of attempted reconciliation should be imposed by law, although as we have said [2], we would give the parties considerable freedom in the choice of a tribunal.

288. Where a conciliatory body has failed to settle a matrimonial dispute and one of the parties wishes to petition for divorce, we think he or she should do so within a reasonable time, which we suggest might be six months, from the date when the conciliatory body certifies its failure to settle the dispute, and that if no petition is filed within that time, it should be obligatory for the would-be petitioner to appear again before the conciliatory body before he would be entitled to present a petition for divorce.

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(1) Cap. 152, s. 6

(2) See paragraph 255

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Recommendation No. 113

We recommend that no person should be permitted to present a petition for divorce unless:-

(a) the matrimonial dispute has been referred to a conciliatory body and that body has failed to settle the dispute; and

(b) the petition is presented within six months of the date of a certificate by the conciliatory body that it has so failed.

We recommend further that subject to the provisions of Recommendation No. 101, the parties be entitled to refer to any conciliatory body of their own choice.

(iv) Grounds for Divorce

289. Under the Matrimonial Causes Act (1), the main grounds for divorce are the matrimonial offences of adultery, desertion or cruelty and, on the part of the husband, rape, sodomy or bestiality, and the proceedings are consequently of a quasi-criminal nature. The only ground for divorce which is not an offence is incurable insanity. In the case of Hindus, there are (2) two additional grounds not of the nature of offences, that is to say a change of religion by the respondent or the fact that he or she has renounced the world by entering a religious order and so remained for at least three years. Under Islamic law, a man is not required to give any reason when pronouncing a talaka. Customary law takes misconduct into account, such as adultery, particularly on the part of the wife, and cruelty, not as specific matrimonial offences but rather as evidence of an intolerable state of affairs.

290. In considering the question whether divorce should be based on specific matrimonial offences or on the more general ground of the irreparable breakdown of the marriage, we have derived much help from the United Kingdom through the Report of the Royal Commission on Marriage and Divorce, 1956, (the Morton Commission) (3), "Putting Asunder, A Divorce Law for Contemporary Society", the Report of a Group appointed by the Archbishop of Canterbury, 1964, and The Law Commission Report on Reform of the Grounds of Divorce, 1966 (4) and we have considered the latest English Bill (5). We feel that the arguments on this issue have now been so fully ventilated that it is unnecessary for us to set them out at length.

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(1) Cap. 152, s. 8
(2) Cap. 157, s. 10(1)(e) and (f)
(3) Cmnd 9678
(4) Cmnd 3123
(5) Divorce Reform Bill 1968

291. The main arguments for maintaining the matrimonial offence as the basis for divorce are that, basically, it gives the court a clear issue of fact to decide, that is, whether or not an offence has been committed; that because the issue is simple, lawyers are able, in the majority of cases, to advise their clients with reasonable confidence as to the likelihood of proceedings being successful; and that a divorce cannot, generally speaking, be granted against an unwilling party who has committed no offence.

292. The main argument against the matrimonial offence as the basis of divorce is that it is based on the fiction that the breakdown of a marriage is due to a specific wrongful act or acts by one party, whereas, as we have already remarked in connection with separation, there is usually some measure of blame on both sides. The matrimonial offence is usually the symptom that a marriage has broken down, not the cause of the breakdown. The fact that divorce can only (apart from cases of incurable insanity) be obtained on proof of a matrimonial offence leads people either deliberately to commit or to pretend to have committed offences, and this encourages hypocrisy and perjury. The fact that one spouse must be branded as guilty in quasi-criminal proceedings may create bitterness where it was not present before and the rules regarding collusion and condonation tend to preclude attempts at reconciliation. Finally, the fact that an "innocent" party may refuse to bring proceedings even though a marriage has in fact broken down beyond hope of repair leads to illicit unions and the birth of children stigmatized as illegitimate.

293. We appreciate that the granting of an uncontested petition for divorce on the ground that the marriage has broken down is not far removed from divorce by consent but even under the present system, we think that many divorces are in fact by consent. In proposing that every divorce should be in the discretion of the court, we are not overlooking the disadvantage that the outcome of every petition would be, to a greater or less degree, uncertain. We realise also that where the parties to a marriage testify that it has broken down, it will not be easy for a court to hold otherwise.

294. We realize also that our proposals, which involve an inquiry into the circumstances of every marriage which it is sought to dissolve, will place a great burden on the courts, and one which some at least of the subordinate courts are ill-fitted to bear. We can, however, see no satisfactory alternative. We can only hope that the preparatory work of the conciliatory bodies and the guidance of the appellate courts will help the trial courts to reach just decisions.

295. On the other hand the introduction of the single ground for divorce would, we think, enable the law to be simplified. Artificial conceptions, such as constructive desertion, could be abolished. Cruelty would be considered in terms of its effect and the purpose behind it would be irrelevant.

296. We consider also that the principle of breakdown is more akin to the principle of divorce as understood in the African society of Kenya. As we explained earlier, although misconduct is taken into account in African divorce, there is not a specific list of "grounds" as in English law. The matrimonial offences may be evidence that the marriage has broken down, but often there are remedies other than divorce for such conduct (1).

297. We think that divorce should be remedial, not punitive; that proceedings for divorce should be of a purely civil nature; and that the sole ground for divorce should be proof that the marriage has irreparably broken down.

298. It will be seen that this would make the ground for divorce similar to that for separation, with one essential difference. Before granting a decree of separation, the court would only have to be satisfied that the marriage had broken down, but before granting a decree of divorce, the court would have to be satisfied that the breakdown was beyond any reasonable hope of repair. This is because there is an element of finality in divorce which is not necessarily present in separation.

Recommendation No. 114

> We recommend that there be only a single ground for divorce, that the marriage has irreparably broken down.

299. Without in any way limiting the court's discretion, we think it will be convenient to list the main factors that may be proved as evidence of breakdown in cases of separation and divorce.

300. These would include adultery, of which an isolated act would by itself carry little weight as evidence of breakdown, although repeated acts or a sustained course of conduct despite protests might be conclusive. Any form of sexual perversion would be admissible, as being conduct intolerable to the other party. Cruelty, mental or physical, would be admissible. We think that desertion for three years should be evidence of breakdown, but we think that in the circumstances of Kenya, where men often travel long distances in search of

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(1) e.g. the remedy of damages for adultery.

work and may remain away for a considerable time, desertion should be so defined as to make it clear that it must be wilful and intended to be permanent. We would include also voluntary separation for at least three years.

301. We have considered whether imprisonment for life or a long term of years should be regarded as evidence of breakdown and we think it should. This question may be looked at from two points of view. On the one hand, where the offence was a heinous one, especially one involving violence, it may be argued that it is conduct which the other party cannot be expected to endure. On the other hand, it may be looked at as a form of desertion, because the separation, though involuntary, is the direct result of the conduct of the offender. We think the minimum sentence that should be considered in this respect should be five years and we think the court should also have regard to the nature of the offence. Incidentally, imprisonment for five years is a ground for divorce under the Constitution of the Shia Imami Ismailis.

302. We do not consider that an incurable physical disease contracted after marriage should be regarded as in any way a ground for divorce but we have found the question of incurable mental illness more difficult. It is at present a ground for divorce under the Matrimonial Causes Act (1) where the patient has been continuously under care and treatment for at least five years, but not, as such, under Islamic law. Under most customary laws, insanity is not regarded as a ground for divorce. We appreciate the magnitude of the tragedy should a person recover from a mental illness believed to have been incurable, to find that he or she has been divorced. On the other hand, we think it unrealistic to require normal people to remain continent for the rest of their lives when the entire structure of their married lives has disappeared. We do not think the length of treatment that the patient has undergone a material factor, because some of the clearest cases of incurable mental illness are where brain injury has resulted from an accident. We think, however, that to justify divorce the case should be one where at least two doctors, one of whom has had psychiatric experience, have certified that they entertain no hope of cure or recovery.

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(1) Cap. 152, s. 8(1)(d)

303. Under Islamic law, apostacy from Islam automatically terminates the marriage of the apostate, although the marriage may be revived if he returns to the faith. Under the Hindu Marriage and Divorce Act, a change of religion by either party to a marriage entitles the other to a divorce, as does the renunciation of the world by entry into a religious order and remaining apart from the world for at least three years.(1) We do not think a change of religion should automatically entitle a spouse to divorce but we do think it may be highly relevant to the question whether a disrupted marriage can be mended and should, therefore, be admissible in evidence. We think the entering of a religious order may well amount to desertion and we do not think it calls for any special provision.

304. We have already (2) referred to the Islamic divorce by repudiation. To a true Muslim, divorce is repugnant and it is a very grave matter to pronounce three talakas. We think, therefore, that the fact that a Muslim has pronounced three talakas, at intervals of thirty days, is clearly evidence that the marriage has broken down, though not, by itself, conclusive evidence that the breakdown is irreparable. We would accordingly include the pronouncement of talakas among the facts that may be proved in evidence in support of a petition for divorce.

305. We do not think that sexual incapacity, sterility or barrenness which has developed since the marriage should be a ground for divorce, nor do we think that habitual drunkenness or drug-taking should of themselves be evidence of breakdown, although they may be highly relevant, as, for example, where they lead to cruelty.

Recommendation No. 115

We recommend that, without limiting the discretion of the court to act on any relevant evidence, the law should specify certain matters which may be considered evidence of breakdown. We recommend these be as follows:-

(a) adultery, particularly when repeated despite protest;

(b) sexual perversion;

(c) cruelty, mental or physical;

(d) wilful neglect;

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(1) Cap. 157, s. 10(1)(e) and (f)

(2) See paragraph 282

(e) imprisonment for life or for a term of at least five years, regard being had to the nature of the offence;

(f) desertion for at least three years, where the court is satisfied that it is wilful and intended to be permanent;

(g) voluntary separation or separation by decree of the court for at least three years;

(h) incurable mental illness, certified by at least two doctors, one of whom has had psychiatric experience;

(i) change of religion by one party, where both parties followed the same faith at the time of the marriage; and where according to the laws of that faith a change of religion dissolves or is a ground for the dissolution of marriage;

(j) pronouncement of three talakas by the husband, where the parties were married by an Islamic ceremony.

It would, of course, be for the court to decide on the weight to be given to the evidence, but it should, as a general principle, refuse to grant a decree where a petition is founded exclusively on the petitioner's own wrong-doing.

306. We do not think that a petition for divorce should plead merely the breakdown of the marriage: we think it should also set out the principal allegations it is intended to prove as evidence of that breakdown. We think this is only fair to the other party. We think also that when setting out his or her allegations, the petitioner should be required to admit any marital misconduct of which he or she had been guilty. This is essential if the court is to have a true picture of the marital situation. We would again stress that in accordance with the above recommendation, a petitioner should not be allowed to rely exclusively on his or her own wrong-doing.

307. We think that before granting an uncontested petition for divorce, the court should always be satisfied that the best possible arrangements have been made for the custody of and access to any infant children of the marriage, with the happiness and well-being of the children as the paramount consideration. We think also that where the parties have made an agreement regarding maintenance, it should be subject to the approval of the court.

Recommendation No. 116

We recommend that every petition for divorce be required to contain:-

(a) a statement of the principal allegations which it will be sought to prove by way of evidence of breakdown and an admission of any marital misconduct of which the petitioner has been guilty;

(b) the terms of any agreement regarding maintenance, or, where no agreement has been reached, the petitioner's proposals;

(c) the terms of any agreement regarding the custody of and access to the infant children, if any, of the marriage, or where no agreement has been reached, the petitioner's proposals

and to be supported by a certificate from a conciliatory body in accordance with Recommendation No. 113 above. We recommend further that any agreement regarding maintenance or the custody of or access to any children of the marriage be subject to the approval of the court.

308. We think that in considering whether a marriage has broken down, the court should have regard to the customs of the community to which the parties belong, because conduct may be accepted in one community which would be intolerable in another.

Recommendation No. 117

We recommend that in considering evidence intended to prove the breakdown of a marriage, the court should be required to have regard to the customs of the community to which the parties belong.

(v) Bars to Divorce

309. Under English law, as applied to Kenya by the Matrimonial Causes Act (1), collusion, condonation and connivance are absolute bars to divorce. In England, collusion ceased to be an absolute bar in 1963 (2) and became instead a discretionary bar. That change has not been followed in Kenya. Collusion in this context may be described briefly as an agreement by the parties to procure a divorce, which was, generally speaking, regarded as an abuse of the processes of the court. This sprang naturally from the nature of divorce proceedings, in which one party was imputing to the other a matrimonial offence. It seems to us that with the substitution of the breakdown of the marriage as the sole ground for divorce, the conception of collusion as a bar to divorce will cease to be appropriate. We think that all that is necessary in its place is a provision enabling the court to dismiss any proceeding where it is satisfied that there has been an attempt to deceive the court in any material respect.

Recommendation No. 118

> We recommend that collusion cease to be a bar to divorce, but that the court be empowered in its discretion to dismiss any proceeding where it is shown that the parties have attempted to deceive the court in any material respect.

310. We think also that condonation should cease to be a bar. The fact that misconduct has been condoned will, of course, affect the weight to be given to it as evidence in deciding whether or not a marriage has broken down irreparably but we think that for it to be a bar to divorce tends to discourage a spirit of forgiveness in cases where matrimonial relations are unhappy. A person who might otherwise forgive an offence in a last attempt at reconciliation may not do so if he or she fears that it would prejudice the likelihood of divorce if reconciliation fails. We think, therefore, that evidence of misconduct which has been condoned should be admissible in proof of breakdown.

Recommendation No. 119

> We recommend that condonation should cease to be a bar to divorce and that evidence of misconduct should not be inadmissible in proof of breakdown merely because the misconduct was condoned.

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(1) Cap. 152, ss. 3 and 10

(2) By the Matrimonial Causes Act, 1963

311. The term connivance is used only in relation to adultery and includes such conduct as encourages or implies an anticipatory consent to a spouse's adultery. We think that in general, and not only in relation to adultery, a person should not have the right to claim relief in respect of conduct which he himself induced or encouraged. We think therefore that in a sense, connivance should continue to be a bar to divorce but not, as at present, an absolute bar; it should instead be looked at as part of the conduct of the parties from which the court has to draw its conclusions.

Recommendation No. 120

> We recommend that connivance cease to be an absolute bar to divorce but that the general principle should be recognized that no party has the right to claim relief in respect of misconduct which he or she has induced or encouraged.

312. There are also discretionary bars, including adultery or cruelty by the petitioner and delay in presenting the petition. Misconduct of the petitioner should, we think, cease to be a bar to divorce and should be considered as part of the evidence on the question of breakdown. Delay is not, we think, to be discouraged, since the longer a person takes to bring divorce proceedings, the greater the chance that the parties will be reconciled.

(vi) Procedure

313. We do not propose to deal with court procedure generally, as we think this is a matter that should be dealt with by Rules of Court, although we should, perhaps, observe that with the abolition of the matrimonial offence as a ground for divorce, the new procedure should, so far as is practicable, be inquisitorial rather than accusatorial. There are, however, two matters of procedure on which we would comment. First, a respondent to a petition for divorce on certain grounds may include in his or her answer a cross-prayer for relief (1), but in other cases it would seem that, as in English law (2), there must be a cross-petition. We see no reason for the distinction and we think the law might be simplified by a provision allowing the answer to any petition for matrimonial relief to include a cross-prayer for any other form of matrimonial relief. With the abolition of the matrimonial offence as a ground for divorce, it will no longer be appropriate to include a cross-prayer for the same relief.

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(1) Cap. 152, s. 12

(2) Pickett v. Pickett (1951) P. 267

Recommendation No. 121

We recommend that the respondent to a petition for matrimonial relief be permitted to include in his or her answer a cross-prayer for any other form of matrimonial relief.

314. It has been held in England (1) that where a petition is for separation and there is no cross-petition the court cannot grant a decree of divorce. We think this is proper but, as it accords with general principles, we do not think any express provision necessary.

315. Secondly, under the Matrimonial Causes Act (2), following English law, two decrees are required to effect a divorce, a decree nisi and a decree absolute, and, unless the court otherwise orders, there must be an interval of three months between the two decrees. The decree nisi was introduced in England in 1860 (3), because it was suspected that decrees were being obtained collusively. The interval between the two decrees gave the opportunity for the Queen's Proctor to conduct investigations where it was suspected that any bar to relief existed. If our proposal that the only ground for divorce be the irreparable breakdown of the marriage is accepted, these bars to relief will, as we have said, cease to be significant. We think, therefore, that there would, under our proposals, be no need for a decree nisi. We do not think it ever leads to reconciliation, because normally the time for reconciliation is before the matter reaches the court and if, as sometimes happens, the parties do come together again after divorce, it is not likely to be within the comparatively short interval between decrees. Having two decrees only adds to the cost of divorce and uneducated persons who have not employed advocates may fail to apply for the decree absolute, thinking that the decree nisi had disposed of the matter. For these reasons, we would abolish the decree nisi.

Recommendation No. 122

We recommend that there be only a single decree of divorce, not a decree nisi and a decree absolute.

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(1) Blanchard v. Blanchard (1928) 138 L.T. 716

(2) Cap. 152, s. 15, and the Matrimonial Causes (Decree Absolute) Order 1967 (L.N. 168 of 1967)

(3) By the Matrimonial Causes Act, 1860, s. 7

316. If, as we recommend, the decree nisi be abolished, there will, we think, be no need to retain the office of President's Proctor. Where the court requires argument on any question of law of public importance, it may invite the Attorney-General to appear as amicus curiae, as is done in other matters; where the court suspects that an offence has been committed, it may direct that the papers be passed to the Director of Public Prosecutions; generally, the matrimonial conduct of the parties will, we hope, have been sufficiently investigated by the conciliatory body.

Recommendation No. 123

We recommend the abolition of the office of President's Proctor.

317. Under English law, when a decree of divorce is granted, it operates to dissolve the tie created by the ceremony of marriage pleaded in the petition, not the marital status generally (1). The effect of this is that where the parties have gone through two ceremonies, it may be necessary to determine which of them created the effective marriage and if, by mistake, the wrong ceremony is pleaded, the decree will be ineffective to determine the marriage. It would appear that the law is the same in Kenya at least where the Matrimonial Causes Act is concerned since the jurisdiction under that Act is to be exercised in accordance with the law applied in England (2). We think this is an unnecessary refinement which might well cause difficulties (as for example when a couple have married under customary law and subsequently contracted a marriage under the African Christian Marriage and Divorce Act (3)). While it is obviously for a petitioner to prove the fact of marriage, we think a decree of divorce once granted should dissolve the marital status.

Recommendation No. 124

We recommend that a decree of divorce should operate to dissolve the marital status however created, not merely the tie created by a specific ceremony.

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(1) Reder v. Reder (1948) W.N. 238;
Thynne v. Thynne (1955) 2 All E.R. 377

(2) Cap. 152, s. 3

(3) Cap. 151, s. 9

(vii) Foreign Divorces

318. We are not aware of any case in which the Kenya courts have been asked to recognize the validity of a foreign divorce but it would appear that such a question would be decided in accordance with English law.* With certain exceptions, English law does not recognize a divorce obtained outside England by a person domiciled in England. (1) The exceptions relate to divorces obtained by wives resident abroad (2) and divorces granted in certain colonial and other territories. (3) So far as persons not domiciled in England are concerned, the English courts will recognize any divorce which would be recognized by the courts of the country where the parties are domiciled at the date of the decree. It may be added that the English courts, on principle, "recognize a jurisdiction which they themselves claim (4)".

319. The English rules are stricter than those of most other countries and their application is not easy. The present practice of the English courts is to recognize a foreign divorce if granted by a court of competent jurisdiction in the country where the parties were domiciled or in a country with which the petitioner has a "real and substantial connection" (5). We suggest that the courts in Kenya should recognize any divorce obtained by anyone in the country of his or her domicil or a decree of divorce granted by the court of a country in which he or she has been ordinarily resident for at least two years prior to the presentation of the petition. This would correspond with the jurisdiction which we suggest should be conferred on the Kenya courts, and it would provide a simple, factual test. To obviate possible hardship, we think the court in Kenya should also recognize any divorce the validity of which has been recognized in a declaratory judgment of the court of the country of domicil of either party.

Recommendation No. 125

We recommend that the law provide for the recognition by the Kenya courts of any divorce:-

(a) obtained by any person in the country of his or her domicil;

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(1) See, for example, Gatty v. Attorney-General (1951) P. 444

(2) Travers v. Holley (1953) P. 246

(3) Colonial and Other Territories (Divorce Jurisdiction), Acts 1926 - 1950

(4) Arnold v. Arnold (1957) P. 237 at p. 252

(5) Indyka v. Indyka (1967) 3 W.L.R. 510; Peters v. Peters (1967) 3 W.L.R. 1235

* The case of Re Sansoni Banin (1960) E.A. 532 was overlooked when this sentence was written, but the decision accords with it

(b) decreed by the court of a country in which the petitioner had been ordinarily resident for at least two years prior to the presentation of his or her petition; or

(c) recognized as valid in a declaratory judgment of the court of the country in which either party thereto is domiciled.

(viii) Registration of Divorces

320. There is at present no system of registration of divorces granted under the Matrimonial Causes Act and the only way a divorce could be traced would be by a search of the court records. Islamic divorces are, however, required to be registered under the Mohammedan Marriage and Divorce Registration Act (1). There is no registration or recording of divorces under customary law.

321. We are unanimously of the opinion that all divorces ought to be registered and that they should be registered under a single system applying to everyone.

Recommendation No. 126

We recommend that all divorces be required to be registered and that there be a single system of registration applying to all persons, regardless of race, religion or community.

322. If, as we recommend, the only form of divorce that can be obtained is one by decree of a court, we think the duty might be placed on the registrars of the various courts to make returns of divorces to the Registrar-General, who would be responsible for maintaining the registers. We do not think the work entailed would prove onerous. We think also that it is most desirable that references to the entries in the register of divorces be endorsed against the appropriate entries in the marriage registers. We suggest that the procedure might be generally similar to that followed in relation to adoption orders and the endorsement of the register of births (2).

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(1) Cap. 155, s. 9

(2) Adoption Act (Cap. 143), s. 14(3)

Recommendation No. 127

> We recommend that all courts granting decrees of divorce be required to notify the same to the Registrar-General, who should be required to maintain the register of divorces, and that the Registrar-General should be required to endorse the appropriate entries in the register of marriages with particulars of divorces so registered.

323. We think also that where persons who were married in Kenya are divorced in any other country by a divorce recognized in Kenya (1), either of them should be entitled to register the divorce here.

Recommendation No. 128

> We recommend that the law permit the registration of a foreign divorce, if it is recognized by the law of Kenya, where the marriage so dissolved was contracted in Kenya, and that when this is done, the Registrar-General should proceed as in Recommendation No. 127 above.

PRESUMPTION OF DEATH

324. We have already recommended (2) that the courts should have power to issue declaratory decrees. There is one such decree that calls for special mention: the decree presuming the death of a spouse. Such a decree may be passed at the present time under the Matrimonial Causes Act (3) and it has the effect of dissolving the marriage if in fact it has not been dissolved by death. This is a power that is rarely exercised, but we think it should continue.

Recommendation No. 129

> We recommend that a declaratory decree made on the application of a husband or a wife presuming the death of his or her spouse should have the effect of dissolving the marriage, if that spouse is not in fact dead.

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(1) See Recommendation No. 125

(2) Recommendation No. 96

(3) Cap. 152, s. 22

MAINTENANCE AS BETWEEN HUSBAND AND WIFE

325. So far as monogamous marriages are concerned, a husband may be ordered to pay maintenance to his wife under the Subordinate Courts (Separation and Maintenance) Act [1], whether or not a separation order is sought. Where a decree for restitution of conjugal rights is passed, under the Matrimonial Causes Act [2], and not complied with, the court may order the husband to make "such periodical payments as may be just" to the wife. The same Act provides [3] for alimony pendente lite, maintenance on a decree of divorce or nullity and alimony on a decree for restitution of conjugal rights or judicial separation. Where maintenance is ordered on divorce or nullity, the court has power to order the husband to secure to the wife a gross or an annual sum of money. The court has power to vary most of these orders but the extent to which that power may be exercised varies according to the nature of the order [4]. There appears to be no power for the court to order a wife to pay maintenance to her husband except where a decree for the restitution of conjugal rights has been obtained by the husband and has not been complied with [5], but in cases of divorce or judicial separation, where the wife is the guilty party, or where a decree for restitution of conjugal rights has been obtained by the husband and has not been complied with, the court may order a settlement of the wife's property, or any part of it, for the benefit of the husband or of the children [6]. The only statutory provision governing quantum is that alimony pendente lite may not exceed one fifth of the husband's average net income for the preceding three years, but we understand that in awarding permanent alimony or maintenance the courts tend to follow the English practice of awarding such amount as will make the wife's income one third of the aggregate income of husband and wife. This is not a rule, but a guide, and the court may depart considerably from it, where the facts of the particular case warrant it.

326. Under Islamic law, a wife on divorce is only entitled to maintenance for the period of her iddat, which is normally three months, although we are told that Muslims often voluntarily pay maintenance for longer periods, where the wife would otherwise be destitute. Under customary law, a wife is not usually entitled to maintenance on separation or divorce.

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(1) Cap. 153, ss 4(c) and 10

(2) Cap. 152, s. 21

(3) Cap. 152, s. 25

(4) See, for example, Carnie v. Carnie (1966) E.A. 233

(5) Cap. 152, s. 27(3)

(6) Cap. 152, s. 27

327. We think the provisions relating to alimony and maintenance in relation to monogamous marriages are unnecessarily complex and obscure. We see no reason to distinguish between alimony and maintenance. We think it should be possible to evolve simple rules and that they should be made to apply to people of all communities and in relation to marriages of whatever kind.

328. We are unanimous in thinking that a husband who has deserted his wife should be liable to pay her maintenance, and we think the court should have the power to order maintenance during the hearing of a matrimonial petition, when granting a decree of separation or divorce, and, if no application for maintenance is made at the time of the decree, at any subsequent time.

Recommendation No. 130

We recommend that the court be given power to order a man to pay maintenance to his wife or former wife:-

(a) if he has deserted her; or

(b) during any matrimonial proceedings; or

(c) on or following the grant of a decree of separation; or

(d) on or following the grant of a decree of divorce.

329. There is one other special circumstance in which maintenance may be ordered under English law; that is where the court has issued a declaratory decree presuming the death of a wife and it is subsequently discovered that she was not dead. There is no express provision in the Matrimonial Causes Act for ordering maintenance in such circumstances but presumably the English practice would be followed. We have already recommended (1) that declaratory decrees presuming death should dissolve marriages. We think it only fair to a wife whose marriage may have been dissolved in this way that she should, if necessary, be able to obtain maintenance.

Recommendation No. 131

We recommend that the court be given power to order a man to pay maintenance to his former wife, where the marriage has been dissolved by a decree presuming her death but where it transpires that she was in fact alive.

(1) Recommendation No. 129

330. We think also that the court should have power to vary orders for maintenance where it is satisfied that there has been some material change in the circumstances. Furthermore, we think the court should similarly have power in changed circumstances to vary the terms of an agreement for maintenance made on a voluntary separation. We appreciate that this is contrary to the normal rule that a person who freely enters into a contract is bound by it, however disadvantageous it may prove, but we think that agreements regarding maintenance should be regarded as in a special category, partly because they spring from the special relationship of marriage; partly because they are based on means and needs, not, as in the commercial contract, on mutual gain; and partly because they are agreements likely to endure for life.

Recommendation No. 132

> We recommend that the court be given power at any time and from time to time to vary any order for maintenance, where the court is satisfied that there has been some material change in the circumstances and power similarly to vary the terms relating to maintenance contained in any agreement for voluntary separation.

331. We have considered also whether the court should have power on separation or divorce to order a wife to pay maintenance to her husband. We think, as in relation to maintenance during marriage (1), that there should be such a power, but only where it is shown that she has the means to do so and where the husband lacks means and is incapacitated by mental or physical ill-health.

Recommendation No. 133

> We recommend that the court be given power to order a woman to pay maintenance to her husband or former husband where she has the means to do so and where he lacks means and is incapacitated by mental or physical ill-health.

332. As we have said, the courts in Kenya tend, in cases coming under the Matrimonial Causes Act, to follow the English practice of treating one-third of the joint incomes of husband and wife as a *prima facie* basis for assessing maintenance. Having regard to the widely differing conditions in Kenya today, we do not think there should be

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(1) See Recommendation No. 58

any general practice: we do not think it possible or desirable to set any formula for the assessment of maintenance, nor would we even fix upper and lower limits. We think the only possible course is to leave the matter in the discretion of the court.

333. Clearly the amount of any maintenance awarded must in the first instance be based on the means and the needs of the parties, but we think the court should also take into account the degree of responsibility for the breakdown of the marriage. We appreciate how very difficult this apportionment will be and we would not wish orders for maintenance to contain any penal element, but, where maintenance is above the bare minimum, we do not think it would be just if a man to whom little, if any, blame could be attached were required to pay the same amount as a man of equal means who was largely or perhaps even wholly responsible for the breakdown of his marriage.

334. We think also that the court should have regard to the customs of the community to which the parties belong. At present, these vary greatly. We think in time they will develop towards uniformity but in the meanwhile it would be wrong to impose uniform standards which would be alien to many of the people they affected. We realize that this means that assessments will, at least at first, vary from place to place but we think the courts will gradually adopt standards reflecting the public attitude and that in the meanwhile this flexibility will ease the transition from the old order to the new.

Recommendation No. 134

> We recommend that the quantum of maintenance be left entirely in the discretion of the court, without any guiding formula, to be assessed basically on the means and needs of the parties but taking also into account the degree of responsibility which the court apportions to each party for the breakdown of the marriage and taking into account also the customs of the community to which they belong.

335. We think the court should have power in appropriate cases when making an order for maintenance to direct that the whole or any part of it be secured by the vesting of any property in trustees, and we think the court should have power to prevent or set aside dispositions intended to defeat claims to maintenance (1). We would, however, abolish the power to order the settlement of a wife's property: such orders are, we believe, rarely if ever made but in principle they are, we think, unjustifiably discriminatory against women. It may be convenient to mention here that we think the power to make protection orders, conferred by the Matrimonial Causes Act, (2) is no longer appropriate: we think the conditions which led to this provision no longer exist and it would certainly be inconsistent with our recommendations.

Recommendation No. 135

We recommend that the court be given power, in its discretion, when ordering maintenance to direct that the whole or any part of it be secured by the vesting of property in trustees, and be given power also to prevent or to set aside dispositions intended to defeat claims to maintenance.

336. At present, an order for unsecured maintenance subsists only during the joint lives of the parties, whereas an order for secured maintenance may be made for the wife's life or any lesser period (3). We think this is reasonable and we see no reason to recommend any change.

Recommendation No. 136

We recommend that, as at present, an order for unsecured maintenance should, subject to the power of the court to review it, subsist during the joint lives of husband and wife but that the court should have power to order that secured maintenance be payable until the wife's death or for any lesser period.

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(1) c.f. the English Matrimonial Causes Act 1965, s. 32

(2) Cap. 152, s. 29

(3) Cap. 152, s. 25(2) and (3)

337. It would appear that at present an order for secured maintenance cannot be varied [1]. This position was rectified in England in 1949 [2], but the change was not followed in Kenya. We think this should now be done.

Recommendation No. 137

> We recommend that the power to vary maintenance orders apply to orders for secured as well as unsecured maintenance.

338. We have given much thought to the question whether the court should have power to order the division on divorce of property acquired during the marriage by the joint efforts of husband and wife. We have considered the Scandinavian system of equal division of assets on the termination of marriage and the "community of surplus" [3] which applies in the German Federal Republic, but we do not think either appropriate to the circumstances of Kenya. Moreover, we think the latter system would prove unworkable here. On the other hand, we do not think either husband or wife should be left without a remedy on divorce where assets towards which he or she has contributed are vested in the other, subject, of course, to bearing his or her share of any debts contracted for their joint benefit. Such matters should normally be settled between the parties, with the help of their families and of the conciliatory body they consult, but in the last resort we think the court should have an unfettered discretion to decide each case as the justice of the case may require. We think, however, that in exercising that discretion the court should take into account local customs, the contributions which the parties have made towards the acquisition of the property and the needs of the children of the marriage, and subject to these should lean towards the principle of equality.

339. We do not propose to attempt any definition of "joint efforts" or "contribution", but we should, perhaps, refer specifically to one problem that has troubled the English courts. That is, whether, when a house belongs to the wife and the husband improves it by doing work on

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(1) Cap. 152, ss 25 and 32 and see Carnie v. Carnie (1966) E.A. 233

(2) Law Reform (Miscellaneous Provisions) Act, 1949, s. 6

(3) This is the equal division of the excess of the value of the matrimonial assets when the marriage is dissolved over the value at the time of the marriage. See "Matrimonial Property - Some Recent Developments" by Professor Kahn-Freund (Modern Law Review, May, 1959).

it or paying for such work, he thereby acquires an interest in the property. The prevailing decision in England (1), contrary to the general rule that would presume a gift, is that the husband does acquire such an interest, although the correctness of this decision has been seriously doubted (2). Such an interest is not acquired by doing small day-to-day jobs but only by substantial work such as would normally call for the employment of a contractor. The same would appear to be the position regarding improvements carried out by a wife to a house which belongs to her husband (3). We think that the contributions to be taken into account should include contributions in work and kind, as well as in money, where they are greater than would ordinarily be regarded as part of a husband's, or a wife's, normal matrimonial duty. We think, also, that this principle should apply to improvements to property owned by either spouse before marriage, as well as to property acquired during the marriage.

Recommendation No. 138

> We recommend that the court be given power in its discretion to order the division between husband and wife on divorce of any assets acquired during the marriage by their joint efforts. We recommend further that in dealing with any application for such division, the court be required to have regard to the customs of the community to which the parties belong, to the contributions they have respectively made towards the acquisition of such assets, to liabilities contracted by either in their joint interest, to the needs of the children of the marriage and, subject to the foregoing, should lean towards equality. We recommend that the power should extend also to property owned before marriage which has been substantially improved during the marriage.

340. We have considered whether it should be open to the parties to agree on a capital payment (in money or kind) in full satisfaction of all future claims to maintenance. It would appear that at present such an agreement does not preclude the making of an order for maintenance (4), although this defeats the purpose of the agreement. We appreciate that such a settlement, if final and conclusive, might operate to the wife's disadvantage, particularly among some communities where the administration of such a capital sum might be taken over by the wife's male

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(1) Appleton v. Appleton (1965) I W.L.R. 25

(2) Pettitt v. Pettitt (1968) I W.L.R. 443

(3) Button v. Button (1968) I W.L.R. 457

(4) Hunting v. Hunting (1963) E.A. 616

relatives, to her detriment. There is also a danger that such a capital sum might be invested injudiciously and quickly lost. On the other hand, such a settlement may be very much in the wife's interest. Unsecured maintenance orders cease on death and it may be difficult or impossible to enforce a maintenance order against a man who has left the country. Also, if a man is in a hazardous business, his means may fluctuate greatly. We think, therefore, that there may well be cases where a capital settlement may not only be reasonable but desirable. Some measure of protection might, however, be afforded if the approval of the court were required, because the court could impose conditions; for example, as to the manner in which the capital sum is to be invested. We do not think such a requirement would lead to appreciable difficulty or expense, because applications for such approval would almost always be made at the time and as part of a petition for separation or divorce.

Recommendation No. 139

> We recommend that an agreement for the payment, in money or kind, of a capital sum in full settlement of all future claims to maintenance be valid and enforceable, provided that the approval of the court has been obtained.

341. We would add here that in assessing the amount of maintenance or the reasonableness of any suggested capital payment, it would be open to the court to take into account, as part of the overall picture and in relation to local custom and the means and needs of the parties, the fact that dowry was or was not paid and has or has not been repaid but, as we have indicated earlier (1), we do not think that dowry should be a part of the law of marriage. We think it should be an independent matter of agreement, governed by custom.

342. We think the right to maintenance should cease automatically if the person to whom it was awarded remarries, except where the parties have agreed otherwise.

Recommendation No. 140

> We recommend that the right to maintenance of a divorced person cease automatically on his or her remarriage, except where the parties have agreed otherwise.

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(1) See paragraph 114

343. It would seem that in English law, and therefore presumably under the law of Kenya, alimony and maintenance are inalienable [1] and that, as they are treated as "a fund for maintenance and not as property", the court will not, save in exceptional circumstances, make an order enforcing more than one year's arrears [2]. Arrears of alimony or maintenance would appear to be provable against the estate of a deceased husband [3], but they are not provable in bankruptcy, whether they accrued before or after the receiving order [4].

344. We think it right that payments of the nature of maintenance should be inalienable. We think, however, that arrears should be recoverable as a debt, up to an appropriate period of limitation, which we suggest might be three years, and should be recoverable against the debtor himself or, where they have accrued before the death of the debtor, against his estate. We think the present rule operates unfairly against a wife who, whilst an order for maintenance is uncomplied with, may exhaust her resources in order to live, although those resources will have been taken into account in assessing the maintenance.

Recommendation No. 141

> We recommend that maintenance payable under the order of a court be inalienable. We recommend further that arrears of unsecured maintenance be recoverable as a debt, subject to a period of limitation of three years; that where such arrears accrued before the making of a receiving order against the debtor, they be provable in bankruptcy; and that where they accrued before the death of the debtor, they be provable against his estate.

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(1) Paquine v. Snary (1909) 1 K.B. 688

(2) Kerr v. Kerr (1897) 2 Q.B. 439

(3) Sugden v. Sugden (1957) 1 All E.R. 300

(4) Kerr v. Kerr, supra.; James v. James (1963) 2 All E.R. 465

THE CUSTODY OF, ACCESS TO AND MAINTENANCE OF CHILDREN

345. Provision for orders giving custody of the children of a marriage is contained in the Subordinate Courts (Separation and Maintenance) Act (1) and in the Matrimonial Causes Act (2). An order may be made under the former Act whether or not a separation order is made, but can only be made in favour of and on the application of the wife, and the right to such an order is lost if the wife is proved guilty of adultery. Such orders cease when the child attains sixteen years. An order may be made under the latter Act in any proceedings for divorce, nullity, judicial separation or restitution of conjugal rights and may deal with maintenance and education as well as custody, and the court would appear to have a complete discretion to order such arrangements as it thinks best regarding custody, although it would seem that an order for access can only be made in favour of a parent. Such orders may subsist, in the case of Africans, until the child, if a boy, attains sixteen years or, if a girl, thirteen years. In the case of other communities, such an order ceases when the child marries or attains majority. These Acts contain no express provision for access to or care and control of children, but it would appear that the courts have followed English practice (3).

346. The various schools of Islamic law hold differing views regarding custody, although generally speaking, subject to detailed rules, custody of boys under seven and girls under nine is with the mother and above those ages, with the father. Under customary law, the father is generally entitled to custody.

347. In addition to these, there is a general power given to the High Court by the Guardianship of Infants Act (4) to make orders as to custody and access on the application of either parent. Such orders may be made whether the parents are living together, separated or divorced. In making such orders, the court is required to have regard to the conduct of the father and the mother and to their wishes, but the paramount consideration is the welfare of the child.

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(1) Cap. 153, s. 4(b) and 5

(2) Cap. 152, s. 30

(3) Hopper v. Hopper (1942) 20 K.L.R. 19

(4) Cap. 144, s. 7

348. We think these provisions need to be consolidated and simplified, and that this is a sphere where there should be uniformity.

349. We do not think anyone should have an absolute right to the custody of the infant children of a marriage if the parties to that marriage separate or are divorced. We think the paramount consideration should be the good of the children. The ultimate decision must, we think rest with the court, but we think the court should always take into account the wishes of the parents and the customs of the community. In this connection, a father will generally wish to ensure that his sons are properly initiated into the traditions of his tribe. We think the wishes of the child should be considered, where the child is of an age to express an independent opinion. We think also that the court in dealing with these questions should be required, so far as is practicable, to obtain the advice of an impartial person trained in matters of child welfare, but without being bound to follow that advice. We think there should be a rebuttable presumption that it is best for a young child, below perhaps seven years of age, to live with the mother, although against this, where there is likelihood of the father ultimately having custody, must be weighed the undesirability of an avoidable disturbance in the life of a child. Much must depend on the facts of each particular case. In this connection, we would remark that grandmothers often play a substantial part in the upbringing of African children.

Recommendation No. 142

We recommend that the custody of the infant children of a marriage, following a decree of separation or divorce should be decided by the court, with the good of the children the paramount consideration, but with the court required to have regard to the wishes of the parents and the children and to local custom. We recommend also that the court should, so far as practicable, take the advice, but without being bound thereby, of any available officers trained in child welfare. We recommend that there should be a presumption that children below the age of seven years, and particularly the younger of such children, should be in the custody of their mothers but that such presumption should be rebuttable on the facts of any particular case.

350. To avoid duplication and possible conflict, we think the Guardianship of Infants Act should be amended by deleting from it section 7, which provides for orders as to custody, and the appropriate corresponding provision made in the new Bill. We would also delete section 10, which would in any case need amendment in view of the proposed new approach to divorce but provision for declarations of unfitness might be included in the new Bill. We think section 11 should also be deleted: we think our recommendations would make it unnecessary and without a background of English law it might be misleading. (1)

351. We have recommended earlier (2) that when a man and a woman have gone through a ceremony purporting to be a marriage which is in fact void, any children of such union should be deemed to be legitimate. We think it is clear that in these circumstances the children would take the name of their father and that he would be responsible for their maintenance. What is not so clear is who would be entitled to their custody and under a duty to care for them. This problem does not arise under English law, where the deeming of legitimacy only arises on a decree of the court avoiding a marriage or declaring it void and the question of custody is dealt with in the decree. We think it is desirable to make provision for this and that on balance, having regard to the probability that the children will be young when the invalidity of the marriage is discovered, it would be best to provide that, subject to any agreement between the parties and to any order that the court may make, the mother should have custody of the children.

Recommendation No. 143

> We recommend that where, under any of the foregoing recommendations, children would be deemed to be legitimate, their mother should, subject to any agreement to the contrary and to any order that the court may make, have custody of those children, without prejudice to any obligation towards them that their father may have under any written law.

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(1) It was derived from the English Custody of Infants Act, 1873, and is explained in Hart v. Hart (1881) 18 Ch. D. 670.

(2) Recommendations Nos. 4, 8, 17, 20, 39 and 41.

352. As we have already indicated more than once, we think that questions relating to dowry should be dissociated from the law of marriage and divorce. It follows, therefore, that, in our view, an order giving custody of a girl child would not affect the right to dowry when that child reaches marriageable age. Custody, maintenance and dowry would each be considered independently. Thus for example, it might well happen that a mother would gain custody of her daughter, but the father would be liable to pay maintenance and the father would in due course be entitled to the dowry. The custody and the maintenance would be decided by the court, in accordance with the principles already indicated, and the dowry in accordance with custom.

353. We think that every order for custody should be open to review at any time, if it can be shown that the circumstances have changed. We think, also, that the court should have the power to vary or set aside any agreement that may have been made on a voluntary separation regarding the custody of the children. In making any such order the court should, in our opinion, be guided by the principles set out in Recommendation No. 142 above.

Recommendation No. 144

We recommend that the court be given power at any time and from time to time to vary or set aside:-

(a) any order relating to the custody of children whose parents are separated or divorced; and

(b) any agreement relating to the custody of children made between the parents on or following their voluntary separation.

354. We think that where an order for custody is made, it should normally be accompanied by provisions allowing access, at reasonable times and with reasonable frequency, to the parent denied custody and also, where the circumstances require it, to other members of the parent's family. We think this would accord with local custom. In England, orders for access are only made in favour of parents, although in Scotland access may be awarded to other members of the family.(1)

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(1) S. v. S. The Times 21st June, 1967

355. It should be noted that "access" has a very limited meaning. For example, where custody of a child has been given to the mother, an order that the child spend one week of the year with the father is an order as to custody, not access [1]. As the law stands at present, this distinction is of importance, but if, as we recommend, the court is given a wide power to vary any order or agreement as to custody or access, it will cease to be significant, and an order for access may be regarded merely as a condition qualifying the order for custody.

Recommendation No. 145

> We recommend that the court be given power, when making an order for custody of a child or at any time subsequently, to order that any parent denied custody or any members of such parent's family be allowed access to the child at such times and with such frequency as to the court may seem reasonable.

356. Various provisions now exist regarding the payment of maintenance for children, in the Subordinate Courts (Separation and Maintenance) Act [2], the Matrimonial Causes Act [3] and the Guardianship of Infants Act [4]. We think these provisions need simplification and some reform.

357. We think the primary responsibility for the maintenance of a child lies with the father, and that where there has been a separation or divorce, the father should be liable for the maintenance of his children, whether or not he is given custody of them. We would, however, give the court power, to meet special cases, to order the mother to pay for, or contribute towards, the maintenance of her children.

Recommendation No. 146

> We recommend that the court be given power in all cases of separation or divorce to order the father to pay the cost of maintenance of his children, irrespective of any order that may be made as to their custody. We recommend also

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(1) See the Tanganyika case of Jennings-Bramly v. Jennings-Bramly (1962) E.A. 512; the law of Kenya would appear to be the same.

(2) Cap. 153, ss. 6(2), proviso (ii), and 10

(3) Cap. 152, ss. 23, 26, 27, 28, 30 and 32

(4) Cap. 144, ss. 7(3),(4), (5) and 16(2)

that the court be given power in its discretion to order the mother to pay or contribute towards the maintenance of her children, where she has the means to do so.

358. We considered also the question who should pay the maintenance of children accepted into the home of a step-father or foster-father. We think the natural father should always be liable, so long as he lives, but that where he has no means or his whereabouts are unknown, there should be a secondary liability on the mother and the step-father. When the natural father is dead, we think the step-father or foster-father must assume the liability. We think the court should be given the power to make such orders as may be necessary to give effect to this recommendation.

Recommendation No. 147

We recommend that where a child has been accepted into the home of a step-father or foster-father, the natural father should continue to be liable for the maintenance of his child but that if he lacks the means to pay or his whereabouts are unknown or he is dead, the mother and the step-father or foster-father should be liable and we recommend that the court be given power, on application, to make such orders as may be necessary to give effect to this recommendation.

359. We think that orders for custody, access and maintenance should only be made in respect of children under the age of eighteen years and that any such order should automatically determine when the child in respect of whom it was made, attains that age. We think this age should be the same whatever the race or tribe of the parties.

Recommendation No. 148

We recommend that the power of the court to order custody of, access to or maintenance of children be limited to relate only to children under the age of eighteen years, and that any such order cease to have effect in relation to any child on that child attaining that age, without prejudice to any claim to arrears then outstanding.

360. We do not think that an order giving custody of a child should entitle the person to whom it is given to take that child out of Kenya if the other party objects. In such circumstances, and indeed in any case of matrimonial dispute regarding a child, the objecting party should be able to apply to the court for an order preventing the child being taken out of the jurisdiction.

Recommendation No. 149

> We recommend that the court be given power on the application of any interested party to make an order prohibiting the taking of a child outside the jurisdiction.

JACTITATION OF MARRIAGE

361. Under English law, there is a remedy for what is known as jactitation of marriage, which means persistently boasting that one is married to someone else when not in fact so married. The remedy was a decree for perpetual silence on the subject. This action was sometimes, though not exclusively, used as a means of obtaining a declaration as to the validity of a disputed marriage. So far as we are aware, no such proceeding has ever been brought in Kenya and we do not think the law should be encumbered with forms of action that meet no practical need.

Recommendation No. 150

> We recommend that the law contain no provision for proceedings in relation to jactitation of marriage.

LEGAL COSTS IN MATRIMONIAL CAUSES

362. It is not the present practice of the courts to condemn a wife in costs in matrimonial proceedings where the decision is against her and her husband may even be ordered to pay her costs, except where it is shown that she has sufficient separate estate (1). There is no rule of law to this effect, and the court has a discretion to take all the circumstances into account. Moreover, a wife is sometimes granted an order for her husband to furnish security for her costs. These practices go back historically to the days when a woman's property passed to her husband on marriage and she was normally completely dependant on him.

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(1) Patel v. Patel (1965) E.A. 560

363. It may be argued in principle that if a wife has the same right as her husband to acquire property and to enter into contracts, there is no logical reason why she should receive preferential treatment in the matter of costs. On the other hand, the proportion of married women in Kenya who have substantial assets of their own is, we believe, small. We have taken the advice of the Council of the Law Society on this question, which was that the present practice should be permitted to continue. We accept that advice.

Recommendation No. 151

We recommend that the present practice continue, by which, subject to the discretion of the court, a wife is not normally condemned in costs, except where it is shown that she has sufficient separate estate.

MISCELLANEOUS

CONSEQUENTIAL AMENDMENTS

364. We have recommended above (1) that there should be complete equality of legal status and legal rights in polygamous households. The implementation of this as regards civil service pensions schemes presents, however, considerable difficulties. The Pensions Act (2) already provides for the equal division of benefits between wives, as does the Widows' and Children's Pensions Act (3), and only minor verbal alterations will be required to these Acts. The Widows' and Orphans' Pensions Act (4) is related entirely to monogamous marriages and should, therefore, in theory, be amended. As, however, the amount of any pension is based on the relative ages of husband and wife, such an amendment would involve the complete rethinking of the Act, and since it relates almost exclusively to European expatriate officers, such a task would appear unjustified. A more serious problem is presented by the Asian Officers' Family Pensions Act (5), which provides that in polygamous households, only the first marriage is recognized as valid for the purposes of the Act. This runs directly contrary to our recommendation and is, we think, unfair towards second and subsequent wives. Here again, any change would involve not merely the enjoyment of the benefits payable under the Act but also their assessment, and we think we can do no more than draw attention to the position.

365. Similar considerations apply to the National Hospital Insurance Act (6), under which it would appear that in the case of a male contributor, benefits can only be enjoyed by the contributor, one named wife and the contributor's children, presumably by any wife. It might well be argued, however, that if a contributor is to enjoy benefits in respect of more than one wife, he should pay additional contributions. This again raises questions of policy beyond the scope of our enquiry.

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(1) See Recommendation No. 13
(2) Cap. 189
(3) Cap. 195
(4) Cap. 192
(5) Cap. 194
(6) Cap. 255

366. We would recommend the amendment of the Workmen's Compensation Act (1). This Act, like those of Tanganyika and Uganda, provides for different classes of dependants according to whether a deceased workman was an African under the paternal system, an African under the maternal system or a non-African, and since the lists vary in comprehensiveness, the distinctions are discriminatory. At the risk of going outside our terms of reference, we recommend a uniform definition, broadly following that in the National Social Security Fund Act (2), but including step-children and step-parents.

367. Various minor consequential amendments to other Acts do not, we think, require any explanation. We should however, perhaps comment on the fact that under the Pensions Act, where an officer is killed on duty, his pension may be payable to his children until they attain the age of twenty-one. We are not recommending any change in this, since it is an undertaking by the Government on the basis of which officers have entered the public service. Whether any change should be made in relation to persons who may join the service in the future is a matter of policy which the Government may wish to consider.

Recommendation No. 152

> We recommend that various written laws be amended consequential on our main recommendations, as set out in the Second Schedule to the draft Bill annexed as Appendix VIII.

368. The relationship of husband and wife affects liability to income tax, and we think we should comment briefly on this. First, as regards the monogamous marriage, the incomes of husband and wife, if they are living together, are aggregated and treated as income of the husband, but the husband is entitled to what is known as the married allowance. Where both husband and wife have substantial incomes, this aggregation makes them liable to pay much higher taxes than if they were unmarried. We draw attention to this, but we think that we should be going outside our terms of reference if we were to suggest major changes in the system of taxation. Where polygamous marriages are concerned, however, we think the present law is liable to operate unfairly. A man with two or more wives is entitled to the same married allowance as a monogamous husband, but the incomes of all his wives are aggregated with his. We think the

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(1) Cap. 236

(2) Cap. 258

principle of aggregation must apply in such cases but we think that if it does, there should be some supplementary allowance in respect of the second and subsequent wives. We appreciate that this is a matter which would require discussion with the Partner States in the East African Community.

Recommendation No. 153

> We recommend that consideration be given to the question whether men with more wives than one should not receive a supplementary allowance against income tax in respect of the second and each subsequent wife, in view of the fact that their incomes are aggregable with his.

369. We are advised that a woman receiving maintenance from her husband or former husband is liable to income tax on it, and that the husband is permitted to deduct the amount of the maintenance from his taxable income. We are not aware on what provision this practice is based, but we think it reasonable.

370. We would add that in the course of our public meetings we were frequently addressed on the subject of affiliation. We think, however, that this is outside our terms of reference and as it involves difficult and highly controversial problems, we are making no recommendation on the subject.

PENALTIES

371. We have suggested in our draft Bill penalties for the various offences, as nearly as we could in proportion to those for comparable offences under the Penal Code. The only ones that call for comment are, we think, those for adultery and enticement. These are severe, but we felt that the maximum sentences for these offences had to be severe, if they were to be deterrent. We have suggested a substantially more severe sentence for enticement than for adultery, because the former necessarily involves the break-up, at least temporarily, of the matrimonial home, whereas the latter may be an isolated, unpremeditated act. We appreciate that enticement, in the sense in which we have used the word, need not necessarily have any sexual connotation, but we think there will be a sexual element in the majority of cases and every sentence is in the discretion of the court in the light of all the circumstances.

372. In this connection, we would most seriously urge that, at least in the early stages, prosecutions for offences against the new law, if it is enacted, should only be undertaken where the offence has been deliberate, and that the penalties imposed, save in exceptional cases, should not be severe.

THE DRAFT NEW LAW

373. As directed in our terms of reference, we have prepared a draft Bill, which would, we think, give effect to our recommendations, and this is attached as Appendix VIII. As regards the form of the draft, we would only comment that we have deliberately avoided following precedents. If the Bill is enacted, English decisions in matrimonial causes will cease to be authoritative in Kenya. The Bill is intended to meet Kenya conditions and we do not think its interpretation should be influenced by decisions of courts in other countries but this would almost inevitably result if we were to import provisions from other laws.

374. It will be observed that we are recommending that the courts be given very wide discretionary powers and also that we are recommending that they be required to have considerable regard to custom. These recommendations might seem to run counter to the views we have expressed that unification of the law and certainty in its provisions are desirable. We think, however, that whatever changes are made, there is bound to be a long period of transition, during which there should be as much flexibility as possible.

375. If our draft is approved, rules of court will immediately be required to regulate practice and procedure and also rules governing the registration of marriages. Other rules will be needed, but these will be less urgent. All forms now used will need to be redesigned, if only to show whether marriages are or are intended to be monogamous or polygamous. In this connection, we would remark that we think the registers should all be kept in the English language, but that the various forms should be printed in English and also in each of the main vernacular languages, for use in the areas where those languages are used.

376. We find it impossible to estimate what the cost of our proposals would be. The immediate, direct, cost would, we think, be small, mainly that of printing forms and registers, but some additional staff would be needed in the Registrar-General's department and some clerical assistance at local level for district registrars, kadhis and

chiefs. Eventually, we anticipate that the Registrar-General will require departmental officers in every district but this will be a matter of gradual growth and will depend, at least to some extent, on the necessary funds being available.

377. Part of the cost of our proposals could, of course, be raised by the fees to be charged for the various services to be performed, but we would urge that these be kept to the minimum economically possible because they will affect people in every walk of life and we would not like the new law to be ignored because ordinary, humble, people could not afford to pay the fees.

378. If our proposals are accepted, it would mean a radical change in the law of Kenya and this would call for the widest possible publicity. The whole administrative service could, and we are sure would, help and this would be most valuable, particularly at locational and village level. We are confident that the Press would co-operate fully and perhaps the most important help would be that given by the Voice of Kenya. We hesitate to presume to offer advice to experts, but we would suggest that, apart from news items and talks on the new law, it might be possible to arrange a serial story or perhaps a series of plays illustrating how the law affects ordinary people.

379. We have already suggested that it would be desirable, if possible, to have a special course for magistrates at the Kenya Institute of Administration and it would be essential to send out instructions and explanations for the use of all concerned and particularly for the chiefs and sub-chiefs on whom much of the success of the proposals would depend.

ACKNOWLEDGEMENTS

380. We would express our gratitude to all who have helped us in our task: first, to the various Commonwealth, African and foreign Governments (1) who were good enough to send us copies of their marriage laws; secondly, to all those members of the public who took the trouble to address us or to write to us; then to the

(1) The following Governments have sent us copies of their laws on the subject of marriage and divorce: Australia, British Columbia, Botswana, Canada, Cyprus, Gambia, Ghana, India, Jamaica, Malaysia, Mali, Malta, Morocco, New Zealand, Pakistan, Singapore, Tanzania, Tunisia, Uganda, United Kingdom, Zambia.

Provincial Commissioners who have given us their advice regarding the setting up of marriage tribunals and for their help, and that of all the other administrative officers and officers of local authorities who made the arrangements for our public meetings; to the Kenya News Agency who made the necessary publicity through the radio and press for our visits around the country; to the Commissioner-General for Income Tax who has been extremely helpful in providing us with information as to the practice of his Department; to Mr. S. Cretney, who acted as Secretary during a very busy period; to Miss J. Herbert for typing this Report and carrying out all the other typing and clerical duties connected with the Commission's work; and to Mis J. Peel and Miss Kohli, who shared the laborious clerical duties involved in producing this Report.

381. Finally, his fellow-Commissioners would add a special word of thanks to Mr. E. Cotran, who, in addition to serving as a Commissioner, has performed the duties of Secretary to the Commission.

2. Within what relationships should people be debarred from marrying? 12.

3. Should a man be allowed more than one wife? If so, should there be any limit to the number of wives? If so, what? 13.

4. Should the consent of both parties to a marriage be essential? 14.

5. Should the consent of the parents be required? If only up to a certain age, what age? 15.

6. Should any other consent be required? 16.

7. Should the legal validity of a marriage depend on the payment of bridewealth? 17.

8. Should the formalities of marriage be the same for everyone? What are the essentials? 18.

9. Should all marriages be registered? Should the validity of marriages depend on registration?

10. Should divorce be allowed by law? 19.

11. If so, for what reasons? Specific misconduct of either party or the general breakdown of the marriage? Should the same conditions apply to husband and wife? 20.

12. Should the law require a procedure of attempted reconciliation before allowing divorce? If so, should this be by official, religious or agreed procedure?

13. Should divorce by consent be allowed?

14. Should the legal validity of a divorce depend on the repayment of bridewealth? If so, in what circumstances?

15. Should every divorce have to go through the courts?

16. Should a husband be liable to pay maintenance to his former wife after divorce? If so, in what circumstances? Should the amount of such maintenance be fixed by a legal formula or should it be left to a court to decide?

17. What should be the liability as between divorced parents for the maintenance of the children of the marriage?

18. Who should have the custody of the children after a divorce? Should either husband or wife have a right to custody or should the interests of the children prevail? Should the rights of the parties depend on their conduct? Should custody be related to the ages of the children? If so, what should be the relevant ages?

19. Who should have custody of children after the death of either parent? Should the surviving parent always have custody? Should the right to custody be affected by the subsequent remarriage of the surviving parent?

20. Who should have custody of children after the deaths of both parents?

21. (a) What should be the status of children born out of wedlock?

(b) Who should be responsible for maintaining -

(i) such a child,

(ii) the unmarried mother?

22. Should married women, divorced women and widows have the same legal status in all respects as men?

23. Should the husband and wife each retain his or her own property after marriage or should it belong to one or other or should it be shared jointly? Should property acquired after marriage belong to either or to both jointly? Should the ownership of property be governed by law or left to be agreed between the husband and wife?

24. Should a woman be free to enter into contracts without the consent of her husband?

25. Should a husband be liable for the debts of his wife? If so, generally or in what circumstances?

26. Should a wife be liable to pay maintenance to her former husband after divorce? If so, under what circumstances?

27. Should a woman after divorce or after the death of her husband be legally independent of her former husband's family?

28. Should a woman be allowed more than one husband at the same time? If so, why?

29. Do you think it desirable and practicable for the law in the above respects to be the same for everyone or should some subjects be left to the custom of the individual's community? If the latter, which subjects?

Any additional suggestions for the improvement of the law relating to marriage, divorce and the status of women in matrimonial matters will be appreciated.

APPENDIX II

Names of Individuals and Organizations who answered Questionnaire

INDIVIDUALS

Ahmed, Farah Eloyo
Alwala, Etale Charles
Amayo, Luka
Aseka, Sarah
Ashihundu, Paul L.
Awino, B.A.
Bengula, Chai
Chelogoi, Emmanuel K.
Couldrey, John Alexander
Duro, Boaz Allan Ohaga
Echessa, Frederick
Farjalah, Alderman Usuf H.
Gachewa, E.N.
Glen, Miss I.M.
Kakoi, Richard M.
Kamau, David S.
Kapila, Romesh
Kasimu, Bakari
Kathembe, Frederick
Kericho, Ezekiew A.
Khamati, Edward M.E.
Kibuyu, Michael N.
Kinuthia, Peter M.
Kinyenye, I.
Kiptiony, Bet
Kiritu-Bem, Parmenas
Kiromo, Miss J.W.
Kitheka, John
Koinange, Miss M.W.
Konya, Jacob Alfayo
Koros, Arap Edwin Kibiego
Koske, Samuel A.
Kuaka, Paul R.
Kubai, The Hon. F; M.P.
Kuria, Michael Chegge
Lung' aho, Thomas Ganra
Lusuli, Rev. Washington Atamba
Maalim, Said Athumani
Maganjo s/o Kahuho
Magige, Joseph Tatwa
Majid, bin Said bin Nasor
Mann, Mrs. E.M.
Marebwa, Rev. Bede A.
Maringa, Raphael S.M.
Matingwony, Joshua A.
Mbanda, Alicia Adote
Mboga, John Ochola
Mbogo, Jonathan Ikigu
Mbogoh, The Hon. G.J; M.P.
Mboya, Paul
Mburea, Eliphas Jacob
Menach, Peters
Mkanga, Jeremy Njue
M'mutungi, Silas
Mondoh, Mrs. Ursula A.L.
Mugo, Baranaba R.
Mugo, Stanley
Mukolwe, Moses M.
Mulamula, Peter Alusiola
Mulli-Mutumbi, Naomie N. John
Mwenda, Robert William
Mwanza, Chikove
Nandre, Karam Singh
Ndaga, John L.
Ndambiri, Erasmus
Ndata, Thomas
Ndia, Mrs. Lydia
Ndumbu, N.K.
Ndungu, J.P.
Njaga, Walter W.
Nyaga, John
Nyongesa, Emmanuel J.
Obare, C.J.
Odoyo, Samson
Ogola, Joshua F.
Ojal, J.M.
Okeyo, George Albert & Mrs. Okeyo
Okuhambo, Wilson
Omar, Abdi Shuria
Omino J.M.
Omolo Ezra Choka
Omusolo, Rev. F.B.
Onchiri, Pastor Zebedonyo
Onyango Joseph
Onyundo, James
Orwa, Z.
Otiende, The Hon. J.D; M.P.
Otieno, John Mark
Otieno, John Walter Onyango
Otunga, Petronilla N.
Ouma, A.N.
Ouma, Joyce
Owang, J.R.
Owango, Solomon
Owino, Daudi Olak
Owiro, George Henry
Patel, Miss Madhuben R.
Peneby, Mohamed Salim
Pkemei, J.
Ptiso, Samuel
Radoli, Zacchary Ouma
Reid, F.G.
Roche, Dominic
Saldanha, F.H.
Salmin, Awadh K. Al-Amry
Shah, Ramniklal K.D.
Sheikh, Mwinyikai Bin Yusuf
Sikh, Ramgarhia Sabha
Sitati, Bem
Simiyu, Erastus
Tsalwa, Samuel Mnkubi
Tsuna, Chief Joto
Wabuko, Moses
Wariithi, Henry Clement
Weges, George Philip
Williger, Rev. Joseph

ORGANIZATIONS

Abanyala (Kakamega)
Advanced Women's Club
Africa Evangelical Presbyterian Church
Africa Inland Church, Mulango District
Agoro Sare Secondary School
Agricultural Dept., Coast
Ahmadiyya Muslim Mission, E.A.
Anglican Church, Kajiado
Anglican Church, Kitui
Arya Pratinidhi Sabha, E.A.
Bishop and Fathers of Kisii Diocese
Catholic Church, Isiolo
County Council, Kipsigis
Cutchhi Sunni Muslim Union
Diocese of Kitui (R.C.)
Executive Committee Kisumu County Council
Hindu Mandal
Holy Ghost Church of Kenya
Ikinu Women Group
Kabarnet Secondary School
Kakamega District Women
Kakamega Parent's Association
Kenya African Church
Kenya Dowry Reformation Movement
Kenya National Union of Teachers, Gusii
Kenya Social Workers Association
Khoja Shia Ithna-Asheri Supreme Council
Kisii Community
Maendeleo Ya Wanawake Organization
Maendeleo Ya Wanawake - Gendia Club
Maendeleo Ya Wanawake - Taita District
Malindi Muslim Association
Marinyani Secondary School
Ministry of Lands and Settlement
Mwangi Maina Social Club
National Christian Council of Kenya
Roho Church Mission
St. Francis' Church
St. John's Church
St. Paul's Anglican Church
Sikh Religious Society
Social Workers Trainees of Women Social Institute
Tharaka of Kambugi Association
Ukia Parish
Union of Sudanese
United Maragoli of East Africa
Veterinary Department, Meru
Y.W.C.A., Mombasa

APPENDIX III

Names of Individuals and Organizations
who addressed Commission orally

NAIROBI (10th, 11th August and 26th, 27th October, 1967)

Abdallah, A.
Ahmadiyya Muslim Missionary of Kenya, E.A.
Ambala, O.A.
Chuma, M.
Couldrey, J.A.
Gichuki, W.K.
Josep, Mrs. Flou
Kalenjin Union - Edward Chalanga, Hezron Sambo, Samuel A. Tijor
Kamau, Dishon
Kenya School of Law Family Law Discussion Group
Kenya Social Workers Association
Kiringu, Luka Ruo
Kirinyaga Welfare Association
Makotsi, A.D.
Mugo, Mrs. M.
Mohamed, Dr. Ashraf
Munoro, G.G.S.
Mwendar, Mrs. E. (Maendeleo Ya Wanawake)
National Christian Council of Kenya
Noor-Hessen, N. (Islamic circle)
Nzlime, W.
Ojiambo, Mrs. J. (National Council of Women)
Shah, R.K.
Mrs. Anderson (representing E.A. Women's League)
Arya Pratinidhi Sabha, E.A.

MOMBASA (21st - 23rd August, 1967)

Abdur, Rahman Bazmi
African Muslim Union of Kenya
Bazmi, A.
Federation of United Muslim Organizations (Kenya)
Freiyah, B. Lamki (Muslim Women of Mombasa)
Hatimy, Sheriff A.M.
Khoja Shia Ithna-Asheri
Kindy, Sheikh Hyder M.
Mohamed, Ahmed Shallo
Mohamed, bin Sheikh
Mohamed, Sheriff Jawad
Ogola, J.J.
Omar, Sheriff Ahmed
Rudainy, Sheriff M.T.
Salim, Sheriff Abdulla
Salim, Abed Zigame
Young Women Christian Organization
Islamic Circle
Coast Kenyans Association Khadis of Coast

MALINDI (24th August, 1967)

Chai, Daniel
Khan, S.A.
Malindi Muslim Association
Nathaniel, Daniel

LAMU (25th August, 1967)

Adnen, Sayid Ahmed
Alwy, Sayid
Bedawy, Sayid Hussen
Saggof, Sayid Omar
Somo, The Hon. Abu; M.P.

VOI (28th August, 1967)

Dingiria, The Hon. A.H; M.P.
Kariuki, Francis
Kilindi, Chief Philip B.
Kubo, Chief Alexander
Maendeleo Ya Wanawake
Maxwell, Dorah
Mengo, The Hon. W.K, M.P.
Mkiamodo, Mrs. Mary
Mockhoy, Justin A.
Mwamburi, Mrs. Mercy
Mwenda, Benjamin Albuno
Muslim representatives, Voi
O'Sullivan, Rev.
Samson, Sophie
Taita Welfare Organization
Wanzah, B.D.

NYERI (30th August and 4th October, 1967)

Benjamin, Joshua
Gacero, Mwai
Gathua, Benson
Gethi, Faris
Gishuru, Muranga
Hubbard, Rev. L.A.
Ikamba, Wilson
Kabuthia, Kihara
Kagotto, Samuel
Kamau, Mrs. Kezia
Kamungu, Johnston
Kanyara, Ayub
Karanja, Rev. John
Kiama, Stanley
Mathenge, Rev. Antony
Minja, Rev. Jason
Muhoro, Rev. Charles
Muhoya, Ex-Senior Chief
Mwangi, Ismail Ali
Ndegwa, The Hon. Duncan
Ndegwa, The Hon. G.G; M.P.
Nderitu, Mrs. Agnus (Maendeleo Ya Wanawake, Nyeri)
Ng'enda, Nerito
Ngunjiri, Stanley
Njaramba, Jeremiah
Nthenge, Francis
Singh, Dalip
Thuo, Mako
Wachira, Nehemia
Wakabi, Victor (KANU, Nyeri Branch)
Wambagi, Mrs. Sarah
Wangambe, Duncan
Wanjohi, Sisto
Wanyeki, Mrs. Grace

MERU (31st August, 1967)

Hassan, Mwalimu Hasidi
Keranthia, Rev. Selasius
Kobia, Roman Jag
Mawera, C.
Mburia, Elifus Jacob
Mmwiriahia, Councillor Senior Chief Nauman
Mugao, John
Mugao, Joseph
Murianki, Councillor Mrs. Judith
Mwobobia, Mrs. Jennifer
Mwongo, Mrs. Joyce
Nazir, A.M.
Ng'anga, L.K.
N'ikiugu, Ex-Chief
Solayman, Mohammed

WAJIR (2nd September, 1967)

Ibrahim, Sheikh Goso
Lord, M.A.

GARISSA (2nd September, 1967)

Abdi, Sheikh Mohamed
Ali, Sheikh Hussein
Ibrahim, Sheikh Ali
Yunis, Sheikh Abdulahi

BUSIA (11th September, 1967)

Andera, Paulo
Asiolo, Mrs. Joyce
Awori, Miss Alice
Awori, Canon
Baraza, Christopher
Buhaya Group
Bunyala Group
Idore, Luka
Maendeleo Ya Wana Wake
Makenga, K.
Marach Group
Mkala, Blasio
Mondoh, Peter
Monyoni, Joro
Mwangi, George
Nyangeza, Mrs. Christine
Odari, Mrs. Sofia
Odenga, Sub-Chief Leno
Oduki, Sedekia
Ogoma, Ex-Chief
Okuku, Noah
Omukule, Jaffet
Ondigo, Alas
Ondu, James
Onyango, A.
Orodi, Mrs. Elizabeth
Otemo, Alfred
Otieno, Mrs. Agnes
Samia Group
Teso Group
Wagashi, Joseph Otete

KAKAMEGA (12th September, 1967)

Akolo, Fanuel
Echessa, Frederick
County Council Group
Gangou, Sheikh Abu Bakr (Muslim Teachers' Union)
Josho, Omgweni
Kakamega Parents' Association
Lung'aho, Thomas G.
Lusuli, Washington
Maendeleo Ya Wana Wake
Oluhambo, Wilson
Otiende, The Hon. Joseph D; M.P.
Settlement Scheme Group (Bungoma)
Wabuge, Wafula

KISUMU (13th and 14th September, 1967)

Ahmed, M.O. (Ahmadiya Muslim Community)
Amayo, David O.
Audi, Onyango (Kenya Teachers Union, Kisumu)
Awour, Chief Albert
Dass, I. (Arya Samaj Community)
Maendeleo Ya Wana Wake
Malo, Shadrak
Muslim Welfare Society, E.A. (Nyanza, Western and Rift Valley Provinces)
Odawo, S.O.
Olang, Bishop (Anglican Diocese of Maseno)
Omino, Joel
Otieno, Onyango
Owino, Albert and Henry Obat
Oywa, Joshua (Gem location)
Rana, Ali
Sanga, John and G.K. Omolo (Executive Officers of Kisumu County Council)
United Maragoli of East Africa, Kisumu Branch

ELDORET (18th September, 1967)

Association of Protestant Churches in Eldoret
Bhatt, M.D.
Chepkantai, Salem
Cheruiyot, The Hon. arap John Kipruto; M.P.
Chumo, Lazaro
Kibeu, David (Bukusu Brotherhood, Uasin Gishu)
Koimur, I.K.
Omar, Maalim (Muslim community)
Tarus, arap R.K.
Tireto, Chebor
Tuwei, The Hon. K; M.P.

KAPENGURIA (19th September, 1967)

Alomai, Mathayo
Busia, Joseph
Kakuko, Chief Joshua
Kimani, Mrs. Leya
Kisana, Jacob
Kokwa, Ramadhani (Muslim community)
Komolkat, Steven
Konjo, Mrs. Chepor
Korio, Chief Richard
Lakit, Ex-Chief Kemei
Lonyangapor, Paolo
Lorimo, The Hon. J.L; M.P.
Lucailei, Luca

KAPENGURIA (Cont.)

Maked, Sikui
Makumbi, Samson
Menach, Peter
M'Gole, S.R. Karia
Mokono, Leman
Mwok, Chief John
Njiro, Changorok
O'Amoth, G.W.L.
Pkemei, Mrs. Dina
Punya, Lotemenk
Siangole, Chief Daniel
Sindano, Mrs. Rebecca
Tiamale, Leman
Tumkou, Rev. Daniel
Tumoto, John Kari

KERICHO (20th September, 1967)

Angasura, Ezekiel
Bii, The Hon. arap Alexander; M.P.
Cheriro, arap Kipsaubo
Cherorat, arap Elijah
Chepkwory, arap Eli
Cheptement, arap Kipsong
Kasembe, arap Dixon (Parents' Association)
Kenchiwa, arap Kipsiene
Kerich, John
Kiget, arap Zacharia
Koech, Mrs. Esther
Koey, arap Isiah
Korir, arap Kipchemoi
Largot, Johana Telo George
Miting, arap Kiplelei
Mohamed, S.D.
Ngerechi, arap Cheborge
Ratich, Antony K.
Romo, arap Joel
Rono, Mrs. Eunice F. (National Council of Women)
Ruto, arap Joel
Sigila, Job
Teinet, Mrs. Martha
Tengesha, Sr. Chief arap Cheborge
Turgut, Stanley

KISII (21st September, 1967)

Geda, Petro
Keragore, Johnson
Kipo, Osiro
Maawia, S.O.
Machoka, Z.
Maturi, Stephen
Mayieka, Stanley (Kenya National Union of Teachers, Kisii)
Mogeni, Samuel G. (for people of the Kisii community selected by D.C.)
Mugende, Fr. (R.C. Diocese of Kisii)
Ntabo, Samuel
Nyabure, Philip
Nyachieo, Stanley
Nyakurol, Rev. Michael
Nyang'era, Kingo'ina
Ogango, Okune (Speaking for The Hon. Oginga Odinga, M.P.)
Ogwora, Onyiego
Olima, Ex-Chief Pius
Ombonyo, Ariga
Owango, Chief Solomon
Rizgalla, Hassan (Muslim community)

NAKURU (22nd September, 1967)

Benson, Rev. (African Inland Church)
Elija Capt. (Salvation Army)
Gathoni, Mrs. Mary
Imbisi, Zablon E. (Nakuru Abaluhya community)
Karago, Karuiki (Teachers Union)
Karanja (Kikuyu Union)
Kengethe, J. (Presbeterian Church)
Kivihya, B.J.A.
Murunga, Peter
Ngotho, Chief Zablon Isaac
Nguba, Rev. Timothy (P.C.E.A.)
Njori, Evelyn
Njugona, Thuo (Kanu Branch, Nakuru)
Ojuka, R.S. (Luno Union, Nakuru Branch)
Yahya, Y.S. (Muslim community)
Wakesa, Jackson

NAIVASHA (23rd September, 1967)

Dias, Rev. V.
Jessami, G.K.
Kinuthia, Peter
Nazer, Mrs. C.E.
Njagi, Perminus (for group of Naivasha residents)
Tuwei, Rev. Jacob

KITUI (27th September, 1967)

Abu Bakr bin Ahmed (Muslim community)
Gariwal, A.S.
Joshi, M.
Konzi, Rev. (A.I. Church)
Mbaluti, Julius
Mbuvi, Canon O.M. (African Brotherhood Church)
Mulaa, Raphael
Ngutu, Paul (for eight traditional elders and chiefs)
Nyimba, Philip
Patel, Dr. P.
Women County Councillors

MACHAKOS (29th September, 1967)

Ali, Mohamed (Machakos Urban Council Muslim Group)
Athenga, Linus
Ilenge, David
Kateta, Chief Daniel
Kibati, J.M.
Kinyungu, Solomon
Kioko, Fr.
Kioko, Chief Philip
Kioko, Chief William
Kitavi, Jesse
Kitola, Mohamed
Kwalo, Tilas
Kwambua, Chief George
Malatya, Chief John
Mandu, Philip
Motuku, Chief Simeon
Mulwa, Wellington (delegation of the Northern Div.)
Muteh, Canon Jeremiah
Muthama, Daniel
Ndalamea, Moses
Ndambuka, Kenyu
Nzau, Daniel
Skankardas, Mrs. S. (Kenya Association of University Women)

THIKA (3rd October, 1967)

Dunnlevy, Dr. E.J.
Gathua, Rebecca
Jan, Hadji Mohammed and Hadji Abdalla Tairara
Kiragwa, Mwangi
Kuria, Chagu
Munene, Dr. J.F.C.
Ngige, George
Ngura, Mwangi
Njeri, Miss Rebecca
Shah, K.N.
Verma, B.S.

EMBU (5th October, 1967)

Embu Division Group (Ex-Chief Murutetu and four others)
Evurori Location Group (Ex-Chief Samson Mukenti and five others)
Kanu Branch, Embu
Maruria Location (Isiah Kithumbi and four others)
Muratho, Nathan N.
Muruiki, Ben Levi
Ngandori Community
Njage, J.M.
Njeru, Maalem Ali (Embu Muslim community)
Njiru, Rev. Musa
Njue, Ex-Chief Josiah
Nyaga, James

KAJIADO (30th October, 1967)

Ali, Sevid Mohamed and Abdi (Muslim community)
Francis, Chief
Kenah, M.T. (Olkejiado County Council)
Kipopo, Chief
Leteipan, Mrs. S. (Maendeleo)
Mpoke, Tiampati (A.I.M.)
Ole-Biresha
Samo, P.

APPENDIX IV

Names of Individuals and Organizations
who submitted written Memoranda

INDIVIDUALS

Abdallah, A.
Ademson, Lutt Odhiambo
Allott, Prof. A.N.
Ambala, O.A.
Asamba, H.U.
Asiko, D.E.O.
Babu, Janu Ongwacho
Busienei, Zachariah Arap
Butt, Aftab A.
Charagu, Eluid
Chelule, Mongesoi
Cherorot, Eliwah A.
Chesoni, Z.R.
Couldrey, J.A.
Cretney, S.M.
Durrand, P.P.
Gichuki, W.K.
Githii, George
Ikahu, Abdul Karim
Kamau, Dishon
Kaguithio, M.D.N.
Kakuyuia, Kibwana Sumba
Kanuna, Philip
Kareithi, Mrs. R.W.
Kareri, Rev. Charles M.
Karia, W.F.
Kariuki, Francis
Kase, J.Z.
Kindy, Hyder M.
Khan, S.A.
Kapalia, Morris M.
Kurala, Shabai Awere
Le Pelley, Peter
Maina Joel
Maina S.K.
Makau, John
Mate, Sylvester B.
Melanyi, Alfred M.
Mgoghwe, Simon R.
Mohamed, H.E.
Mohamed, O.S. Athumani
Moses s/o Obare
Muchiri, Joshuah Benjamin
Mungura, Michael Muchai
Munoru, G.G.S.
Muria, Michael Chegge
Murunga, Peter M.
Muteti, D.M.
Mutuku, W. Dansistor
Mutune, Dr. Elija P.
Mutune, Mrs. Mary Ruth
Muturi, Nelson
Mutweia, Jackson Nzioki
Mwangi, Joseph Irungu
Nazer, C.E.
Ndegwa, D.N.
Ngala Tuva, E.D.
Ngugi s/o Kamunyo
Njirainey, Ali
Njorogi s/o Icua
Nurmohamed, Sakinabai
Nyota, Samuel
Nyumba, Philip
Obewa, Sheikh Mohamed Daudi
Ochola, Rev. John Paul
Odawo, S.O.
Ogingo Odinga
Ogola, John Joseph
Ogola, M. Olale
Oliveira, Lameki
Omar, Sheikh Abdillahi
Omolo-Omwanda, Kenneth E.
Omulo, W.R. Owuor
Onyango, Okumu
Otieno, Elly E.
Otieno, J.W. Onyango
Owino, Samson Martin
Radolo, Utolo
Shah, R.K.D.
Shah, Veljee Devshi
Sheikh, Isahak Mohammed
Sheikh, Seif Athuman
Suleman, Kenyi
Tarus, R.K. Arap
Tora, Chief and Chief Ali
Upadhyay, Kunurd
Wambu, Ustadh Abdulrahman
Wamae, Paul Matheri
Wangii, Beth
Yussuf, Ramazani

ORGANIZATIONS

Abagusii Union (E.A.)
Abaluhya Association (E.A.) Nakuru
African Muslim Union of Kenya
African Women Club
Ahmadiyya Muslim Mission, E.A.
Arya Pratinidhi Sabha, E.A.
Bungoma Muslim Welfare Society

Christian Holy Ghost Church of E.A.
Coast African Cultural Society
Coast Kenyans Association
Family Service Council
Federation of United Muslim Organization (Kenya)
H.H. The Aga Khan Shia Imami Ismailia Council of Kenya
Hindu Union
Institute of Social and Cultural Affairs, E.A.
Islahil Islamiyya, Lamu
Kabras Association
Kakamega Muslim Community
Kathis and other Muslim Leaders
Kenya African National Union, Nyeri
Kenya Association of Social Workers
Kenya Association of University Women
Kenya Civil Servants' Union
Kenya Dowry Reformation Movement
Kenya National Union of Teachers
Kenya School of Law
Kenya Social Workers Association
Khoja Shia Ithna-Asheri Supreme Council
Kikuyu Union (Rift Valley)
Kirinyaga Welfare Association of E.A.
Kisii Muslim Community
Lamu/Tana Muslim Association
Luo Union (E.A.) Nakuru
Maendeleo Ya Wanawake Organization
Majmuat-Ul-Khairat Kilifi Union
Malindi Muslim Association
Mothers' Union
Mumias Muslim Mosque Committee
Mungano Riyata Madrasatil Islamia Committee
Muslimsof Elgeyo, Nandi and Uasin Gishu
Muslims of Lamu
Muslim Welfare Society, E.A.
Muslim Welfare Society, E.A. Nyanza
Muslim Women of Mombasa
Naivasha Residents
Nakuru Sunni Muslim Community
National Christian Council of Kenya
National Council of Women of Kenya
Ngandore Community
Northern Division of Masaku
Senior Students of St. Mary's School, Yala
Society of Islamic Reformation
Sudanese Association of East Africa
United Churches of Portestants
Voi Leading Muslims
Western Province Muslim Teachers Union
Women of Lamu and Tana River
Youth Council

APPENDIX V

Subsisting written laws of or applying to Kenya which the Commission has examined

The Constitution of Kenya
The Interpretation and General Provisions Act (Cap. 2)
The Civil Procedure Act (Cap. 5 1948 Edition)
The Law of Contract Act (Cap. 23)
The Law Reform Act (Cap. 26)
The Fatal Accidents Act (Cap. 32)
The Age of Majority Act (Cap. 33)
The Bankruptcy Act (Cap. 53)
The Penal Code (Cap. 63)
The Evidence Act (Cap. 80)
The Children and Young Persons Act (Cap. 141)
The Affiliation Act (Cap. 142)
The Adoption Act (Cap. 143)
The Guardianship of Infants Act (Cap. 144)
The Legitimacy Act (Cap. 145)
The Marriage Act (Cap. 150)
The African Christian Marriage and Divorce Act (Cap. 151)
The Matrimonial Causes Act (Cap. 152)
The Subordinate Courts (Separation and Maintenance) Act (Cap. 153)
The Maintenance Orders Enforcement Act (Cap. 154)
The Mohammedan Marriage and Divorce Registration Act (Cap. 155)
The Mohammedan Marriage, Divorce and Succession Act (Cap. 156)
The Hindu Marriage and Divorce Act (Cap. 157)
The Trustee Act (Cap. 167)
The Pensions Act (Cap. 189)
The Provident Fund Act (Cap. 191)
The Widows' and Orphans' Pensions Act (Cap. 192)
The Asiatic Widows' and Orphans' Pensions Act (Cap. 193)
The Asian Officers' Family Pensions Act (Cap. 194)
The Widows' and Children's Pensions Act (Cap. 195)
The Employment of Women, Young Persons and Children Act (Cap. 227)
The Workmen's Compensation Act (Cap. 236)
The National Hospital Insurance Act (Cap. 255)

The National Social Security Act (Cap. 258)

The Registered Land Act (Cap. 300)

The Estate Duty Act (Cap. 483)

The Kadhi's Courts Act 1967 (No. 14 of 1967)

The Magistrate's Courts Act 1967 (No. 17 of 1967)

The Immigration Act 1967 (No. 25 of 1967)

The East African Income Tax (Management) Act, 1958
(E.A.H.C. Act No. 10 of 1958)

The Indian Transfer of Property Act (Applied Laws, Group 8)

(Note: we are of the opinion that Groups 9 and 10 of the Applied Laws are now obsolete.)

APPENDIX VI

A Bill for

An Act to Declare and Amend the Law relating to Domicil

ENACTED by the Parliament of Kenya, as follows:-

Short title

1. This Act may be cited as the Law of Domicil Act 196 .

Interpretation

2. In this Act -

"country" means a sovereign state, except where the law of the state recognises that different domicils attach to different parts of that state, when it means any such part.

Domicil of origin

3. Every person shall acquire at the date of his birth -

(a) if he is born legitimate or deemed to be legitimate, the domicil of his father, or if he is born posthumously, the domicil which his father had at the date of his death;

(b) if he is born illegitimate, the domicil of his mother.

Foundlings

4. An infant who is a foundling shall acquire domicil in the country where he is found.

Legitimation

5. An infant who is legitimated by the marriage of his parents shall acquire the domicil of his father at the date of the legitimation.

Adoption

6. An infant whose adoption has been authorized by a court of competent jurisdiction or recognized by a declaratory decree of such a court shall, as from the date of the order or decree, acquire the domicil of the adopter or, where he is adopted by two spouses, that of the husband.

Marriage

7. A woman shall, on marriage, acquire the domicil of her husband.

Domicil of choice

8.(1) Where a person, not being under any disability, takes up residence in a country other than that of his domicil with the intention of making that country his permanent home, or where, being resident in a country other than that of his domicil, he decides to make that country his permanent home, he shall, as from the date of so taking up residence or of such decision, as the case may be, acquire domicil in that country and shall cease to have his former domicil.

(2) A person may intend or decide to make a country his permanent home even though he contemplates leaving it should circumstances change.

(3) An adult married woman shall not, by reason of being married, be incapable of acquiring an independent domicil of choice.

(4) The acquisition of a domicil of choice by a married man shall not, of itself, change the domicil of his adult wife or wives, but the fact that a wife is present with her husband in the country of his domicil of choice at the time when he acquires that domicil or subsequently joins him in that country shall raise a rebuttable presumption that the wife has also acquired that domicil.

Consequential change of domicil

9.(1) Subject to the provisions of sub-sections (2) and (3) of this section, the domicil of an infant shall change -

(a) where the infant was born legitimate or is deemed to be legitimate or has been legitimated, with that of his father, or, if his father is dead, with that of his mother; and

(b) where the infant is illegitimate, with that of his mother:

Provided that where the custody of an infant has been entrusted to his mother by decree of a court of competent jurisdiction, his domicil shall not change with that of his father but shall change with that of his mother.

(2) The domicil of an infant female who is married shall change with that of her husband.

(3) The domicil of an infant, other than a female who is married, whose adoption has been authorized by a court of competent jurisdiction or recognized by a declaratory decree of such a court, shall change with that of his adopter or, where he was adopted by two spouses, that of the husband, or, if the husband is dead, that of the wife.

Unity and continuity of domicil

10.(1) No person may have more than one domicil at any time and no person may be without a domicil.

(2) A person retains his domicil until he acquires a new domicil notwithstanding that he may have left the country of his domicil with the intention of never returning.

Cessation of application of Part II of the Indian

11. Part II of the Succession Act, 1865, of India shall cease to extend or apply to Kenya.

APPENDIX VII

A Bill for

An Act to Repeal and Replace the Age of Majority Act

ENACTED by the Parliament of Kenya, as follows:-

Short title

1. This Act may be cited as the Age of Majority Act 19 .

Age of majority

2. A person shall attain full age and cease to be under any disability by reason of minority at the beginning of the eighteenth anniversary of the day on which he was born.

Repeal Cap. 33

3. The Age of Majority Act is hereby repealed.

Transitional and saving

4.(1) Nothing in this Act shall affect -

(a) the provisions of any written law which expressly prescribes any age as conferring capacity for any purpose; or

(b) the capacity of any person who, before the commencement of this Act, has attained majority under the law applicable to him.

(2) Where by any instrument or by the order of any court, a guardian has been appointed for any person until that person attains the age of twenty-one years, such appointment shall be read and construed as though it had been until the person attained eighteen years or until the date of commencement of this Act, whichever is the later.

57. Maintenance of register of annulments and divorces
58. Copies of decrees of annulment and divorce to be sent to Registrar-General
59. Registration of foreign annulments and divorces
60. Endorsement of marriage registers
61. Correction of errors
62. Power for Minister to restrict provisions relating to registration
63. Evidence of marriage

PART IV: PROPERTY, RIGHTS, LIABILITIES AND STATUS

64. Rights and liabilities of married women
65. Equality between wives
66. Separate property of husband and wife
67. Special provisions relating to the matrimonial home
68. Presumptions as to property acquired during marriage
69. Gifts between husband and wife
70. No liability for antecedent debts of spouse
71. Duty to maintain spouse
72. Presumption of wife's authority to pledge her husband's credit, etc.
73. Husband and wife and the law of tort
74. No right of spouse to inflict corporal punishment
75. Agreements to live apart
76. Status of widows

PART V: MISCELLANEOUS RIGHTS OF ACTION

77. Right to damages for breach of promise of marriage
78. Limitation of actions for breach of promise
79. Right to return of gifts
80. Contracts to pay dowry enforceable by civil suit
81. Suits for return of dowry
82. Limitation of actions relating to dowry
83. Right to damages for adultery
84. Right to damages for enticement
85. Assessment of damages for adultery or enticement

PART VI: MATRIMONIAL PROCEEDINGS

Jurisdiction, Procedure and General Provisions

86. Jurisdiction of courts
87. Right to invoke jurisdiction
88. Transfer of proceedings
89. Power for magistrate or kadhi to state case

Preliminaries to Marriage

26. Notice of intention to marry
27. Publication of notices of intention
28. Notice of objection
29. Procedure on notice of objection
30. Determination of objection
31. Powerfor Registrar-General to dispense with requirement of notice
32. Lodging of objections with Registrar-General

Contracting of Marriage

33. Manner of contracting marriage
34. Time for contracting marriage
35. Witnesses
36. Marriages to be public
37. Procedure for marriages in civil form
38. Marriages according to religious rites and licensing of ministers
39. Power for Registrar-General to authorize marriages in places not otherwise permissible
40. Duty on kadhis and registration officers to attend marriages
41. Issue of marriage certificate or transmission of statement of particulars
42. Marriages in Kenya Embassies, etc., abroad
43. Issue of certificates of no impediment
44. Recognition of marriages contracted abroad
45. Recognition of marriages contracted in Embassies, etc., in Kenya

Void Ceremonies, Voidable Marriages and Legitimacy

46. Void ceremonies
47. Voidable marriages
48. Legitimacy
49. Matters not affecting validity

PART III: REGISTRATION OF MARRIAGES, ANNULMENTS AND DIVORCES AND EVIDENCE OF MARRIAGE

50. Maintenance of marriage registers
51. Duty to register marriages and procedure to be followed
52. Registration of subsisting unregistered marriages
53. Registration of marriages contracted abroad
54. Returns to be sent to Registrar-General
55. Completed registers to be sent to Registrar-General
56. Maintenance of index, searches, inspection and copies

APPENDIX VIII

The Law of Matrimony Act, 196 .

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4. Appointment of registration areas
5. Appointment of district registrars
6. Appointment of registrars
7. Appointment of registration officers
8. Appointment of registrars for foreign countries

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9. Establishment of marriage tribunals
10. Duties of tribunals
11. Powers of tribunals
12. Right of audience before tribunals
13. Meetings to be private
14. Procedure and evidence
15. Decisions to be recorded
16. No appeal from decisions of tribunals

PART II: MARRIAGE

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17. Meaning of marriage
18. Kinds of marriage
19. Conversion of marriages
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21. Minimum age
22. Prohibited relationships
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24. No marriage save of free will
25. Requirement of consent

Preliminaries to Marriage

26. Notice of intention to marry
27. Publication of notices of intention
28. Notice of objection
29. Procedure on notice of objection
30. Determination of objection
31. Powerfor Registrar-General to dispense with requirement of notice
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PART VI: MATRIMONIAL PROCEEDINGS

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87. Right to invoke jurisdiction
88. Transfer of proceedings
89. Power for magistrate or kadhi to state case

90. Appeals from magistrates' and kadhis' courts
91. Appeals from the High Court
92. Forms of proceedings
93. Alternative reliefs
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A Bill for

An Act of Parliament to regulate the law relating to marriage, personal and property rights as between husband and wife, separation, divorce and other matrimonial reliefs and other matters connected therewith

ENACTED by the Parliament of Kenya, as follows:-

PART I: PRELIMINARY

General

Short title and commencement

1. This Act may be cited as the Law of Matrimony Act 196 , and shall come into operation on such date as the Minister may, by notice in the Gazette, appoint.

Interpretation

2.(1) In this Act, except where the context otherwise requires -

"child" includes an adopted child and an illegitimate child;

"conciliatory body" has the meaning attributed to it in section 111;

"court" means any court having jurisdiction under section 86;

"decree" includes a decree of a foreign court which is recognized as effective under section 102;

"dowry" means any payment of stock, goods, money or other property made or promised in consideration of an intended marriage;

"marriage" has the meaning attributed to it in section 17, and any reference to a marriage means a marriage whether contracted before or after the commencement of this Act and whether contracted in Kenya or elsewhere;

"matrimonial home" means the building or part of a building in which the husband and wife ordinarily reside together, and includes -

(a) where a building and its curtilage are occupied for residential purposes only, that curtilage and any out-buildings thereon; and

(b) where a building is on or occupied in conjunction with agricultural land, any land allocated by the husband or the wife, as the case may be, to his or her spouse for her or his exclusive use;

"matrimonial proceeding" means any proceeding instituted under Parts II and VI of this Act or any comparable proceeding brought under any written law hereby repealed or in any foreign court;

"minimum age" in relation to marriage, has the meaning attributed to it in section 21;

"minister of religion" means any minister, priest or other person who is empowered to celebrate marriages by the laws of any religion according to the rites of which marriages may be celebrated under the provisions of this Act;

"party" in relation to a marriage or intended or purported marriage, means the husband or the wife or the intended or purported husband or wife, as the case may be;

"prohibited relationship" has the meaning attributed to it in section 22;

"religion" means, in the case of any system of religious belief which is divided into denominations, sects or schools, any such denomination, sect or school, and includes any non-denominational body or other association of a religious nature;

"specified religion" means a religion specified in an order made by the Minister under the provisions of section 33.

(2) A reference in this Act to a monogamous marriage includes a marriage originally polygynous or potentially polygynous, the character of which has been converted to monogamous by a declaration made under section 19 and a reference to a polygynous or potentially polygynous marriage shall be given the corresponding interpretation.

Appointments

Appointment of Registrar-General, Deputy and Assistant Registrars-General

3.(1) The Registrar-General shall be the Registrar-General of Marriages and Divorces for the purposes of this Act.

(2) There shall be a Deputy Registrar-General and as many Assistant Registrars-General of Marriages and Divorces as the Minister shall consider necessary.

Appointment of registration areas

4. The Minister may, by notice in the Gazette, appoint any area of Kenya to be a registration area for the purpose of this Act.

Appointment of district registrars

5.(1) There shall be a district registrar for each registration area and as many assistant district registrars as the Minister shall consider necessary.

(2) In the absence or during the illness or incapacity of the district registrar, the senior assistant for the time being stationed in the registration area shall act as registrar.

(3) District registrars and assistant district registrars may be appointed individually by name or collectively as the holders of specific public offices.

Appointment of registrars

6. Every district registrar and every minister of religion who is licensed under section 38 and every kadhi shall be a registrar for the purposes of this Act.

Appointment of registration officers

7.(1) There shall be registration officers for such areas as the Minister may decide, to perform such duties as may be prescribed and generally to assist district registrars in the operation of this Act.

(2) Registration officers may be appointed individually by name or collectively as the holders of specific public offices and pending the appointment of a registration officer for any area, the chief and sub-chiefs for that area shall be registration officers.

Appointment of registrars for foreign countries

8.(1) The Minister may, by notice in the Gazette, appoint any member of the diplomatic staff of Kenya in any country to which this section applies, either individually by name or as the holder of a public office, to be the registrar for the purposes of this Act in respect of that country.

(2) The Minister shall, by notice in the Gazette, designate the countries to which this section applies.

(3) This section shall apply to any country which has notified the Government of Kenya that it does not disapprove of the contracting of marriages at the Kenya Embassy, High Commission or consulate in that country.

Marriage Tribunals

Establishment of marriage tribunals

9.(1) There shall be a marriage tribunal for each division or location, as the District Commissioner may decide.

(2) A marriage tribunal shall consist of a chairman, who shall be nominated by the District Commissioner, and not less than two or more than four other members, who shall be selected by the administrative officer in charge of the division from a list of persons nominated for that purpose by the District Commissioner.

(3) So far as may be practicable, the persons selected to serve on a marriage tribunal shall include at least one person with training or experience in social welfare.

Duties of tribunals

10. The duties of a marriage tribunal shall be -

(a) to consider and determine objections to intended marriages referred to the tribunal under the provisions of section 29;

(b) on the application of either party to a marriage, to attempt to reconcile the parties to that marriage, where -

(i) the applicant complains of desertion by his or her spouse; or

(ii) the applicant contemplates instituting proceedings for divorce;

(c) to make such inquiries and such attempts at reconciliation as the court may direct in exercise of the powers conferred on it by sub-section (2) of section 119(X).

Powers of tribunals

11.(1) A marriage tribunal shall, in the case of an objection to an intended marriage, require the attendance of the parties to the intended marriage and of the objector, and, in any other case, require the attendance of the parties to the marriage.

(2) A marriage tribunal may require the attendance of any other person who, in the opinion of the tribunal, may be able to give any relevant information or to assist in any process of reconciliation.

(3) A marriage tribunal may at any time and from time to time, at the request of any party or of its own motion, adjourn any proceedings to enable further inquiries to be made or to afford the parties time to settle their differences between themselves.

Right of audience before tribunals

12.(1) The parties to a marriage or intended marriage which is under consideration by a marriage tribunal and any objector to an intended marriage shall have the right to be present and to address the tribunal and to call witnesses and each of the parties and any such objector shall have the right to cross-examine the witnesses called by any other.

(2) No advocate shall appear or act for any party in any proceeding before a marriage tribunal and no party shall be represented by any person, other than a member of his or her family, without the leave of the tribunal.

Meetings to be private

13. No proceeding before a marriage tribunal shall be open to the public at large.

Procedure and evidence

14.(1) Subject to the provisions of this Act and of any rules made hereunder, a marriage tribunal may regulate its own proceedings.

(2) A marriage tribunal may admit evidence which would not be admissible in a court of law.

Decisions to be recorded

15. A marriage tribunal shall not be required to maintain a record of proceedings before it but every decision of a marriage tribunal shall be recorded in writing with a brief statement of the reasons therefor and shall be signed by the chairman.

No appeal from decisions of tribunals

16. There shall be no right of appeal from any decision of a marriage tribunal:

Provided that any person who alleges that a marriage tribunal has misconducted itself in any material respect or that it has taken a decision which is manifestly contrary to the rules of natural justice may apply to the court, which shall have power to make such order as the justice of the case may require.

PART II: MARRIAGE

The Nature of Marriage

Meaning of marriage

17. Marriage means the voluntary union of a man and a woman, intended to last for their joint lives.

Kinds of marriage

18.(1) Marriages are of two kinds, that is to say -

(a) those that are intended to be monogamous; and

(b) those that are intended to be potentially polygynous or are in fact polygynous.

(2) A marriage contracted in Kenya which is subsisting at the commencement of this Act shall -

(a) if contracted in Islamic form (unless the parties were Shia Imami Ismailis) or according to rites recognized by customary law in Kenya, be presumed to be polygynous or potentially polygynous; and

(b) in any other case, be presumed to be monogamous,

unless the contrary is proved.

Conversion of marriages

19.(1) A marriage contracted in Kenya may be converted -

(a) from monogamous to potentially polygynous; or

(b) if the husband has one wife only, from potentially polygynous to monogamous,

by a declaration made by the husband and the wife, that they each, of their own free will, agree to the conversion.

(2) A declaration under sub-section (1) shall be made in the presence of a registrar and shall be recorded in writing, signed by the husband and the wife and the registrar, at the time of making.

(3) A registrar before whom a declaration is made under this section shall forthwith transmit a copy thereof to the Registrar-General.

(4) No marriage shall be converted from monogamous to potentially polygynous or from potentially polygynous to monogamous otherwise than by a declaration made under this section.

Duration of marriage

20. A marriage, whether contracted in Kenya or elsewhere, shall for all purposes of the law of Kenya subsist until determined -

(a) by the death of either party thereto;

(b) by a decree declaring that the death of either party thereto is presumed;

(c) by a decree of annulment;

(d) by a decree of divorce; or

(e) by an extra-judicial divorce outside Kenya which is recognized in Kenya under the provisions of section 103.

Restrictions on Marriage

Minimum age

21.(1) No person shall marry who, being male, has not completed his eighteenth year or, being female, has not completed her sixteenth year.

(2) Notwithstanding the provisions of sub-section (1), the court shall, in its discretion, have power, on application, to give leave for a marriage where the parties are, or either of them is, below the ages prescribed in sub-section (1) if -

(a) both parties have completed their fourteenth years;

(b) the female is pregnant; and

(c) the court is satisfied that there are special circumstances which make the proposed marriage desirable.

(3) A person who has not attained the age of eighteen years or sixteen years, as the case may be, and in respect of whom the leave of the court has not been obtained under sub-section (2), shall be said to be below the minimum age for marriage.

Prohibited relationships

22.(1) No person shall marry his or her grandparent, parent, child or grandchild, sister or brother, great-aunt or great-uncle, aunt or uncle, niece or nephew, great-niece or great-nephew, as the case may be.

(2) No person shall marry the grandparent or parent, child or grandchild of his or her spouse or former spouse.

(3) No person shall marry the former spouse of his or her grandparent or parent, child or grandchild.

(4) No person shall marry a person whom he or she has adopted or by whom he or she was adopted.

(5) For the purposes of this section, relationship of the half blood is as much an impediment as relationship of the full blood and it is immaterial whether a person was born legitimate or illegitimate.

(6) Persons who are, by this section, forbidden to marry shall be said to be within the prohibited relationships.

Subsisting marriage

23.(1) No man while married by a monogamous marriage shall contract another marriage.

(2) No man while married by a polygynous or potentially polygynous marriage shall contract a marriage in any monogamous form.

(3) No woman who is married shall, while that marriage subsists, contract another marriage.

No marriage save of free will

24. No marriage shall be contracted except as an act of the free will of each of the parties thereto.

Requirement of consent

25.(1) A person who has not completed his or her twenty-first year shall, notwithstanding that he or she shall have attained the age of majority as prescribed by the Age of Majority Act 196 , nevertheless be required, before marrying, to obtain the consent -

(a) of his or her father; or

(b) if his or her father is dead, of his or her mother; or

(c) if both his or her father and mother died before he or she attained the age of eighteen years, of the person who was his or her guardian immediately before he or she attained that age,

but in any other case, or if all those persons are dead, shall not require consent.

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(2) Where the court is satisfied that the consent of any person to a proposed marriage is being withheld unreasonably or that it is impracticable to obtain such consent, the court may, on application, give consent and such consent shall have the same effect as if it had been given by the person whose consent was required by sub-section (1).

Preliminaries to Marriage

Notice of intention to marry

26.(1) Subject to the provisions of section 31, where a man and a woman desire to marry, they shall, at least twenty-one days before the day when they propose to marry, give notice of their intention to a registrar or registration officer.

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(2) A notice given under this section shall contain -

(a) the names and ages of the parties and the places where they reside;

(b) the names of the parents of the parties and the places where they reside;

(c) a statement that the parties are not within the prohibited relationships;

(d) where either party is below the age of twenty-one years, the name of the person, if any, giving consent to the marriage or the reason why no such consent is being given;

(e) a statement in relation to each party that he or she is a bachelor or spinster, married, a widower or widow, or divorced, as the case may be, with, where either party is divorced, particulars of the divorce;

(f) a statement that the marriage is intended to be of a monogamous or polygynous or potentially polygynous character, as the case may be;

(g) where the marriage is to be polygynous, the names of the intended husband's wives; and

(h) the date when and the place where the parties desire to marry,

and shall be signed by both parties and, where the consent of the court to the intended marriage has been obtained, shall be accompanied by a certified copy of the order giving that consent.

Publication of notices of intention

27. It shall be the duty of a registrar or registration officer who receives a notice of intention to cause the intention to be made known locally by such means as may be prescribed and, until any rules are made in that behalf, by such means as are customarily used to make known matters of public importance and by any other means he may consider desirable and, so far as is practicable, where the parents of either party reside elsewhere, in the place or places where they reside or, where both the parents of a party are dead, in the place where that party was brought up.

Notice of objection

28.(1) Any person may give notice of objection to the registrar or registration officer to whom the notice of intention was given, on the ground that he or she is aware of facts which, under the provisions of this Act, constitute an impediment to the intended marriage.

(2) Where a man married by a polygynous marriage has given notice of an intended marriage, his wife or, if he has more than one wife, any of his wives may give notice of objection to the registrar or registration officer to whom the notice of intention was given, on the ground that -

(a) having regard to the husband's means, the taking of another wife is likely to result in hardship to his existing wife or wives and infant children, if any; or

(b) the intended wife is of notoriously bad character or otherwise likely to introduce grave discord into the household.

(3) A person who has given notice of objection may at any time withdraw it, but any such withdrawal shall be in writing, signed by him or her.

Procedure on notice of objection

29.(1) It shall be the duty of a registrar or registration officer who receives a notice of objection to transmit it, together with the notice of intention -

(a) where the notice of objection was given under sub-section (1) of section 28, to the court; and

(b) where the notice of objection was given under sub-section (2) of section 28, to the marriage tribunal.

(2) A registrar or registration officer who receives a notice of objection shall not celebrate or participate in the intended marriage and shall take all lawful action within his power to prevent it from being contracted, pending notification that the objection has been withdrawn or dismissed.

Determination of objection

30.(1) On receipt of a notice of objection and notice of intention transmitted to it under section 29, the court or the marriage tribunal, as the case may be, shall require the attendance of the parties to the intended marriage and the objector and shall hear them and their witnesses, if any, and any other persons the court or the tribunal may think necessary to hear for a just determination of the objection, and shall make findings on the facts alleged in the notice of objection and shall either, by order, direct that the intended marriage is not to be contracted or shall dismiss the objection.

(2) The court or the tribunal, as the case may be, shall send a certified copy of its decision to the registrar or registration officer to whom the notice of intention was given.

Power for Registrar-General to dispense with requirement of notice

31.(1) The Registrar-General may, subject to the provisions of section 32, by licence in the prescribed form, dispense with the giving of notice, as required by section 26, on proof to his satisfaction -

(a) that the parties are not within the prohibited relationships;

(b) that there is no impediment of subsisting marriage;

(c) that the parties are not below the minimum age for marriage;

(d) that every consent required under section 25 has been obtained; and

(e) that there is some good and sufficient reason for so doing.

(2) The proof required by sub-section (1) shall be in the form of a statutory declaration but the Registrar-General may require such further or other evidence as he may deem necessary.

Lodging of objections with Registrar-General

32. Any person who has reason to believe that a marriage is intended and that there are good grounds for believing that a valid objection could be made to such marriage under section 28, may give notice of objection to the Registrar-General and where such notice is given, the Registrar-General shall not, unless such notice has been withdrawn, exercise his power, under section 31, to dispense with the giving of notice.

Contracting of Marriage

Manner of contracting marriage

33.(1) A marriage may be contracted in Kenya -

(a) in civil form; or

(b) according to the rites of any religion specified in an order made under the provisions of sub-section (2); or

(c) if the intended husband is a Muslim, in Islamic form; or

(d) according to rites recognized in Kenya by customary law.

(2) The Minister shall have power, by order published in the Gazette, to authorize the celebration of marriages according to the rites of the religions specified in such order, and may at any time and from time to time vary any such order by the addition thereto or the deletion therefrom of the name of any religion but so that the deletion of the name of a religion shall be without prejudice to the validity of any marriage contracted under the rites thereof prior to the publication of such order.

(3) For the purposes of this Act, a marriage in Islamic form means a marriage contracted in the manner recognized by Islam or by any school or sect of that faith.

Time for contracting marriage

34. Subject to the provisions of section 31, at least twenty-one days and not more than three months shall elapse between the giving of notice of intention to marry and the contracting of the intended marriage.

Witnesses

35.(1) Every marriage shall be contracted in the presence of at least two witnesses.

(2) No person shall be competent to act as a witness to a marriage who is below the age of eighteen years or who is unable to understand the nature of the ceremony by reason of mental illness or intoxication or who does not understand the language in which the ceremony is conducted, unless the whole of the ceremony is interpreted into a language which he or she can understand.

(3) For the avoidance of doubt, it is hereby declared that neither the district registrar in whose presence a marriage in civil form is contracted nor a minister of religion who celebrates a marriage according to the rites of a specified religion is a witness to the marriage for the purposes of this section or of section 46 or section 164.

Marriages to be public

36.(1) Any member of the public may attend a marriage in civil form so far as the accommodation in the office of the district registrar may reasonably permit.

(2) Any person who is a follower of the religion according to the rites of which a marriage is contracted may attend that marriage.

(3) Any member of the community to which the parties or either of them belong may attend a marriage contracted in Islamic form or according to rites recognized by customary law.

Procedure for marriages in civil form

37. A marriage may be contracted in civil form in the presence of the district registrar in his office or in such other place as may have been authorized by licence issued under section 39, in the manner following -

(a) the district registrar, being satisfied that the preliminary requirements of this Act have been complied with and that there is no impediment to the marriage, shall ask each of the parties, in the presence of the other and of the witnesses, whether he or she of his or her own free will desires to marry the other;

(b) if both parties reply in the affirmative, the district registrar shall ask them if the marriage is intended to be monogamous or polygynous or potentially polygynous, shall satisfy himself that they understand the consequences of the different kinds of marriage, and shall record their replies;

(c) if the parties are in agreement as to the kind of marriage they desire, and not otherwise, the intended husband shall say to the intended wife -

"I (giving his name) take you (giving her name) to be my wife"

and the intended wife shall say to the intended husband -

"I (giving her name) take you (giving his name) to be my husband";

(d) the marriage shall thereupon be complete but the parties shall be at liberty to add any additional rite, such as the giving of a ring.

Marriages according to religious rites and licensing of ministers

38.(1) A marriage may be celebrated according to the rites of a specified religion in any place habitually used as a place of public worship or in such other place as may have been authorized by licence issued under section 39, by a minister of that religion who has been licensed in that behalf by the Registrar-General:

Provided that no minister of religion shall be compelled to celebrate any marriage.

(2) The Registrar-General may, on the application of the proper authority of any specified religion, by notice published in the Gazette, license any minister of that religion to celebrate marriages and may at any time, in like manner, cancel any such licence.

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(3) Every licence granted under section 6 of the African Christian Marriage and Divorce Act and not cancelled shall be deemed to be a licence granted under this section.

Power for Registrar-General to authorize marriages in places not otherwise permissible

39. The Registrar-General may, if he is satisfied that there is some good and sufficient reason, by licence in the prescribed form, authorize -

(2) If a registrar has been appointed under this Act for the country in which the marriage is intended to be contracted, the application shall be sent to the registrar for transmission to the Registrar-General.

(3) On receipt of an application under this section, the Registrar-General shall cause all such inquiries to be made as are practicable, and, if no impediment is shown, he shall issue the required certificate.

Recognition of marriages contracted abroad

44. A marriage contracted outside Kenya, other than a marriage contracted under section 42, shall be recognized as valid for all purposes of the law of Kenya, if -

(a) it was contracted in a form required or permitted by the law of the country where it was contracted;

(b) each of the parties had, at the time of the marriage, capacity to marry under the law of the country of his or her domicil; and,

(c) where either of the parties is a citizen of or is domiciled in Kenya, both parties had capacity to marry according to this Act.

Recognition of marriages contracted in Embassies, etc., in Kenya

45. A marriage contracted in any foreign Embassy, High Commission or consulate in Kenya shall be recognized as valid for all purposes of the law of Kenya, if -

(a) it was contracted in a form required or permitted by the law of the country whose Embassy, High Commission or consulate it is or in a form permitted under this Act; and

(b) each of the parties had, at the time of the marriage, capacity to marry under the law of the country of his or her domicil; and

(c) where either of the parties is a citizen of or is domiciled in Kenya, both parties had capacity to marry under this Act.

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Void Ceremonies, Voidable Marriages and Legitimacy

Void ceremonies

46.(1) A ceremony purporting to be a marriage shall be a nullity -

(a) if either party thereto is below the minimum age for marriage; or

(b) if the parties thereto are within the prohibited relationships; or

(d) if the court or a marriage tribunal, in exercise of the power conferred by section 30, has directed that the intended marriage is not to be contracted; or

(e) if the consent of either party was not freely given thereto; or

(f) unless both parties are present in person at the ceremony; or

(g) if both parties knowingly and wilfully acquiesce in a person officiating thereat who is not lawfully entitled to do so; or

(h) unless two competent witnesses are present thereat; or

(i) if it is expressed to be of temporary nature or for a limited period.

(2) Without prejudice to the generality of paragraph (e) of sub-section (1), consent shall not be held to have been freely given if the party who purported to give it -

(a) was influenced by coercion or fraud; or

(b) was mistaken as to the nature of the ceremony; or

(c) was suffering from any mental disorder or mental defect, whether permanent or temporary, or was intoxicated, so as not fully to appreciate the nature of the ceremony.

Voidable marriages

47.(1) Subject to the provisions of sections 106 and 107, a marriage shall be voidable if -

(a) at the time of the marriage -

(i) either party was incapable of consummating it; or

(ii) either party was subject to recurrent attacks of insanity or epilepsy; or

(iii) either party was suffering from venereal disease in a communicable form; or

(iv) the wife was pregnant by some person other than the husband; or

(b) the marriage has not been consummated owing to the wilful refusal of one party to consummate it; or

(c) either party was below the age of twenty-one years and consent to the marriage was required under section 25 and had not been given and the court sees good and sufficient reason to set the marriage aside.

(2) A voidable marriage is for all purposes a valid marriage until it is annulled by decree of the court.

Legitimacy

48.(1) Where children are born to persons who were parties to a ceremony purporting to be a marriage which is a nullity under the provisions of section 46, such children shall for all purposes be deemed to be legitimate children of those persons.

(2) Where, prior to the coming into force of this Act, any persons were parties to a ceremony purporting to be a marriage which under the law then applying was a nullity, any children of such persons shall for all purposes be deemed to be legitimate and, where such children were born before the date of the coming into force of this Act, shall be deemed to be legitimate as from that date.

(3) No decree of any court annulling a marriage shall render any child of the marriage illegitimate.

Matters not affecting validity

49. A marriage which in all other respects complies with the express requirements of this Act shall be valid for all purposes, notwithstanding -

(a) any non-compliance with any custom relating to dowry or the giving or exchanging of gifts before or after marriage;

(b) failure to give notice of intention to marry as required by this Act;

(c) notice of objection to the intended marriage having been given and not discharged;

(d) the fact that any person officiating thereat was not lawfully entitled to do so, unless that fact was known to both parties at the time of the ceremony;

(e) any procedural irregularity; or

(f) failure to register the marriage.

PART III: REGISTRATION OF MARRIAGES, ANNULMENTS AND DIVORCES AND EVIDENCE OF MARRIAGE

Maintenance of marriage registers

50.(1) Every registrar shall maintain a register of marriages in the prescribed form:

Provided that it shall be permissible for two or more ministers of religion who are licensed under section 38 to maintain one register if that register is kept in a place of worship.

(2) The Registrar-General shall maintain a register of foreign marriages.

Duty to register marriages and procedure to be followed

51.(1) When a marriage is contracted in civil form, it shall be the duty of the district registrar forthwith to register it.

(2) When a marriage is celebrated by a minister of religion according to the rites of a specified religion, it shall be his duty forthwith to register it.

(3) When a marriage is contracted in Islamic form in the presence of a kadhi, it shall be his duty forthwith to register it.

(4) When a marriage is contracted in the presence of the district registrar, in Islamic form (no kadhi being present) or according to customary rites, it shall be the duty of the district registrar forthwith to register it.

(5) When a marriage is contracted in Islamic form or according to customary rites and there is no kadhi or district registrar, as the case may be, or registration officer present, it shall be the duty of the parties to apply for registration, within ten days after the marriage, to the registrar or registration officer to whom they gave notice of intention to marry.

(6) A registration officer to whom application is made under sub-section (5) shall satisfy himself that the marriage was validly contracted and shall then proceed in the manner set out in sub-section (2) of section 41.

(7) A kadhi or district registrar who receives a statement of particulars sent to him under section 41 or under sub-section (6) shall forthwith register the marriage:

Provided that, before registering any such marriage, the kadhi or district registrar may make such further inquiries as he thinks necessary to satisfy himself that the marriage was validly contracted and that the facts set out in the statement of particulars are correct.

(8) A kadhi or district registrar to whom an application for registration is made under sub-section (5) shall make such inquiries as he thinks necessary to satisfy himself that the marriage was validly contracted and may require the attendance of two witnesses to the marriage, and when so satisfied shall register the marriage.

(9) A marriage may be registered under sub-section (7) or sub-section (8) notwithstanding that application for registration was not made within the prescribed time.

Registration of subsisting unregistered marriages

52.(1) Either party to a subsisting marriage contracted before the commencement of this Act, which has not been registered under the provisions of any written law heretofore in force, may apply to the district registrar or to a kadhi or to a registration officer for the registration of that marriage:

Provided that such application shall not be made to a registration officer in respect of a marriage contracted otherwise than under customary law.

(2) On receipt of an application under this section, the district registrar, kadhi or registration officer shall make such inquiries as he may think necessary to satisfy himself that the alleged marriage was validly contracted.

(3) Where application has been made to a registration officer, and he has satisfied himself as aforesaid, he shall send a statement of particulars relating to the marriage to the district registrar, with a certificate that he is satisfied that the marriage was validly contracted under customary law.

(4) Where application has been made to a district registrar or kadhi and he has satisfied himself as aforesaid or where a district registrar has received a statement of particulars from a registration officer, with his certificate, he shall, subject to the provisions of sub-section (5), register the marriage.

(5) Where application for registration has been made by one party to an alleged marriage and the other party -

(a) denies that there was such a marriage; or

(b) cannot be found and the marriage is disputed by any member of his or her immediate family,

the district registrar or kadhi shall not register the alleged marriage unless there is produced to him a declaratory decree of the court that the alleged marriage was validly contracted.

Registration of marriages contracted abroad

53.(1) When any person who is a citizen of Kenya has contracted a marriage outside Kenya, otherwise than under the provisions of section 42, he or she or his or her spouse may apply to the Registrar-General for the registration of that marriage under this Act and the Registrar-General, on being satisfied that the marriage is one that should be recognized as valid under the provisions of section 44, shall register the marriage.

(2) When any such marriage is contracted in a country for which a registrar has been appointed under section 8, an application under sub-section (1) shall be sent to the Registrar-General through such registrar.

(3) The Registrar-General may accept as evidence of a marriage contracted in any country outside Kenya, a marriage certificate issued in that country or such other evidence as he may consider sufficient.

(4) Where any such certificate is not in English it shall be accompanied by a translation into English certified to be correct by a consular officer or notary public or such other person as the Registrar-General may, in any particular case, approve.

Returns to be sent to Registrar-General

54. Within thirty days after the last day of every month, every registrar shall send to the Registrar-General a copy, certified to be a true copy, of all entries made during that month in the register of marriages in his custody:

Provided that where two or more ministers of religion are maintaining one register, any of them may certify the copy required by this section.

Completed registers to be sent to Registrar-General

55.(1) When any register of marriages maintained under this Act has been completed, the registrar shall forthwith send it to the Registrar-General.

(2) Every person who, immediately before the coming into force of this Act, was a registrar of marriages under the Marriage Act or the African Christian Marriage and Divorce Act or an assistant registrar under the Mohammedan Marriage and Divorce Registration Act, shall, as soon as practicable thereafter, send all registers of marriages and divorces in his possession to the Registrar-General:

Cap. 150
Cap. 151
Cap. 155

Provided that the Registrar-General may permit the use of any such registers for registration under this Act until new registers in the form prescribed under this Act are available.

Maintenance of index, searches, inspection and copies

56.(1) The Registrar-General shall maintain an index showing the names of all parties to registered marriages.

(2) Any person may require a search to be made in the index and shall be entitled to inspect -

(a) the entry in the marriage register relating to any marriage, if that register has been sent to the Registrar-General under section 55; or

(b) in any other case, the certified copy of that entry sent to the Registrar-General under section 54,

or to receive a copy of that entry or of the certified copy of that entry, as the case may be, certified to be a true copy.

(3) For the purpose of this section, references to an entry in a register of marriages include references to an entry in a register of marriages kept under any written law heretofore in force.

Maintenance of register of annulments and divorces

57. The Registrar-General shall maintain a register of annulments and divorces and shall forthwith enter therein the prescribed particulars of all decrees of annulment and divorce sent to him under section 58 and of all decrees of annulment and divorce for the registration of which application is made under section 59.

Copies of decrees of annulment and divorce to be sent to Registrar-General

58. Every court which grants a decree of annulment or divorce shall forthwith send one copy of the decree, certified to be a true copy, to the Registrar-General, for registration.

Registration of foreign annulments and divorces

59.(1) Where a marriage which was contracted in Kenya is annulled or dissolved by the decree of a court outside Kenya, either of the parties may apply to the Registrar-General for the registration of that decree and the Registrar-General, on being satisfied that the decree is one which should be recognized as effective under the provisions of section 102, shall register the decree.

(2) An application under this section shall be accompanied by an office copy of the decree and, where that decree is not in English, by a translation thereof into English certified to be correct by a consular officer or notary public or such other person as the Registrar-General may, in any particular case, approve, and by a statutory declaration as to the facts which gave the court jurisdiction.

Endorsement of marriage registers

60.(1) Where a marriage has been converted from monogamous to potentially polygynous or from potentially polygynous to monogamous, the Registrar-General shall, on receipt of a copy of the declaration made under section 19, cause the entry in the register of marriages relating to that marriage to be endorsed with a note to that effect and with such reference as will enable the declaration to be traced.

(2) Where a decree of annulment or divorce, wherever granted, has determined a marriage which was contracted in Kenya and which has been registered under the provisions of this Act or any written law heretofore in force, the Registrar-General shall, on registering that decree, cause the entry in the register of marriages relating to that marriage to be marked with the word "Determined" and a reference to the proceedings in which the decree was granted.

Correction of errors

61.(1) The Registrar-General, or any registrar on the directions of the Registrar-General, may correct any error in any register or in any marriage certificate.

(2) Every such correction shall be made in such a way that what was written is not rendered illegible and shall be authenticated by the signature of the Registrar-General or of the registrar, as the case may be, and the date of the correction.

(3) Where application is made for the correction of a marriage certificate, the Registrar-General or the registrar, as the case may be, shall require the production of the certificate issued to the parties so that it may similarly be corrected, but may dispense with such production, where he is satisfied that it is impossible or impracticable.

Power for Minister to restrict provisions relating to registration

62. The Minister shall have power, by notice published in the Gazette, to suspend the provisions of this Act relating to registration of marriages contracted according to rites recognized by customary law in relation to any area, to be specified in such notice, where he considers that adequate facilities for such registration do not exist.

Evidence of marriage

63. The following documents shall be admissible in evidence without proof in any court or before any person having by law or consent of parties authority to take evidence and shall be prima facie evidence of the facts recorded -

(a) a marriage certificate issued under this Act or any previous written law;

(b) a copy of such marriage certificate purporting to be certified as a true copy by the registrar having custody of the original;

(c) an entry in any register of marriages kept under this Act or any written law heretofore in force;

(d) a copy of an entry in any such register purporting to be certified as a true copy by the Registrar-General or the registrar having custody of the register;

(e) a copy of an entry in a return sent to the Registrar-General in accordance with section 54, certified by the Registrar-General to be a true copy of such entry;

(f) an entry made, prior to the coming into force of this Act, in any register of marriages by the proper authority of the Khoja Shia Ith'nasheri, the Shia Imami Ismaili or the Bohra community or a copy of any such entry certified by the proper officer of that authority to be a true copy;

(g) in relation to a marriage celebrated in a place of worship at a time when the official registration of such marriages was not required, an entry in any register of marriages kept by the proper authority of the religion concerned or a copy of any such entry sealed with the seal, if any, of that authority and certified under the hand of the registrar or other proper officer of that authority to be a true copy.

PART IV: PROPERTY, RIGHTS, LIABILITIES AND STATUS

Rights and liabilities of married women

64. A married woman shall have the same right as has a man to acquire, hold and dispose of property, whether movable or immovable, the same right to contract, the same right to sue and the same liability to be sued in contract or in tort or otherwise.

Equality between wives

65. For the avoidance of doubt, it is hereby declared that, subject to the express provisions of any written law, where a man has two or more wives they shall, as such, enjoy equal rights, be subject to equal liabilities and have equal status in law.

Separate property of husband and wife

66. Subject to the provisions of section 67 and to any agreement to the contrary that the parties may make, a marriage shall not operate to change the ownership of any property to which either the husband or the wife may be entitled or to prevent either the husband or the wife from acquiring, holding and disposing of any property.

Special provisions relating to the matrimonial home

67.(1) Where any estate or interest in the matrimonial home is owned by the husband or by the wife, he or she shall not, while the marriage subsists and without the consent of the other spouse, alienate it, whether by way of sale, gift, lease, mortgage or otherwise, and the other spouse shall be deemed to have an interest therein capable of being protected by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.

(2) Where any person alienates his or her estate or interest in the matrimonial home in contravention of sub-section (1), the estate or interest so transferred or created shall be subject to the right of the other spouse to continue to reside in the matrimonial home until -

(a) the marriage is dissolved; or

(b) the court on a decree for separation or an order for maintenance otherwise orders,

unless the person acquiring the estate or interest can satisfy the court that he had no notice of the interest of the other spouse and could not by the exercise of ordinary diligence have become aware of it.

(3) Where any estate or interest in the matrimonial home is owned by the husband or by the wife and that husband or wife deserts his or her spouse, the deserted spouse shall not be liable to be evicted from the matrimonial home by or at the instance of the husband or the wife, as the case may be, or any person claiming through or under him or her, except -

(a) on the sale of the estate or interest by the court in execution of a decree against the husband or wife, as the case may be; or

(b) by a trustee in bankruptcy of the husband or wife, as the case may be.

Presumptions as to property acquired during marriage

68. Where, during the subsistence of a marriage, any property is acquired -

(a) in the name of the husband or of the wife, there shall be a rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse;

(b) in the names of the husband and wife jointly, there shall be a rebuttable presumption that their beneficial interests therein are equal.

Gifts between husband and wife

69. Where, during the subsistence of a marriage, either spouse gives any property to the other, there shall be a rebuttable presumption that the property thereafter belongs absolutely to the donee.

No liability for antecedent debts of spouse

70. Subject to the provisions of the Bankruptcy Act, no person shall be liable for any debt contracted by his or her spouse prior to their marriage.

Duty to maintain spouse

71. Except where the parties are separated by agreement or by decree of the court and subject to any subsisting order of the court -

(a) it shall be the duty of every husband to maintain his wife or wives and to provide them with such accommodation, clothing and food as may be reasonable having regard to his means and station in life;

(b) it shall be the duty of every wife who has the means to do so, to provide in similar manner for her husband if he is incapacitated, wholly or partially, from earning a livelihood by reason of mental or physical injury or ill-health.

Presumption of wife's authority to pledge her husband's credit, etc.

72.(1) Subject to the provisions of sub-sections (2) and (3), a wife is presumed, unless the contrary is proved, to have authority to pledge her husband's credit, or to borrow money in his name, or to use any of his money which is in her possession or under her control, or to convert his movable property into money and use the same, so far as such credit or money is required for the purchase of necessaries for herself and the infant children of the marriage, appropriate to the husband's means and way of life.

(2) Such authority shall be presumed only -

(a) where the husband and wife are living together; or

(b) where the husband and wife are separated under an agreement which provides that the husband will pay maintenance to the wife and he has failed to comply with that agreement; or

(c) where the husband has deserted his wife or by his conduct has compelled her to leave him.

(3) Notwithstanding anything in sub-sections (1) and (2), no such authority shall be presumed where it is proved that the wife is living openly in an adulterous association.

(4) The presumption of authority set out in sub-section (1) shall be rebutted by evidence -

(a) that the wife was already receiving a sufficient allowance or sufficient maintenance or had sufficient means;

(b) that the wife already had a sufficiency of the goods so purchased;

(c) that the goods so purchased were excessive in quantity or extravagant having regard to the husband's means,

and it shall be immaterial that a person giving credit or lending money may have been unaware of the fact.

Husband and wife and the law of tort

73. As from the commencement of this Act -

(a) no husband shall be liable for the torts of his wife by reason only of his being her husband;

(b) a husband and wife shall have the same liability in tort towards each other as if they were unmarried;

(c) neither a husband nor a wife shall be entitled to claim damages, in an action arising out of any negligent act or breach of duty, in respect of the loss of the help and companionship, as such, of his or her spouse.

No right of spouse to inflict corporal punishment

74. For the avoidance of doubt, it is hereby declared that, notwithstanding any custom to the contrary, no person has any right to inflict corporal punishment on his or her spouse.

Agreements to live apart

75. The parties to a marriage may agree to live apart and any such agreement, including any provisions as to maintenance, matrimonial property and the custody of the infant children, if any, of the marriage shall be valid and enforceable:

Provided that the court shall have power, whether the agreement was made before or after the coming into force of this Act and notwithstanding any provision to the contrary in any such agreement, on the application of either party at any time and from time to time to vary or set aside any such provisions -

(i) where it is satisfied that the circumstances have changed in any material respect; or

(ii) so far as the custody of children is concerned, if it is satisfied that the agreed arrangements are not in the best interests of the children.

Status of widows

76. Notwithstanding any custom to the contrary, a woman whose husband has died shall thereafter be free -

(a) to reside wherever she may please; and

(b) to remain unmarried or to marry again any man of her own choosing.

PART V: MISCELLANEOUS RIGHTS OF ACTION

Right to damages for breach of promise of marriage

77.(1) A suit may be brought for damages for the breach of a promise of marriage made in Kenya whether the breach occurred in Kenya or elsewhere, by the aggrieved party or, where that party is below the age of eighteen years, by his or her parent or guardian:

Provided that -

(a) no suit shall be brought against a party who, at the time of the promise, was below the age of eighteen years;

(b) no damages shall be awarded in any such action in excess of loss actually suffered as a result of expenditure incurred as a direct result of the promise.

(2) A suit may similarly be brought in respect of the breach of a promise of marriage made in any other country but only if such an action would lie under the law of that country.

(3) No suit shall be brought for specific performance of a promise of marriage.

Limitation of actions for breach of promise

78. No suit shall be brought for damages for the breach of a promise of marriage more than one year after the date of the breach.

Right to return of gifts

79. A suit may be brought for the return of any gift made in contemplation of a marriage which has not been contracted, where the court is satisfied that it was made with the intention on the part of the giver that it should be conditional on the marriage being contracted, but not otherwise.

Contracts to pay dowry enforceable by civil suit

80. An agreement to give dowry, whether made before or after the coming into force of this Act, shall be enforceable as a contract, and the breach of any such agreement shall give rise to remedies for breach of contract, if the marriage in respect of which the agreement to give the dowry was made has been contracted, as if the agreement had been one for valuable consideration.

Suits for return of dowry

81. A suit may be brought for the return of dowry, in whole or in part, where it has been given in anticipation of an intended marriage which has not been contracted or where, under customary law, it is recoverable on divorce, but not in consequence of the death of the wife.

Limitation of actions relating to dowry

82.(1) No suit to enforce an agreement to give dowry or to recover damages for the breach of such an agreement shall be instituted after the death of either of the parties to the marriage in respect of which the dowry was to have been given.

(2) No suit for the return of dowry shall be instituted -

(a) on account of an intended marriage not having been contracted, more than three years after the date when the marriage was to have been contracted; or

(b) on account of a marriage having been determined by divorce, more than three years after the date of the decree or, in the case of a divorce obtained before the coming into force of this Act, the date when the divorce became effective.

Right to damages for adultery

83.(1) A husband or wife may bring a suit for damages against any person with whom his or her spouse has committed adultery:

Provided that no such proceeding shall lie -

(a) where the aggrieved party has consented to or connived at the adultery;

(b) where damages in respect of the alleged adultery have been claimed in a petition for divorce.

(2) A suit brought under this section shall be dismissed if the defendant satisfies the court that he or she did not know and had no reason to believe that the person with whom he or she committed the act of adultery was married.

Right to damages for enticement

84.(1) A husband or wife may bring a suit for damages against any person who has, for any reason, enticed or induced his or her spouse to desert him or her.

(2) A suit brought under this section shall be dismissed if the court is satisfied that the conduct of the plaintiff has been such as to justify or excuse his or her spouse leaving the matrimonial home.

Assessment of damages for adultery or enticement

85.(1) Damages for adultery or enticement shall be in the discretion of the court but shall not include any exemplary or punitive element.

(2) In assessing such damages, the court shall have regard -

(a) to any relevant customs of the community to which the parties belong;

(b) in cases of adultery, to the question whether husband and wife were living together or apart; and

(c) to any damages that may have been awarded in any criminal proceedings arising substantially out of the same facts.

PART VI: MATRIMONIAL PROCEEDINGS

Jurisdiction, procedure and general provisions

Jurisdiction of courts

86. Original jurisdiction in matrimonial proceedings shall be vested -

(a) where the marriage was contracted in Islamic form, concurrently in the High Court and in kadhis' courts; and

(b) in all other cases, concurrently in the High Court and in magistrates' courts of the first class:

Provided that the Chief Justice may, at any time and from time to time, when he considers it necessary for the due administration of justice, by order confer jurisdiction in matrimonial proceedings on any magistrate.

Right to invoke jurisdiction

87.(1) Any person may petition the court for a declaratory decree -

(a) if he or she is domiciled in Kenya; or

(b) if he or she is resident in Kenya; or

(c) where the decree sought is as to the validity of a ceremony which took place in Kenya and purported to be a marriage.

(2) Any person may petition the court for a decree of separation if he or she has been resident in Kenya for at least one year immediately preceding, and is present in Kenya at the time of the presentation of the petition.

(3) Any person may petition the court for a decree of annulment or a decree of divorce if he or she -

(a) is domiciled in Kenya; or

(b) has been resident in Kenya for at least two years immediately preceding the presentation of the petition.

(4) Any person may apply to the court for maintenance, or for custody of infant children or for any other matrimonial relief if -

(a) he or she is domiciled in Kenya; or

(b) he or she is resident in Kenya at the time of the application; or

(c) both parties to the marriage are present in Kenya at the time of the application.

Transfer of proceedings

88. Where a matrimonial proceeding has been instituted in a magistrate's court or in a kadhi's court, it shall be lawful, at any time before judgment, for the High Court, on the application of either of the parties or of the magistrate or kadhi to transfer the proceeding to itself or to some other magistrate's court or kadhi's court.

Power for magistrate or kadhi to state case

89. A magistrate or kadhi hearing a matrimonial proceeding may at any stage of the proceeding state in the form of a special case for the opinion of the High Court any question of law arising in the proceeding.

Appeals from magistrates' and kadhis' courts

90.(1) Any person aggrieved by any decision or order of a magistrate's court or of a kadhi's court in a matrimonial proceeding may appeal therefrom to the High Court.

(2) An appeal to the High Court shall be filed in the magistrate's court or the kadhi's court, as the case may be, within thirty days of the decision or order against which the appeal is brought.

(3) The provisions of the Civil Procedure Act relating to appeals shall not apply to appeals under this Act.

Appeals from the High Court

Forms of proceedings

Alternative reliefs

Cross-prayers for relief

Petitions to be heard in open court

Connivance

Appeals from the High Court

91.(1) Any person aggrieved by a decision or order of the High Court in its appellate jurisdiction may appeal therefrom to the Court of Appeal for East Africa on any ground of law or mixed law and fact.

(2) Any person aggrieved by a decision or order of the High Court in its original jurisdiction may appeal therefrom to the Court of Appeal for East Africa.

Forms of proceedings

92.(1) Every proceeding for a declaratory decree or for a decree of annulment, separation or divorce shall be instituted by petition.

(2) Every application for maintenance, or for custody of children, or for any other matrimonial relief shall, unless included in a petition for a declaratory decree or for annulment, separation or divorce, be by summons in chambers.

Alternative reliefs

93. It shall be lawful to include in any petition for matrimonial relief, a prayer in the alternative for any other matrimonial relief.

Cross-prayers for relief

94. The respondent to any petition for matrimonial relief may include in his or her answer to the petition a cross-prayer for any other form of matrimonial relief and the court shall have power to grant any relief on such cross-prayer that it might have granted on a petition for the relief sought.

Petitions to be heard in open court

95. All petitions in matrimonial proceedings shall be heard in open court:

Provided that -

(i) the court shall have power in its discretion, in exceptional circumstances, to order that the public be excluded from any hearing;

(ii) where, to comply with the requirements of sub-section (2)(b) of section 134, the court questions an infant as to his or her wishes regarding custody, it shall do so in chambers.

Connivance

96. Evidence of misconduct by a husband or a wife shall not be inadmissible in any matrimonial proceeding on the ground of connivance by the aggrieved spouse but no person shall be entitled to any relief by reason only of misconduct at which he or she has connived.

Condonation

97. Evidence of misconduct by a husband or a wife shall not be inadmissible in any matrimonial proceeding on the ground that the misconduct was condoned by the aggrieved spouse.

Power for court to dismiss proceeding on account of deception or non-disclosure

98. The court shall have power to dismiss any petition or application or make such other order as it may think fit, including an order as to costs, in any case where it is satisfied that the petitioner or applicant has attempted to deceive the court in any material respect or has wilfully failed to make a full disclosure of all relevant facts.

Mutual decrees not to be granted

99. In any case where there is a cross-prayer or a cross-petition for matrimonial relief, the court shall not grant decrees in favour both of the petitioner and of the respondent, except as regards any ancillary relief.

Abolition of decree nisi

100. For the avoidance of doubt, it is hereby declared that relief by way of annulment, separation or divorce may be granted by a single decree and a decree granting relief shall no longer be preceded by a decree nisi.

Costs in matrimonial proceedings

101.(1) Costs in matrimonial proceedings shall be in the discretion of the court:

Provided that a woman shall not be ordered to pay the costs of her husband or former husband unless the court is satisfied that she has sufficient property of her own to make such an order reasonable.

(2) At any stage of a matrimonial proceeding, the court may, in its discretion, order a man to furnish security for the payment of the costs in that proceeding of his wife or former wife.

Recognition of decrees of foreign courts

102. Where a court of competent jurisdiction in any foreign country has passed a decree in any matrimonial proceeding, whether arising out of a marriage contracted in Kenya or elsewhere, such decree shall be recognized as effective for all purposes of the law of Kenya -

(a) if the petitioning party was domiciled in that country or had been resident there for at least two years prior to the filing of the petition; or

(b) being a decree of annulment or divorce, it has been recognized as effective in a declaratory decree of a court of competent jurisdiction in the country of domicil of the parties or either of them.

Recognition of extra-judicial divorces

Power for court to grant declaratory decrees

Recognition of extra-judicial divorces

103. Where any person has obtained a divorce, otherwise than by decree of a court, in any foreign country, the divorce shall be recognized as effective for all purposes of the law of Kenya if -

(a) it was effective according to the law of the domicil of each of the parties at the time of the divorce; or

(b) it has been recognized as effective in a declaratory decree of a court of competent jurisdiction in the country of domicil of the parties or either of them.

Declaratory decrees

Power for court to grant declaratory decrees

104.(1) In any proceedings under this Part, the court may, on the petition of any interested person, grant a declaratory decree, with or without consequential relief, and no such proceeding shall be open to objection on the ground that it is a declaratory decree that is sought or that no consequential relief is claimed.

(2) Without prejudice to the generality of sub-section (1), the court may -

(a) on the petition of any person who was a party to a ceremony purporting to be a marriage, whether such ceremony took place in Kenya or any other country, grant a decree declaring the ceremony to have been or not to have been a valid marriage for the purposes of the law of Kenya; or

(b) on the petition of any person who desires to establish that he or she or either of his or her parents was born legitimate, grant a decree declaring that the parents or, as the case may be, the grandparents of such person were lawfully married; or

(c) on the petition of any person who claims that his or her marriage was determined under Islamic or customary law prior to the coming into force of this Act, grant a decree declaring that the marriage was or was not so determined; or

(d) on the petition of any person who claims that his or her marriage has been annulled or dissolved under the law of any country other than Kenya, grant a decree declaring that, for the purposes of the law of Kenya, the marriage was or was not so determined; or

(e) on the petition of any person who can show reasonable grounds for supposing that his or her spouse is dead, grant a decree declaring that such spouse is presumed to be dead,

or may, as the case may be, dismiss the petition.

ffect of eclaratory ecrees

105.(1) A decree declaring that one of the parties to a marriage is presumed to be dead shall, if that party is not in fact dead, operate to determine the marriage as from a date thirty days from the date of the decree, where no appeal or notice of appeal, as the case may be, has been filed within that time, or in any other case on the final determination of the appeal or, where a second appeal lies, on the final determination of that appeal or on the expiration of the time for giving notice of appeal.

Parties to a petition for annulment

(2) Any other declaratory decree or the decision on appeal from any such decree shall be conclusive as between and binding upon all persons who were parties to the proceeding or were served with notice thereof and all persons claiming under any such persons.

Annulment

Power for court to annul voidable marriage

106. The court shall have power to grant a decree of annulment in respect of any marriage which is voidable under the provisions of section 47:

Provided that -

Effect of decree of annulment

(i) where the petition is founded on an allegation that at the time of the marriage the respondent was subject to recurrent attacks of insanity or epilepsy or was suffering from venereal disease in a communicable form or was pregnant by some person other than the petitioner, the court shall not grant a decree unless it is satisfied -

(1) that the petition was filed within one year of the date of the marriage; and

(2) that at the time of the marriage the petitioner was ignorant of the fact alleged; and

(3) that marital intercourse has not taken place with the consent of the petitioner since discovery by the petitioner of that fact.

(ii) where the petition is founded on an allegation that at the time of the marriage one of the parties was below the age of twenty-one years and that consent as required by section 25 had not been given, the court shall not grant a decree unless it is satisfied that the petition was filed before that party attained the age of twenty-one years.

Parties to a petition for annulment

107.(1) Subject to the provisions of sub-section (2), a petition for annulment of a marriage may only be brought by one of the parties to the marriage and where the petition is founded on an allegation of facts of which one party was ignorant at the time of the marriage, may only be brought by that party, and where the petition is founded on the wilful refusal of one party to consummate the marriage, may only be brought by the other party.

(2) A petition for annulment of a marriage on the ground that one of the parties was below the age of twenty-one years and that the consent of his or her parent or guardian or of the court to the marriage had not been given may be brought by the parent or guardian of that party.

Effect of decree of annulment

108.(1) The parties to a marriage which has been annulled by decree of the court shall be deemed never to have been married:

Provided that a decree of annulment shall not -

(i) render any child of the marriage illegitimate; or

(ii) render lawful anything which was done unlawfully during the marriage or render unlawful anything which was done lawfully during the marriage; or

(iii) affect the competence or compellability of either spouse as a witness in respect of anything done or not done, or any privilege in respect of communications made, during the marriage; or

(iv) relieve the husband of any debt properly incurred on his behalf by his wife during the marriage.

(2) A decree of annulment shall be effective as from a date thirty days from the date of the decree, if no appeal or notice of appeal, as the case may be, has been filed within that time and in any other case on the final determination of the appeal or, where a second appeal lies, on the final determination of that appeal or on the expiration of the time for giving notice of appeal.

Separation and Divorce

ght to tition for paration or divorce

109. Subject to the provisions of sections 87, 110 and 111, any married person may petition the court for a decree of separation or divorce on the ground that his or her marriage has broken down, but no decree of divorce shall be granted unless the court is satisfied that the breakdown is irreparable.

striction petitions for divorce ring first ree years marriage

110.(1) No person shall, without the prior leave of the court, petition for divorce before the expiry of three years from the date of the marriage which it is sought to dissolve.

(2) Leave shall not be granted to petition for divorce within three years of marriage except where it is shown that exceptional hardship is being suffered by the person applying for such leave.

(3) An application may be made to the court under this section either before or after reference to a conciliatory body under section 111.

Requirement of rior reference conciliatory ody

111.(1) No person shall petition for divorce unless he or she has first referred the matrimonial difficulty to a conciliatory body and that body has certified that it has failed to reconcile the parties:

Provided that this requirement shall not apply in any case -

(i) where the petitioner alleges that he or she has been deserted by, and does not know the whereabouts of, his or her spouse; or

(ii) where the respondent is residing outside Kenya and it is unlikely that he or she will enter the jurisdiction within the six months next ensuing after the date of the petition; or

(iii) where the respondent has been required to appear before a conciliatory body and has wilfully failed to attend; or

Proceedings of conciliatory bodies

(iv) where the respondent is imprisoned for life or for a term of at least five years; or

(v) where the petitioner alleges that the respondent is suffering from incurable mental illness; or

(vi) where the court is satisfied that there are extraordinary circumstances which make reference to a conciliatory body impracticable.

(2) A matrimonial difficulty may be referred to any conciliatory body acceptable to both parties but, where they are unable to agree on a conciliatory body, shall be referred to the marriage tribunal for the area in which they reside or, where they are living in different areas, to the marriage tribunal for the area in which they last resided together.

(3) A conciliatory body means -

(a) a council set up for the purposes of reconciliation by the appropriate authority of any specified religion; or

(b) a council of local elders recognized as arbitrators under customary or Islamic law; or

(c) a marriage tribunal; or

(d) any other body approved as such by the Minister by notice in the Gazette.

(4) The Minister may at any time by notice in the Gazette withdraw his approval of any body as a conciliatory body but without prejudice to anything lawfully done by such body prior to the publication of the notice.

Proceedings of conciliatory bodies

112.(1) A conciliatory body to which a matrimonial difficulty has been referred shall require the attendance of the parties and shall give each of them an opportunity of being heard and may hear such other persons and make such inquiries generally as it may think fit and may, if it considers it necessary, adjourn its proceedings from time to time.

(2) If the conciliatory body is unable to resolve the matrimonial difficulty to the satisfaction of the parties and to persuade them to resume married life together, it shall issue a certificate that it has heard the parties, made such inquiries as it thought proper, and attempted but failed to reconcile the parties.

(3) A conciliatory body may append to its certificate such recommendations as it may think fit regarding maintenance, the division of matrimonial property and the custody of the infant children, if any, of the marriage.

(4) No advocate shall appear or act for any party in any proceeding before a conciliatory body and no party shall be represented by any person, other than a member of his or her family, without the leave of the conciliatory body.

arties to titions

113.(1) No person shall be made a co-respondent to a petition for a decree of separation.

Evidence that a marriage has broken down

(2) Where a petition for a decree of divorce includes an allegation of adultery on the part of the respondent, the petitioner may, and if so directed by the court shall, make the person with whom the adultery is alleged to have been committed a co-respondent.

ntents of petitions

114.(1) Every petition for a decree of separation or divorce shall contain -

(a) particulars of the marriage between the parties and the names, ages and sex of the children, if any, of the marriage;

(b) particulars of the facts giving the court jurisdiction;

(c) particulars of any previous matrimonial proceedings between the parties;

(d) a statement of the principal allegations which it will be sought to prove as evidence of the breakdown of the marriage;

(e) where the petitioner has been guilty of any marital misconduct, an admission of such misconduct;

(f) the terms of any agreement regarding maintenance or the division of any assets acquired through the joint efforts of the parties or, where no such agreement has been reached, the petitioner's proposals; and

(g) particulars of the relief sought.

(2) Every petition for a decree of divorce shall be accompanied by a certificate by a conciliatory body, issued not more than six months before the filing of the petition, in accordance with sub-section (2) of section 112:

Provided that such certificate shall not be required in cases to which the proviso to sub-section (1) of section 111 applies.

(3) A petition for a decree of divorce which includes an allegation of adultery may include a prayer that the co-respondent be condemned in damages in respect of the alleged adultery:

Provided that a prayer for damages for adultery shall not be included in a petition for divorce if damages for the alleged adultery have already been claimed in a suit brought under section 83.

Evidence that a marriage has broken down

115.(1) In deciding whether or not a marriage has broken down, the court shall have regard to all relevant evidence regarding the conduct and circumstances of the parties and, in particular-

(a) shall, as a general principle, refuse to grant a decree where a petition is founded exclusively on the petitioner's own wrong-doing; and

(b) shall have regard to the customs of the community to which the parties belong.

(2) Without prejudice to the generality of sub-section (1), the court may accept any one or more of the following matters as evidence that a marriage has broken down but proof of any such matter shall not entitle a party as of right to a decree -

(a) adultery committed by the respondent, particularly when more than one act of adultery has been committed or when an adulterous association is continued despite protest;

(b) sexual perversion on the part of the respondent;

(c) cruelty, whether mental or physical, inflicted by the respondent on the petitioner or on the children, if any, of the marriage;

(d) wilful neglect on the part of the respondent;

(e) desertion of the petitioner by the respondent for at least three years, where the court is satisfied that it is wilful;

(f) voluntary separation or separation by decree of the court, where it has continued for at least three years;

(g) imprisonment of the respondent for life or for a term of at least five years, regard being had both to the length of the sentence and to the nature of the offence for which it was imposed;

(h) mental illness of the respondent, where at least two doctors one of whom is qualified or experienced in psychiatry have certified that they entertain no hope of cure or recovery;

Powers of court on claim to damages for adultery

(i) change of religion by the respondent, where both parties followed the same faith at the time of the marriage and where according to the laws of that faith a change of religion dissolves or is a ground for the dissolution of marriage;

(j) where the parties were married in Islamic form, the fact that the husband has pronounced three talakas at intervals of thirty days.

Evidence in support of petition for divorce may be the same as for previous separation

116. When hearing a petition for a decree of divorce, the court may admit and found its decision, wholly or partly, on evidence which is substantially the same as that on which a decree of separation has previously been granted.

Duties of court on a petition for separation or divorce

117. It shall be the duty of a court hearing a petition for a decree of separation or divorce -

(a) to inquire, so far as it reasonably can, into the facts alleged and to consider whether those facts, or such of them as are proved, show that the marriage has broken down;

(b) to inquire into the arrangements made or proposed as regards maintenance and the division of any matrimonial property and to satisfy itself that such arrangements are reasonable;

(c) to inquire into the arrangements made or proposed as regards the maintenance and custody of the infant children, if any, of the marriage and to satisfy itself that such arrangements are in the best interests of the children; and

(d) in the case of a petition for divorce, where the court is satisfied that the marriage has broken down, to consider whether the breakdown of the marriage is irreparable.

Powers of court on claim to damages for adultery

118.(1) Where, in a petition for divorce, damages for adultery have been claimed against a co-respondent -

(a) if, after the close of the evidence for the petitioner, the court is of the opinion that there is not sufficient evidence against the co-respondent to justify requiring him or her to reply, the co-respondent shall be discharged from the proceedings; or

(b) if, at the conclusion of the hearing, the court is satisfied that adultery between the respondent and the co-respondent has been proved, the court may award the petitioner damages against the co-respondent.

(2) The provisions of section 85 shall apply to the assessment of damages awarded under this section.

(3) The court may award damages against a co-respondent under this section notwithstanding that the petition is, as against the respondent, dismissed or adjourned.

(4) The court shall have power, when awarding damages under this section, to direct that such damages, or any part of them, be vested in trustees upon trust to apply the income thereof for the benefit of the infant children, if any, of the marriage or, where the petitioner is required to pay maintenance to the respondent, in or towards the payment of that maintenance, and subject thereto in trust for the petitioner.

Effect of decree of separation

Effect of decree of divorce

Power for court to grant decree of separation or divorce

119.(1) At the conclusion of the hearing of a petition for separation or divorce, the court may -

(a) if satisfied that the marriage has broken down and, where the petition is for divorce, that the breakdown is irreparable, grant a decree of separation or divorce, as the case may be, together with any ancillary relief; or

(b) if not so satisfied, dismiss the petition; and

Power for cou to set aside vary decrees separation

(c) where there is a cross-petition or cross-prayer, if satisfied as aforesaid, grant a decree on the petition or on the cross-petition or cross-prayer, as it may deem just, with any ancillary relief to either party; or

(d) if not so satisfied, dismiss both the petition and the cross-petition or cross-prayer.

(2) Where the petition or the cross-petition or cross-prayer, if any, is for a decree of divorce, the court may adjourn the proceedings for such period, not exceeding six months, as the court may think fit, for further inquiries or further attempts at reconciliation to be made and may direct that such inquiries or attempts be made by the conciliatory body or, where the conciliatory body is not a marriage tribunal, by a marriage tribunal.

Power for cou to order division of matrimonial assets

(3) Where a decree of separation or divorce is granted, it shall include provision for the maintenance and custody of the infant children, if any, of the marriage:

Provided that the court may grant a decree which includes an interim order as to custody, reserving its final order pending further inquiries as to the most satisfactory arrangements that can be made.

Effect of decree of separation

120. A decree of separation shall relieve the parties of the duty to co-habit and to render each other help and companionship and, except so far as the decree otherwise provides, of the duty to maintain each other, but shall not dissolve their marital status.

Effect of decree of divorce

121.(1) A decree of divorce shall dissolve the marital status of the parties as from a date thirty days from the date of the decree, if no appeal or notice of appeal, as the case may be, has been filed within that time, or in any other case, on the final determination of the appeal or, where a second appeal lies, on the final determination of that appeal or on the expiration of the time for giving notice of appeal.

(2) A marriage which has been dissolved shall not be an impediment to the subsequent marriage of either of the parties thereto.

Power for court to set aside or vary decrees of separation

122.(1) The court shall set aside a decree of separation on the joint application of the parties.

(2) The court may set aside a decree of separation on the application of either party where it is satisfied that the decree was obtained as the result of misrepresentation or mistake of fact.

(3) The court may vary the terms of any decree of separation on the application of the parties or either of them where there has been any material change in the circumstances.

Division of Assets and Maintenance as between Husband and Wife

Power for court to order division of matrimonial assets

123.(1) The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.

(2) In exercising the power conferred by sub-section (1), the court shall have regard -

(a) to the customs of the community to which the parties belong;

(b) to the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;

(c) to any debts owing by either party which were contracted for their joint benefit; and

(d) to the needs of the infant children, if any, of the marriage.

and subject to those considerations, shall incline towards equality of division.

(3) For the purposes of this section, references to assets acquired during a marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.

Power for court o order maintenance for pouse

124.(1) The court may order a man to pay maintenance to his wife or former wife -

(a) if he has refused or neglected to provide for her as required by section 71;

(b) if he has deserted her, for so long as the desertion continues;

(c) during the course of any matrimonial proceedings;

(d) when granting or subsequent to the grant of a decree of separation;

(e) when granting or subsequent to the grant of a decree of divorce;

(f) if, after a decree declaring her presumed to be dead, she is found to be alive.

(2) The court shall have the corresponding power to order a woman to pay maintenance to her husband or former husband where he is incapacitated, wholly or partially, from earning a livelihood by reason of mental or physical injury or ill-health, and the court is satisfied that having regard to her means it is reasonable so to order.

(3) The power to order maintenance in the cases referred to in paragraphs (d), (e) and (f) of sub-section (1) shall extend to cases where the decree was granted by a foreign court, if it is one which is recognized as effective under the provisions of section 102, and for this purpose a declaratory decree recognizing as effective a divorce obtained otherwise than by decree of a court shall be deemed to be a decree of divorce.

Assessment maintenance

Power for co to order security for maintenance

Compounding maintenance

Duration of orders for maintenance

Right to maintenance to cease on re-marriage

Assessment of maintenance

125. In determining the amount of any maintenance to be paid by a man to his wife or former wife or by a woman to her husband or former husband, the court shall base its assessment primarily on the means and needs of the parties but shall have regard also -

(a) to the degree of responsibility which the court apportions to each party for the breakdown of the marriage; and

(b) to the customs of the community to which the parties belong.

Power for court to order security for maintenance

126. The court may in its discretion when awarding maintenance order the person liable to pay such maintenance to secure the whole or any part of it by vesting any property in trustees upon trust to pay such maintenance or part thereof out of the income from such property and, subject thereto, in trust for the settlor.

Compounding of maintenance

127. An agreement for the payment, in money or other property, of a capital sum in settlement of all future claims to maintenance, shall not be effective until it has been approved, or approved subject to conditions, by the court, but when so approved shall be a good defence to any claim for maintenance.

Duration of orders for maintenance

128. Except where an order for maintenance is expressed to be for any shorter period or where any such order has been rescinded, and subject to the provisions of section 129, an order for maintenance shall expire -

(a) if the maintenance was unsecured, on the death of the husband or of the wife, whichever is the earlier;

(b) if the maintenance was secured, on the death of the spouse in whose favour it was made.

Right to maintenance to cease on re-marriage

129.(1) The right of any divorced person to receive maintenance from his or her former spouse under any order of court shall cease on his or her marriage to any other person.

(2) The right of any divorced person to receive maintenance from his or her former spouse under an agreement shall cease on his or her marriage to any other person unless the agreement otherwise provides.

Power for court to vary orders for maintenance

130. The court may at any time and from time to time vary, or may rescind, any subsisting order for maintenance, whether secured or unsecured, on the application of the person in whose favour or of the person against whom the order was made, or, in respect of secured maintenance, of the legal personal representatives of the latter, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

Power for court to vary agreements for maintenance

131. Subject to the provisions of section 127, the court may at any time and from time to time vary the terms of any agreement as to maintenance made between husband and wife, whether made before or after the coming into force of this Act, where it is satisfied that there has been any material change in the circumstances and notwithstanding any provision to the contrary in any such agreement.

Maintenance payable under order of court to be inalienable

132. Maintenance payable to any person under any order of court shall not be assignable or transferable or liable to be attached, sequestered or levied upon for, or in respect of, any debt or claim whatsoever.

Recovery of arrears of maintenance

133.(1) Subject to the provisions of sub-section (3), arrears of unsecured maintenance, whether payable by agreement or under an order of court, shall be recoverable as a debt from the defaulter and, where they accrued due before the making of a receiving order against the defaulter, shall be provable in his or her bankruptcy and, where they accrued due before his or her death, shall be a debt due from his or her estate.

Orders subje to condition

(2) Subject to the provisions of sub-section (3), arrears of unsecured maintenance which accrued due before the death of the person entitled thereto shall be recoverable as a debt by the legal personal representatives of such person.

(3) No amount owing as maintenance shall be recoverable in any suit if it accrued due more than three years before the institution of the suit.

Custody and Maintenance of Children

Power for court to make order for custody

134.(1) The court may, at any time, by order, place an infant in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the infant be entrusted to either parent, of any other relative of the infant or of any association the objects of which include child welfare.

(2) In deciding in whose custody an infant should be placed the paramount consideration shall be the welfare of the infant and, subject to this, the court shall have regard -

(a) to the wishes of the parents of the infant; and

(b) to the wishes of the infant, where he or she is of an age to express an independent opinion; and

(c) to the customs of the community to which the parties belong.

(3) There shall be a rebuttable presumption that it is for the good of an infant below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of an infant by changes of custody.

(4) Where there are two or more children of a marriage, the court shall not be bound to place both or all in the custody of the same person but shall consider the welfare of each independently.

Orders subject to conditions

135.(1) An order for custody may be made subject to such conditions as the court may think fit to impose, and subject to such conditions, if any, as may from time to time apply, shall entitle the person given custody to decide all questions relating to the upbringing and education of the infant.

(2) Without prejudice to the generality of sub-section (1), an order for custody may -

(a) contain conditions as to the place where the infant is to reside, as to the manner of his or her education and as to the religion in which he or she is to be brought up;

(b) provide for the infant to be temporarily in the care and control of some person other than the person given custody;

(c) provide for the infant to visit a parent deprived of custody or any member of the family of a parent who is dead or has been deprived of custody at such times and for such periods as the court may consider reasonable;

(d) give a parent deprived of custody or any member of the family of a parent who is dead or has been deprived of custody the right of access to the infant at such times and with such frequency as the court may consider reasonable; or

(e) prohibit the person given custody from taking the infant out of Kenya.

Declaratory order as to unfitness of parent to have custody

136.(1) The court may, when granting a decree of separation or divorce or at any time thereafter, on the application of the father or the mother of any infant of the marriage, make an order declaring either parent to be a person unfit to have the custody of the infant and may at any time rescind any such order.

(2) Where an order has been made under sub-section (1), and has not been rescinded, the parent thereby declared to be unfit shall not, on the death of the other parent, be entitled to the custody of such infant unless the court otherwise orders.

ustody of hildren eemed legitimate

137. When a child is deemed to be legitimate under the provisions of section 48, the mother shall, in the absence of any agreement or order of court to the contrary, be entitled to custody of the child.

Duty to aintain hildren

138.(1) Except where an agreement or order of court otherwise provides, it shall be the duty of a man to maintain his infant children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his means and station in life or by paying the cost thereof.

(2) Except as aforesaid, it shall be the duty of a woman to maintain or contribute to the maintenance of her infant children if their father is dead or his whereabouts are unknown or if and so far as he is unable to maintain them.

ower for court to order aintenance for hildren

139.(1) The court may at any time order a man to pay maintenance for the benefit of his infant child -

(a) if he has refused or neglected reasonably to provide for him or her; or

(b) if he has deserted his wife and the infant is in her charge; or

Power for co to order security for maintenance

Duration of orders for custody and maintenance

Power for co to vary orde for custody maintenance

Power for co to vary agre ment for cust or maintenan

Recovery of arrears of maintenance

(c) during the pendency of any matrimonial proceedings; or

(d) when making or subsequent to the making of an order placing the infant in the custody of any other person.

(2) The court shall have the corresponding power to order a woman to pay or contribute towards the maintenance of her infant child where it is satisfied that having regard to her means it is reasonable so to order.

(3) An order under sub-section (1) or sub-section (2) may direct payment to the person having custody or care and control of the infant or to trustees for the infant.

Power for court to order security for maintenance

140. The court may, in its discretion, when ordering the payment of maintenance for the benefit of an infant, order the person liable to pay such maintenance to secure the whole or any part of it by vesting any property in trustees upon trust to pay such maintenance or part thereof out of the income from such property, and, subject thereto, in trust for the settlor.

Duration of orders for custody and maintenance

141. Except where an order for custody or maintenance of an infant is expressed to be for any shorter period or where any such order has been rescinded, it shall expire on the attainment by the infant of the age of eighteen years.

Power for court to vary orders for custody or maintenance

142. The court may at any time and from time to time vary, or may rescind, any order for custody or maintenance of an infant on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

Power for court to vary agreement for custody or maintenance

143. The court may at any time and from time to time vary the terms of any agreement relating to the custody or maintenance of an infant, whether made before or after the commencement of this Act, notwithstanding any provision to the contrary in any such agreement, where it is satisfied that it is reasonable and for the welfare of the infant so to do.

Recovery of arrears of maintenance

144. The provisions of section 133 shall apply, mutatis mutandis, to orders for the payment of maintenance for the benefit of an infant.

Duty to maintain infant accepted as member of family

145.(1) Where a man has accepted an infant who is not his child as a member of his family, it shall be his duty to maintain such infant while he or she remains an infant, so far as the father and the mother of the infant fail to do so, and the court may make such orders as may be necessary to ensure the welfare of the infant:

Provided that the duty imposed by this sub-section shall cease if the infant is taken away by his or her father or mother.

(2) Any sums expended by a man in maintaining such infant shall be recoverable as a debt from the father of the infant.

Court to have regard to advice of welfare officers, etc.

146. When considering any question relating to the custody or maintenance of any infant, the court shall, whenever it is practicable, take the advice of some person, whether or not a public officer, who is trained or experienced in child welfare but shall not be bound to follow such advice.

Power for court to restrain taking of infant out of Kenya

147.(1) The court may, on the application of the father or the mother of an infant -

(a) where any matrimonial proceeding is pending;
or

(b) where, under any agreement or order of court, one parent has custody of the infant to the exclusion of the other,

issue an injunction restraining the other parent from taking the infant out of Kenya or may give leave for such child to be taken out of Kenya either unconditionally or subject to such conditions or on such undertaking as the court may think fit.

(2) The court may, on the application of any interested person, issue an injunction restraining any person, other than a person having custody of an infant, from taking the infant out of Kenya.

Injunction against molestatio

(3) Failure to comply with an order made under this section shall be punishable as a contempt of court.

No proceedi to compel co-habitati

Other Reliefs

Power for court to set aside and prevent dispositions intended to defeat claims to maintenance

148.(1) Where -

(a) any matrimonial proceeding is pending; or

(b) an order has been made under section 123 and has not been complied with; or

(c) an order for maintenance has been made under section 124 or section 139 and has not been rescinded; or

(d) maintenance is payable under any agreement to or for the benefit of a spouse or former spouse or infant child,

the court shall have power on application -

(i) if it is satisfied that any disposition of property has been made by the spouse or former spouse or parent of the person by or on whose behalf the application is made, within the preceding three years, with the object on the part of the person making the disposition of reducing his or her means to pay maintenance or of depriving his or her spouse of any rights in relation to that property, to set aside the disposition; and

(ii) if it is satisfied that any disposition of property is intended to be made with any such object, to grant an injunction preventing that disposition.

(2) For the purposes of this section, "disposition" includes a sale, gift, lease, mortgage or any other transaction whereby ownership or possession of the property is transferred or encumbered but does not include a disposition made for money or money's worth to or in favour of a person acting in good faith and in ignorance of the object with which the disposition is made, and "property" means property of any nature, movable or immovable, and includes money.

Injunctions against molestation

149. The court shall have power during the pendency of any matrimonial proceedings or on or after the grant of a decree of annulment, separation or divorce, to order any person to refrain from forcing his or her society on his or her spouse or former spouse and from other acts of molestation.

No proceeding to compel co-habitation

150. No proceeding may be brought to compel a wife to live with her husband or a husband with his wife, but it shall be competent to a spouse who has been deserted to refer the matter to a marriage tribunal.

Reciprocal Arrangements for Enforcement of Maintenance Orders

Reciprocal arrangements with other countries for enforcement of maintenance orders

151.(1) Where an agreement has been made with any country with respect to the reciprocal enforcement of maintenance orders, the Minister may, by order published in the Gazette, declare that the provisions of sections 152, 153 and 154 shall apply in the case of that country.

(2) For the purposes of this and the three following sections, "maintenance order" means an order, other than an order of affiliation, for the periodical payment of sums of money towards the maintenance of the wife or former wife or husband or former husband or infant child of the person against whom the order is made.

Registration of orders made in other countries

152.(1) Where a maintenance order has, whether before or after the commencement of this Act, been made against any person by any court in a country to which this section applies and a certified copy thereof has been transmitted to the Minister for the time being responsible for foreign affairs, the Minister shall send a copy to a court in Kenya for registration and thereupon the order shall be registered in the prescribed manner.

(2) The court in which an order is to be so registered shall, if the court in which the order was made was a court of superior jurisdiction, be the High Court, and in any other case shall be a magistrate's court having jurisdiction under this Act.

Enforcement of registered orders

153.(1) An order which has been registered under section 152, may from the date of registration, be enforced as if it had been an order made by the court in which it is registered.

(2) The court and the officers of such court shall take all such steps for enforcing the order as may be prescribed.

Transmission of orders made in Kenya

154.(1) Where a court in Kenya has, whether before or after the commencement of this Act, made a maintenance order against any person and it is proved to that court that the person against whom the order is made is resident in a country to which this section applies, the court shall send a certified copy of the order to the Minister for the time being responsible for foreign affairs for transmission to that country.

(2) Where such an order is made by a magistrate's court, it shall be sent to the Minister through the Registrar of the High Court.

False state in notice o intention t marry or in notice of objection

Failure to attend befo marriage tribunal or conciliator body

Giving fals testimony, etc., befor marriage tribunal or conciliator body

Minimum age

Prohibited relationshi

PART VII: OFFENCES

False statement in notice of intention to marry or in notice of objection

155. Any person who, when giving notice of intention to marry in compliance with section 26, or notice of objection to an intended marriage under section 28, makes any false statement shall be guilty of an offence and liable on conviction to imprisonment for three years:

Provided that it shall be a good defence to a charge under this section, that the person charged had reasonable grounds for believing the statement to be true.

Failure to attend before marriage tribunal or conciliatory body

156. Any person who, having been required to attend before a marriage tribunal, or other conciliatory body, refuses or neglects to do so without reasonable excuse shall be guilty of an offence and liable on conviction to a fine not exceeding five hundred shillings.

Giving false testimony, etc., before marriage tribunal or conciliatory body

157. Any person who in or in relation to any proceeding before a marriage tribunal or other conciliatory body -

(a) knowingly gives false testimony; or

(b) fabricates evidence or makes use of fabricated evidence; or

(c) destroys, mutilates or conceals any documentary evidence; or

(d) attempts to influence any witness,

shall be guilty of an offence and liable on conviction to imprisonment for two years.

Minimum age

158.(1) Any person who is a party to a ceremony purporting to be a marriage knowing or having reason to believe that the other party is below the minimum age for marriage shall be guilty of an offence and shall be liable on conviction to imprisonment for five years.

(2) Any person who participates in any such ceremony knowing or having reason to believe that either party is below the minimum age for marriage shall be guilty of an offence and shall be liable on conviction to imprisonment for three years.

Prohibited relationship

159.(1) Any person who is a party to a ceremony purporting to be a marriage where the parties are within the prohibited relationships shall be guilty of an offence and liable on conviction to imprisonment for five years:

Provided that it shall be a good defence to a charge under this section, that the person charged did not know and could not reasonably have discovered the relationship.

(2) Any person who participates in any such ceremony knowing or having reason to believe that the relationship exists shall be guilty of an offence and liable on conviction to imprisonment for three years.

Prohibited ceremony

160.(1) Any person who is a party to a ceremony purporting to be a marriage, knowing that the intended marriage has been prohibited by order of the court or of a marriage tribunal under the powers conferred by section 30, shall be guilty of an offence and liable on conviction to imprisonment for five years.

(2) Any person who participates in any such ceremony knowing that the intended marriage has been so prohibited shall be guilty of an offence and liable on conviction to imprisonment for three years.

Coercion, fraud, etc.

161.(1) Any person who is a party to a ceremony purporting to be a marriage knowing or having reason to believe that the consent of the other party was induced by any coercion or fraud on the part of himself or herself or of any other person, or by a mistake as to the nature of the ceremony, or that the other party was suffering from any mental disorder or mental defect, whether permanent or temporary, or was intoxicated, so as not fully to appreciate the nature of the ceremony, shall be guilty of an offence and liable on conviction to imprisonment for five years.

(2) Any person who participates in any such ceremony with knowledge of the fact which makes the ceremony a nullity shall be guilty of an offence and liable on conviction to imprisonment for three years.

Ceremony performed by unauthorized official

Bigamy and similar offences

162.(1) A man who, being married by a monogamous marriage, is a party to a ceremony whereby he purports to take another wife shall be guilty of an offence.

Absence of witnesses

(2) A woman who is a party to a ceremony whereby she purports to marry a man who is married to another woman by a monogamous marriage, knowing or having reason to believe that he is so married, shall be guilty of an offence.

(3) A man who, being married by a polygynous or potentially polygynous marriage, is a party to a ceremony whereby he purports to take another wife in monogamous marriage shall be guilty of an offence.

Irregular marriages

(4) A woman who is a party to a ceremony whereby she purports to take a man in monogamous marriage, knowing or having reason to believe that he is married to another woman by a polygynous or potentially polygynous marriage shall be guilty of an offence.

(5) A married woman who is a party to a ceremony whereby she purports to marry a man other than her husband shall be guilty of an offence.

(6) A man who is a party to a ceremony whereby he purports to marry a woman who is married to another man knowing or having reason to believe that she is so married, shall be guilty of an offence.

(7) Any person guilty of an offence under sub-section (1), (2), (3), (4), (5) or (6) shall be liable on conviction to imprisonment for five years.

(8) Any person who participates in any such ceremony with knowledge of the fact which makes the ceremony a nullity shall be guilty of an offence and liable on conviction to imprisonment for three years.

(9) It shall be a good defence to a person charged with an offence under sub-section (1), (3), or (5) ~~or (6)~~, that he or she believed his or her spouse, or the spouse of the person with whom he or she purported to contract marriage, as the case may be, to be dead or that the marriage had been dissolved and had reasonable grounds for that belief.

Ceremony performed by unauthorized official

163. Any person who is a party to or participates in a ceremony purporting to be a marriage knowing or having reason to believe that any person officiating thereat is not lawfully entitled to do so, shall be guilty of an offence and liable on conviction to a fine not exceeding two thousand shillings.

Absence of witnesses

164. Any person who is a party to or participates in a ceremoney purporting to be a marriage at which there are not at least two witnesses present shall be guilty of an offence and liable on conviction to a fine not exceeding two thousand shillings.

Irregular marriages

165.(1) Any person who is a party to a ceremony of marriage where -

(a) either party is below the age of twenty-one years and consent to the marriage, as required by section 25, has not been given; or

(b) notice of intention to marry, as required by section 26, has not been given; or

(c) notice of objection to the intended marriage has been given and has not been dismissed,

shall be guilty of an offence and liable on conviction to imprisonment for six months:

Provided that it shall be a good defence to a charge under paragraph (a) or paragraph (c) of this sub-section, that the person charged did not know and had no reason to believe that the party was below the age of twenty-one years or that notice of objection had been given, as the case may be.

Enticement

(2) Any person who participates in any such ceremony with knowledge of the irregularity shall be guilty of an offence and liable on conviction to the like penalty.

Meaning of participation

166. For the purposes of sections 158 to 165 inclusive, "to participate in" a ceremony means -

(a) to officiate thereat; or

(b) to give consent thereto under section 25; or

(c) to act as a witness thereto.

Failing to apply for registration

167. Any person who, being under a duty to apply for the registration of any marriage, fails to do so within the prescribed time, shall be guilty of an offence and liable on conviction to a fine not exceeding five hundred shillings:

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Provided that no person shall be charged with an offence under this section if the marriage has been registered under the provisions of sub-section (9) of section 51.

Adultery

168. Any married person who has sexual intercourse with a person not his wife or her husband, as the case may be, shall be guilty of an offence and liable on conviction to imprisonment for six months and the person with whom he or she had such intercourse shall likewise be guilty of an offence and liable on conviction to the like penalty:

Cap. 75

Provided that -

(a) no prosecution shall be instituted in respect of an offence under this section except on the complaint of the aggrieved spouse and within one year of the alleged offence;

(b) it shall be a good defence to a charge under this section -

Rules

(i) that the person charged, if he or she is unmarried, did not know and had no reason to believe that the person with whom he or she committed the adultery was married; or

(ii) that the adultery was consented to, or connived at, by the complainant.

Enticement

169. Any person who, for any reason, entices or induces a husband or a wife to desert his or her spouse shall be guilty of an offence and shall be liable on conviction to imprisonment for two years:

Provided that -

(a) no prosecution shall be instituted in respect of an offence under this section except on the complaint of the aggrieved spouse and within one year of the alleged offence;

(b) it shall be a good defence to a charge under this section, that the behaviour of the complainant has been such as to excuse desertion by his or her spouse.

Power for court when convicting to award damages

170.(1) When any person is convicted of an offence under section 168 or section 169, and it appears to the court that damages would be recoverable by the complainant in a suit brought under section 83 or section 84, as the case may be, and that no such suit has been brought, the court may, in its discretion, in addition to or instead of passing sentence, order the convicted person to pay to the complainant such damages, not exceeding one thousand shillings, as the court may consider reasonable.

(2) An order for damages made under this section shall be subject to appeal and the provisions of the Criminal Procedure Code relating to appeals against sentence shall apply to any such appeal.

Cap. 75

(3) In any subsequent civil proceedings for damages arising out of the act which constituted the offence, the court trying the suit shall take into account any damages awarded under this section.

PART VIII: MISCELLANEOUS

Rules

171.(1) The Rules Committee constituted under section 81 of the Civil Procedure Act may make rules of court for regulating practice and procedure under Part II and Part VI of this Act, including the procedure on petitions and applications, the transfer of proceedings, the stating of cases and appeals to the High Court, the registration of maintenance orders and the steps to be taken for their enforcement, and for the forms to be used and the fees to be paid in respect thereof.

(2) Subject to the provisions of sub-section (1), the Minister may make rules prescribing anything which may be prescribed under this Act and for the better carrying into effect of the provisions of this Act and, without prejudice to the generality of the foregoing, such rules may -

(a) prescribe forms of application for the specification of religions under section 33 and the licensing of ministers under section 38;

(b) regulate the procedure of marriage tribunals;

(c) prescribe the manner in which notices of intention to marry are to be made known;

(d) prescribe the forms to be used for the giving of any notice required by this Act to be given;

(e) prescribe a form of explanation to be given by a district registrar or registration officer to the parties to an intended marriage in civil form or, as the case may be, according to rites recognized by customary law, before asking them whether the marriage is to be monogamous or polygynous or potentially polygynous;

(f) prescribe the forms of licences to be issued by the Registrar-General;

(g) prescribe the form of marriage certificates;

(h) prescribe the form of statement of particulars relating to a marriage to be used by registration officers;

(i) prescribe the forms of the registers to be kept and the returns to be made under this Act;

(j) prescribe the fees to be paid for services to be performed under this Act.

Repeal

172. The statutes set out in the First Schedule are hereby repealed.

Amendment of certain statutes

173. The statutes set out in the Second Schedule are hereby amended, in relation to the provisions thereof specified in the second column of that Schedule, in the manner specified in relation thereto in the third column of that Schedule.

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Saving

Cessation of application of proviso to section 10 of Indian Transfer of Property Act

174. The proviso to section 10 of the Transfer of Property Act, 1882, of India shall cease to extend or apply to Kenya.

Saving

175.(1) Any subsisting union between a man and a woman which under any written or customary law constituted a valid marriage at the coming into force of this Act, shall continue to be such, notwithstanding any provision of this Act which might have invalidated it but for this section.

(2) All proceedings commenced under any statute or any part of a statute hereby repealed shall, so far as practicable, be continued under this Act and for this purpose -

(a) every application for a separation order and every petition for judicial separation shall be deemed to be a petition for a decree of separation under this Act and the grounds set out in the application or petition shall be deemed to be the principal allegations which it will be sought to prove as evidence that the marriage has broken down:

Provided that where a co-respondent is named in a petition for judicial separation, he shall be discharged from the proceedings, without prejudice to any right of action the petitioner may have against him;

(b) every petition for divorce, other than one on which a decree nisi has been granted, shall be deemed to be a petition for a decree of divorce under this Act and the grounds set out in the petition shall be deemed to be the principal allegations which it will be sought to prove as evidence of the breakdown of the marriage but every such petition shall, unless the court otherwise orders, be stayed pending reference to a conciliatory body.

(3) Notwithstanding the provisions of sub-section (2), where a decree nisi has been granted in any matrimonial proceedings, the proceeding shall continue as if this Act had not been enacted.

(4) An order for judicial separation or a decree of divorce granted under any statute hereby repealed shall, in relation to the powers of the court regarding maintenance, be deemed to be a decree of separation or divorce, as the case may be, granted under this Act.

THE FIRST SCHEDULE

Statutes Repealed

Cap. 150	The Marriage Act
Cap. 151	The African Christian Marriage and Divorce Act
Cap. 152	The Matrimonial Causes Act
Cap. 153	The Subordinate Courts (Separation and Maintenance) Act
Cap. 154	The Maintenance Orders Enforcement Act
Cap. 155	The Mohammedan Marriage and Divorce Registration Act
Cap. 157	The Hindu Marriage and Divorce Act

THE SECOND SCHEDULE

Statutes Amended

The Interpretation and General Provisions Act (Cap. 2)	s. 3(1)	Insert, after the definition of "magistrate" - "'marriage' means a marriage contracted in accordance with or recognized as valid by the Law of Matrimony Act 196 , and 'husband', 'married woman' and 'wife' shall be interpreted accordingly;". Insert, after the definition of "the Minister" - "'minor' means a person who has not attained the age of eighteen years and "infant" shall have the like meaning;".
The Law of Contract Act (Cap. 23)	Schedule	Delete the first item.
The Law Reform Act (Cap. 26)	s. 2(2)	Delete paragraph (b).
The Penal Code (Cap. 63)	s. 145(2)	Delete "or was his wife".
	s. 171	Delete.
	s. 172	Delete.
	s. 239	Insert after the word "charged" the following words - "under the provisions of this Code or any other written law."
	s. 274	Delete and substitute - "274. For the avoidance of doubt, it is hereby declared that a husband may be guilty of stealing from his wife or a wife from her husband."
	s. 393	Renumber as sub-section (1) and add - "(2) For the avoidance of doubt, it is hereby declared that a husband and a wife may be guilty of conspiring together."
The Evidence Act (Cap. 80)	s. 53	Delete the proviso and substitute "Provided that such an opinion shall not be sufficient to prove a marriage in a prosecution for bigamy, adultery or enticement or in any civil proceedings for damages for adultery or enticement or in a matrimonial proceedings."

s. 113 Delete.

s. 114 Delete.

s. 118 Delete the marginal note and substitute "Presumption of legitimacy".

Delete from "shall be conclusive proof" to the end of the paragraph and substitute "shall raise a rebuttable presumption that he is the legitimate son of that man."

Insert after section 118 -

"Presumption of validity of registered marriage

118A. The fact that a marriage has been registered under the law of Matrimony Act 196 or any written law previously in force providing for the registration of marriages shall raise a rebuttable presumption that such marriage was valid.

"Presumption of marriage

118B. Where it is proved that a man and a woman have lived together for one year or upwards, in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married:

Provided that no such presumption shall be drawn in any criminal proceedings for bigamy, adultery or enticement or in any civil proceedings for damages for adultery or enticement or in any matrimonial proceedings.

"Presumption of death

118C. Where it is proved that a person has not been heard of for seven years by those who might be expected to have heard of him if he were alive, there shall be a rebuttable presumption that he is dead."

s. 127 Delete and substitute the following -

"Competency of spouses in civil suits

127. In civil proceedings, the parties to the suit and their spouses shall be competent and compellable witnesses:

Provided that no person shall be compelled to give evidence to prove that he or she did or did not have marital intercourse with his or her spouse during any period of time.

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"Competency of accused in criminal proceedings

127A.(1) In crim proceedings, an a person shall be a petent witness fo defence at every of the proceeding whether such pers charged alone or tly with any othe person:

Provided that a accused person sh not be called as witness except on own application.

(2) The fail an accused person give evidence sha be made the subje any comment by th secution.

"Competency of spouse as witness for the defence

127B.(1) In crimi proceedings, the spouse of an accu person shall be a petent and compel witness for the d at every stage of proceedings:

Provided that t spouse of an accu person shall not called as a witne except on the app tion of that pers

(2) The fail the spouse of an sed person to giv evidence shall no made the subject comment by the pr tion.

"Competency of spouse as witness for the prosecution

127C.(1) In crimi proceedings, the of an accused per shall, subject to provisions of sub- sections (2) and (not be competent compellable as a ness for the pros tion.

(2) The spou an accused person be a competent an pellable witness the prosecution a every stage of the ceedings where tha person is charged

(a) with the offer of bigamy; or any similar offence; or

(b) with an offence under Chapter XV of the Penal Code; or

Cap. 65

(c) in respect of an act or omission affecting the person or property of his or her spouse or the children of either of them.

(3) The spouse of an accused person shall be a competent, but shall not be a compellable, witness for the prosecution at every stage of the proceedings where that person is charged with adultery or enticement.

(4) An accused person shall not be liable to be convicted on evidence admitted under sub-section (2) or sub-section (3) unless it is corroborated by other material evidence in support thereof implicating him".

s. 130(1) — Delete "paragraphs (a), (b) and (c) of section 127(3)" and substitute "sub-section (2) or (3) of section 127C".

Renumber as section 130.

s. 130(2) — Delete.

The Children and Young Persons Act (Cap. 141) — s. 21(a) — Delete "section 30 of the Matrimonial Causes Act" and substitute "section 134 of the Law of Matrimony Act 196 ".

The Adoption Act (Cap. 143) — s. 2(1) — Delete "twenty-one" from the definition of "infant" and substitute "eighteen".

The Guardianship of Infants Act (Cap. 144) — s. 2 — Delete the definition of "infant" and substitute -

"'infant' means a person who has not attained the age of eighteen years;".

\- Insert after section 5 -

"5A. Where under any written law a person of or over the age of eighteen years is nevertheless under incapacity by reason of being below an age prescribed in that law, the court shall have power, on the application of that person, to appoint a guardian of him for the purposes of that law."

s.
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The Mohammedan Marriage, Divorce and Succession Act (Cap. 156) — s.
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s.

The Trustee Act (Cap. 167) — s.

The Pensions Act (Cap. 189) — s.
s.

s.

The Widows' and Children's Pensions Act (Cap. 195) — s.
s.

The Workmen's Compensation Act (Cap. 236) — s.

(b) with an offence under Chapter XV of the Penal Code; or

(c) in respect of an act or omission affecting the person or property of his or her spouse or the children of either of them.

(3) The spouse of an accused person shall be a competent, but shall not be a compellable, witness for the prosecution at every stage of the proceedings where that person is charged with adultery or enticement.

(4) An accused person shall not be liable to be convicted on evidence admitted under sub-section (2) or sub-section (3) unless it is corroborated by other material evidence in support thereof implicating him".

"paragraphs (a), (b) and (c)
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"section 30 of the Matrimon-
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	s.	7	Delete.
	s.	10	Delete.
	s.	11	Delete.
	-		Insert after section 18 a new section
	"18A.	The	provisions of this Act shall be read subject to those of the Law of Matrimony Act 196 ."
The Mohammedan Marriage, Divorce and Succession Act (Cap. 156)	s.	3	Delete.
	s.	5	Delete.
	s.	6	Delete.
	s.	7	Substitute a full stop for the semi-colon after "Act" in the third line and delete the subsequent words.
The Trustee Act (Cap. 167)	s.	33	Delete the words "twenty-one" wherever they appear and substitute "eighteen".
The Pensions Act (Cap. 189)	s.	2(1)	Delete the definition of "wife".
	s.	2	Add an additional sub-section as follows -
			"(4) Where under this Act any pension, gratuity or other allowance is payable to the wife or widow of an officer and that officer is or was at the date of his death married to two or more women, the pension, gratuity or other allowance shall be divided equally between them during the period in which there is more than one widow eligible therefor".
	s.	13(3)	After "wife" insert "or wives".
The Widows' and Children's Pensions Act (Cap. 195)	s.	2(1)	Delete the definition of "wife".
	s.	2	Insert after sub-section (1) -
			"(1A) Where under this Act any pension, gratuity or other allowance is payable to the widow of an officer and that officer was at the date of his death married to two or more women, the pension, gratuity or other allowance shall be divided equally between them during the period in which there is more than one widow eligible therefor."
The Workmen's Compensation Act (Cap. 236)	s.	3(1)	Delete the definition of "member of the family" and substitute -
			"'member of the family' means any of the following, that is to say: husband, wife, parent, stepparent, grandparent, son, daughter, stepchild, grandchild, brother or sister, half-brother or half-sister and includes also an infant child whom the workman had accepted as a member of his family;".

	First Schedule	Delete.
The Registered Land Act (Cap. 300)	s. 113	Delete the words "twenty-one" and substitute "eighteen".
The Kadhi's Courts Act 1967 (No. 14 of 1967)	s. 5	Renumber as sub-section (1) and add - "(2) A Kadhi's Court shall have and exercise such jurisdiction in matrimonial causes as is conferred on it by the Law of Matrimony Act ,19 ."
	s. 6	Renumber as sub-section (1) Delete the opening word "The" and substitute "Subject to the provisions of sub-section (2), the". Insert after sub-section (1) - "(2) In any proceedings under the Law of Matrimony Act ,19 , a Kadhi's Court shall apply the law of evidence contained in the Evidence Act."
	Cap. 80	
The Magistrate's Courts Act 1967 (No. 17 of 1967)	s. 2	In the definition of "claim under customary law" delete paragraph (b) and substitute "(b) dowry, so far as the same is not governed by any written law;"; delete paragraph (d), insert at the end of paragraph (e) ", so far as the same are not governed by any written law".
The Limitation of Actions Act 1968 (No. 21 of 1968)	s. 2	Delete the definition of "minor" and substitute - "'minor' means any person who has not attained the age of eighteen years;".