# THE LEGAL STATUS OF WOMEN IN KENYA: PATERNALISM AND INEQUALITY

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> Mr. Chairman; His Lordship the Chief Justice; Your Lords; Your Excellencies; Distinguished Guests; Ladies and Gentlemen: You will, I hope, excuse my reverting to the more conventional term of **Chairman** instead of **Chairperson** since the Women's Year ended about a month ago . . .
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> Address by Hon. The Attorney-General, Mr. Charles Njonjo, M.P. on the ceremonial opening of the Nairobi Session of the Hague Academy of International Law Seminar, Nairobi, 26th January, 1976.

This paper is a descriptive analysis of the present legal status of women in Kenya.[1] It seeks to establish the extent to which the legal system permits, condones, and reinforces discrimination against women and to examine the manifestations of this in social practice.

The central hypothesis that emerges in this paper is that law and social practice are dialectically related and hence a discriminatory legal status based on sex plays a significant role in shaping the socio-economic behavior in role allocation by sex in society.[2]

A secondary hypothesis is that women are, in law and practice, less privileged in the vital areas of decision-making than men and that this explains their subservient role in society. It should be noted that in certain areas women appear to be more privileged. This kind of over-privilege is, however, interpreted as a manifestation of paternalistic protectionism, which lends further credence to the view that women are the weaker sex.

## The Constitution

Kenya's independence Constitution of 1963 was a "package-deal,"

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1. This paper is a substantially condensed version of Discussion Paper No. 235, Institute for Development Studies, University of Nairobi (April 1976) entitled **The Status of Women in Kenya: A Study of Paternalism, Inequality and Underprivilege.**

2. The empirical analysis in support of the role allocation hypothesis has been omitted here. The principal data used was drawn from the registers of the Industrial and Commercial Development Corporation (I.C.D.C.) and the Housing Finance Company of Kenya (H.F.C.K.), which are the major corporations providing loans and mortgage facilities for business and residential housing. Government records provided information regarding discrimination in educational opportunities, employment and wage differentials. The array of discriminatory legal regimes within criminal law has also been omitted.

Westminster-model type drafted under the direction of the Colonial Office in England. Through the Bills of Rights, it attempted to provide special legal machinery for the protection of, *inter alia*, minority races and tribes; it also sought to make breaches of some loosely defined "rights" and "freedoms" justiciable in municipal courts. The Bills of Rights spell out what the government should not do — not what it should do — regarding protection from deprivation of property; discrimination; protection of life, liberty, security; freedom of conscience, expression, assembly, association, and so on. Yet except for the protection from deprivation of private property, the "fundamental rights" and guaranteed "freedoms" provided for in the independence Kenyan Constitution (see the present Chapter 5 of the 1969 Constitution) are virtually eliminated by provisos and exceptions that bear catch-all words and phrases capable of interpretation in support of capricious government actions.

Section 82 of the 1969 Constitution, which purports to provide protection from discrimination states:

> (1) Subject to sub-sections 4,5 and 8 of this section, no law shall make any provision that is discriminatory either of itself or in its effect . . . .
>
> (3) In this section, the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, color or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

However, the Kenya Constitution excludes the sex attribute as one of the descriptions covered by the term 'discriminatory' under Section 82 (3). Thus in Kenya there is no constitutional protection in case of sex discrimination. Furthermore, personal law, religious law, and customary law are specifically exempted under Section 82 (4) (6) from challenge in court even if they are discriminatory. Under these conditions, existing or newly established tribal, religious or common laws and practices that discriminate against women *qua* women may legally be valid in Kenya. Since law is an aspect of government policy, the Kenyan government appears to condone discrimination based on sex.

**Contractual Legal Capacity**

Kenya has retained the colonial model of law which vests in every legal personality (representing a human being, a corporate person or other lesser association) the power and ability to fight for his or her own survival

3 According to the 1969 Census Report, women accounted for 51% of the total adult (16 year and older) population of approximately 5½ million. Kenya, Population Census, 1969, Statistics Division, Ministry of Finance and Planning (Nairobi Government Printer).

with the presumption that the maximum good to the general public will flow therefrom. The power is given to the atomized individual from the point at which, through legal fiction, the law admits that the person is possessed of a status which may enable him or her to use contract as a basis of communication with the general public by creating mutual rights and duties. This contractual status is then to be seen as a weapon the individual uses in manipulating his proprietary well-being. The concern of this section is to ascertain the point at which the law vests one with such power and to identify the discriminatory qualifications it permits.

According to the Age of Majority Act (No. 1) of 1974, a person, male or female, ceases to be under any disability by reason of minority on attaining the age of 18.[4] Until 1974, Africans, male and female, had no legal age of contract.[5] In practice, however, Africans had always made contracts which were and still are justiciable in courts of law. Here is a classic example of a situation in which social practice filled a legal lacuna and the law was forced to recognize such practice. It is noteworthy that in the pre-independence period African men were more advantaged than women in contractual matters. This was partly due to inequalities in the traditional role of women and partly due to discriminatory English practice superimposed on Kenyan society during the colonial era.[6]

The present contractual legal capacity of Kenyan women is not independent throughout Kenyan law: in some areas it is supplemented by and dependent upon a man's contractual capacity.[7] This dependent status arose from the time of pre-industrial English society when women were regarded as chattel and had no proprietary capacity. This disability was incorporated into English common law and in turn was received into and adopted in Kenyan law.[8] For instance, there are two principles by which a woman may make contracts for and on behalf of her husband or lover without the personal consent of such a husband or lover (irrespective of the economic status of the spouse or cohabitant since the man must assume liability for the woman's needs).

4. It is to be noted, however, that the law recognizes "Special Contracts" where deviation from this age limit is allowed; for instance, in marriage contracts (which are discussed below) and quasi-contracts, in which the law recognizes contracts like those for necessaries of life made with children below this age.

5. The Age of Majority Act, 1933 provided in Section 3 that Europeans, men and women, became majors at 21 and Section 4 provided that "non-Africans," other than Europeans became majors at 18 (men and women). Africans were not covered.

6. See S.B.O. Gutto, **The Legal Constraints on Female Participation in the Economy**, LL.B. Dissertation paper, Faculty of Law, University of Nairobi, 1974/75.

7. See for instance the case of Best v. Samuel Fox & Co. Ltd. (1952) 2 All. E-R. 394 in which Lord Justice Morton, in agreement with the other Lord Justices, said on p. 400 that in the 1950s the old law, which was still in force, regarded the husband as having a quasi-proprietory right in his wife.

8. By virtue of a series of Orders-in-Council, copied and enacted by our independent parliament under the Judicature Act (No. 16 of 1967), Section 3 (c).

Under the agency of necessity, a married woman has the legal power to pledge the credit of her husband for necessities of life commensurate with the couple's normal standard of living. In a situation in which a married woman is forced to live apart from her husband before a court of law has made an order of maintenance, she automatically possesses this power.[9]

The presumed agency of necessity is operative in the case of cohabitation with or without a legally binding marriage. It vests in a woman (by the mere fact of cohabitation[10]) the power to bind her husband or lover to a contract for necessities which are commensurate with the subsistence standards of the house. The latter principle therefore does not depend on separation as the former does. However, in practice, few businessmen would allow another man's wife or mistress to pledge his credit to obtain goods, despite the potential protection the law provides. Another social fact is that few husbands, wives, mistresses, or businessmen are aware of these legal powers; this contributes to the apparent immobilization of the law, thus making the apparent legal privilege for women in this respect sterile.

That men are not accorded agency powers leads to the conclusion that the law gives men a stronger underlying contractual capacity which can be utilized by women only in special cases. Such an arrangement may have been justified in pre-industrial Europe or pre-independence Kenya, but the reasoning behind its retention is weak in present-day Kenyan society in which 29% of a total of 1.7 million households are headed by women.[11] Admittedly, a large majority of women still lag behind a large majority of men in proprietary control but it is to be argued that the law ought not to reflect the prejudice that all women are inferior to men in this respect. Such laws bolster the opinion that all women are by virtue of their sex incapable of utilizing a full and independent contractual capacity. This leads to policy relegating women to underprivileged roles in society and hence inequality with men. If it be found necessary by virtue of marriage or cohabitation that partners support each other, then the law should provide that the partner who is economically superior should be subject to the agency principles discussed.

**Some Aspects of Family Law**

Family law includes laws of marriage, divorce, guardianship of infants, custody of children, and illegitimacy. This discussion will be limited to practices which differentiate between men and women in the area of marriage and divorce law.

9. Wilson v. Glossop (1888) 20/Q.B.D. 354 at 357; Weingerteen v. Engel (1947) 1 All. E.R. 425

10. Debenham v. Mellon (1880) 6 App. Cas. 24 applies to a legally married woman and Ryan v. Sams (1847) 12 Q.P. 460 to a mistress.

11. See M. Monsted, The Population Implications in Rural Development in Kenya, Paper read at the Workshop on the Teaching of Population Dynamics in Law Schools in Africa (Nairobi, 1974); and UNDP/ILO, Employment. Incomes and Equality - A Strategy for Increasing Productive Employment in Kenya (Geneva: 1972).

There are two marriage systems legally recognized in Kenya: polygynous or potentially polygynous, and monogamous. One may contract monogamous marriage through civil law, which allows for Christian religious ceremonization and solemnization;[12] the customary-into-Christian conversion model;[13] and the Hindu religious type.[14] Polygynous or potentially polygynous marriages are contractable under Islamic religious law[15] and African customary law.[16] In addition to the above formal systems the law also recognizes some unions, not initially contracted as marriage, which then fall into either of the two systems, depending on the circumstances of the particular case. These may be called "marriages-presumed-by-law."

*Monogamous System*

Monogamous marriages have one basic underlying assumption which has survived from the ecclesiastical laws of pre-industrial Christianity which is that a marriage is seen as a voluntary union, for life, of one man and one woman, to the exclusion of all others.[17] This is misleading since it precludes the possibility of the now well established legal concept and practice of divorce. Perhaps a better definition is one coined by a South African judge who said that such marriage is: "The union of one man with one woman, to the exclusion, while it lasts, of all others."[18]

Certain legal prerequisites must be satisfied before a monogamous marriage is contracted under either the Marriage Act or Hindu law. First, there is a requirement that the parties to the marriage have attained a prescribed minimum age. Under the Marriage Act, both the male and female must be 18.[19] Should either (not both) be below 18 but over 16, the written consent of one having legal custody over him or her must be obtained.[20]At present the Marriage Act treats both men and women equally in this respect, but there is a strong possibility that the minimum age for women will be lowered to 16.[21] Hindu law already decrees a

12. The Marriage Act, Chapter 150: Laws of Kenya.
13. The African Christian Marriage & Divorce Act (Chapter 151), which provides the procedural law for converting a customary potentially polygynous marriage into a Christian monogamous marriage.
14. Hindu Marriage & Divorce Act: Chapter 157.
15. Mohammedan Marriage, Divorce & Succession Act: Chapter 155.
16. Section 3 (2) of Judicature Act, 1967; Sec. 2 of Magistrates Courts Act, 1967; ruling of Justice Miller in Mwagiru v. Mumbi (1967) E.A. 639.
17. Section 2 of Matrimonial Causes Act. Chapter 152, which is based on the ruling in Hyde v. Hyde (1866) L.R. 1 P.D. 130.
18. Per Innes, C.J. in Ebrahim v. Essop, 1905, T.S. 59.
19. Section 11 of Marriage Act, as amended by Act. No. 7 of 1975.
20. Sections 11, 19 and 35 (2) of Marriage Act, Sections 22, 21 provide for additional procedures if consent is refused.
21. Recommendation N. 2 Commission on the Law of Marriage and Divorce, provides minimum ages of 18 for men and 16 for women; Rec. No. 3 further states that the courts should be 'given power to permit marriage of a person below the minimum age. . .as an extraordinary measure;

minimum age of 18 years for the bridegroom and 16 for the bride with a proviso that if the bride is between 16 and 18 her guardians must give a form of consent similar to the one required under the Marriage Act.[22] Age differential in a marriage is a crucial factor dictating the subordination of women. It is a weapon men use to ensure female subservience and male leadership in matrimonial unions. Once a man marries a woman younger than himself, he assumes a paternal role by virtue of his maturity, experience in life, and most often, job and educational superiority and economic status.

The other legal requirement of interest here is the stipulation that each party to a marriage must give free consent. Lack of free consent makes a purported monogamous marriage a nullity under the Matrimonial Causes Act.[23] The courts hold strongly that any marriage entered into without free consent is contrary to public policy and is therefore invalid and in addition *contra bonos mores*. The fundamental question here is how "free" is the consent given in Kenya, especially by females who have less access to economic security.

During the currency of a monogamous marriage, the law imposes some rights and duties on the spouses which reflect religious beliefs regarding the paternal duties of men towards women. The source of the agency powers of a woman, discussed earlier, is the right of a wife to be provided with life necessities including a home, by the husband. When this duty is not discharged, the woman automatically has the right to sue for separation and a maintenance order.[24] A husband can be prosecuted for a criminal offence if he fails to discharge his duty and he faces possible imprisonment for a maximum of 3 years.[25]

A wife has no corresponding duties regarding her husband; neither does the husband have any other rights that are not mutually enjoyed by the wife. It is clear from this that the law makes it a "man's burden" to care for his wife. These provisions were perhaps relevant during an age when women had no proprietary capacity. Their retention at present, without amendments to make them mutually applicable only serves to perpetuate traditional images of sexual inequality.

Another area of significance during the currency of a marriage is the extent to which the law provides for and protects the spouses' proprietary capacity. Since 1970[26] Kenyan law stipulated that married women (it is

and only where neither party is below the age of 14 years and where the girl is pregnant'; this is contained in Section 21 of the Marriage Bill, 1976.

22. Section 3 (1) (c) and (d), Hindu Marriage, Divorce & Succession Act, op. cit.

23. Chapter 152, Laws of Kenya, Section 14 (1) (e); see also Section 9 of the Hindu Marriage & Divorce Act, op. cit; and the case of Bhamjiv. Runda (1957 E.A. 110.

24. Subordinate Courts (Separation and Maintenance) Act. Chapter 153, Section 3.

25. Under Section 239 of the Penal Code (Chapter 63).

26. This is the time the High Court of Kenya decided in the case of Iv.I (1971) E.A. 278 that the Married Women's Property Act, 1882 (U.K.) is law in Kenya.

argued that this includes women married under both systems since all the marriages in the two systems are legally recognized under Kenya law) are protected by the Married Women's Property Act, 1882 (U.K.). The Act has undergone considerable change in Britain since 1882,[27] but Kenya received it as it was in 1897 when it had not yet been significantly altered.

Two sections of the Act are important here. Section 12 provides that married women have full proprietary capacity, which means that a married woman is to be considered a *feme sole* in matters affecting her property and is *sui juris*, that is, she has the capacity to sue in order to protect property she is in possession of. The scope of Section 12 is limited, however, to cover only action against outsiders, not against her husband. The section provides that spouses may not in fact sue each other in *tort* (civil action exluding contract). Thus, a spouse may only bring an action against his or her partner where there is a breach of contract, unless the state institutes a criminal action on his or her behalf.[28] This is an extremely serious situation which calls for immediate amendment so that one spouse may have recourse to the courts in civil action (*tort*) when the other has destroyed his or her property; the Marriage Bill, 1976 attempts to do this.

Section 11, the other important section, purports to give a married woman security of tenure in a matrimonial home and the right to benefit from the assets specifically mentioned in her husband's insurance policy for her benefit and/or the children's benefit. Such property then becomes trust property to be held by the policy holder and the insurance company for the benefit of the spouse and/or children. An outsider may not claim any right over such property where the right claimed arose after the execution of the policy. (The husband likewise enjoys these rights.) This section ought to be amended so that the protection in a matrimonial home does not depend entirely on an insurance policy[29] and so that it takes into account cases of deserted spouses. Such an amendment is particularly necessary in Kenya where most agricultural land is being registered in the names of males and therefore women must risk being evicted by third party creditors on their husband's demise.[30]

In addition to the provisions of the 1882 Act, married couples during the continuum of their marriage are subject to the equitable doctrine of

27. For the most important changes up to mid-1975, see Gutto, Footnote 6, above, Chapter 3:6.

28. Under Section 274 of the Penal Code, already cited.

29. It is consoling to note that 1968 Report of the Commission on the Law of Marriage and Divorce said in its Recommendation No. 61 that the new law should provide 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 curtilage;' Section 66 of the Marriage Bill 1976 incorporates this policy.

30. This has been empirically tested in Mbere and Kwale areas. See Special Rural Development Program: Second Overall Evaluation, Occassional paper No. 12, Institute for Development Studies, University of Nairobi, 1975.

presumption of advancement.[31] This postulates that where a man/woman transfers a legal interest in a property to his/her spouse/child, even without consideration, equity will hold that he/she meant and actually transferred, for good, the interest in the property to the transferee. The doctrine may help to eradicate the loophole by which many spouses register property in the names of their husbands/wives or children when they want to avoid taxes or other legitimate claims that may affect such property. Normally, as soon as the apprehended danger has disappeared, they (the transferors) re-transfer the property back into their own names. This process is frequently recurring and usually initiated by propertied men. This is the *benami* doctrine in Hindu and Islamic law.

The effect of the doctrine of presumption of advancement is to give the person in whose name the property is transferred the right to claim exclusive ownership unless the transferor shows clearly that his intention for the nominal transfer was *bona fide* and he did not want to transfer the interest absolutely. The requirement is that the transferor must stand *in loco parentis* or have a marital relationship with the transferee. Though the doctrine is of mutual application to the sexes, it is the men in Kenya who control property in the majority of cases and the women are usually used as the scapegoats (transferees). Usually, unsuspecting survey reports fail to appreciate this fact and show as "owners" persons whose names appear only for window-dressing purposes and who can be divested of the right at any moment.

Whether the doctrine applies to monogamous unions contracted under Hindu law is not clear at present. Although earlier authorities held that *benami* transactions apply to Hindus[32] and Muslims[33] in Kenya, it has been ably argued that *benami* is a customary practice (not religious) peculiar to Indian society and should not be adopted in Kenya.[34]

It is submitted that the doctrine of presumption of advancement should be made applicable to matrimonial relations arising from both polygynous and monogamous systems. In consideration of the contribution made by spouses to production, accumulation, and maintenance (either through financial input or labor input) of family assets, the law should incorporate a policy which vests in such spouses definite proportional interest in matrimonial property. This should extend to cover either direct or indirect labor or financial contribution to commercial business.[35] This is one of the meaningful ways by which law

31. Received as Part of Kenya law by the ruling in I v. I, (1971), Supra.

32. Ruling in Chadha v. M. Singh (1956) 29 K.L.R. 21.

33. Shallo v. Maryam (1967) E.A. 409.

34. R.W. James, "Benami and the Equitable Doctrine of Resulting Trust." Journal of the Denning Law Society. 11 (2) (1969) 106; G.F.A. Sawyer, "The Application of Muslim Law in Kenya: a Brief Note." East African Law Review 1 (1968) 285.

35. The British House of Lords, when sitting as the Highest Court in Britain, has partially rejected

can aid women to redress the past and present imbalance in proprietary control.

In dissolving monogamous marriages, the laws that govern the procedures, grounds and consequences are codified under the Matrimonial Causes Act, Subordinate Courts (Separation & Maintenance) Act, Hindu Marriage & Divorce Act, and African Christian Marriage & Divorce Act. Some of these Acts provide for differential treatment based on sex. The unconscionable nature of those provisions relating to inequity and underprivilege will be discussed after they have been identified.

Generally the law upholds that only the High Court has the jurisdiction to hear and determine all matrimonial causes including dissolution arising out of monogamous marriages,[36] except for those under the converted customary-into-Christian type which are dissolvable by Subordinate Courts.[37] Women are, however, given the exclusive right to seek for judicial separation and maintenance in a speedier, less expensive way in Magistrates' Courts under the Subordinate Courts (Separation and Maintenance) Act. This in fact is the sole purpose of the Act. [38] The only bar is to a woman who has committed adultery without the husband either condoning it or creating conditions that led to such infidelity.[39] The impediment can however be overcome by the power given to the Attorney-General to petition in place of an adulterous wife, dead wife or wife who is outside Kenya, for the benefit of the children.[40]

The Act gives women additional grounds for judicial separation that are not enjoyed by husbands under any of the statutes cited above. These grounds are that[41] the husband is a habitual drunkard or habitual drug-taker; that he has been convicted of a crime under the penal code for having caused her actual bodily harm by causing her to take noxious substances, unlawfully wounding her, assaulting and causing bodily harm; or that he has failed to provide the necessities of life to her and her children. A wife may also petition where the husband is found guilty of

this notion and agreed to recognize only cases where a spouse has made direct financial contribution: Pettitt v. Pettitt (1969) 2 W.L.R. 966; Falconer v. Falconer (1970) 1 W.L.R. 1333; Gissing v. Gissing (1970) 3 W.L.R. 255. The only area where labor is considered as creating an interest is in family commercial business. See, Nixon v. Nixon (1969) 3 All E.R. 1133.

36. Section 3 of the Matrimonial Causes Act reads that: "Subject to the provisions of the African Christian Marriage and Divorce Act, jurisdiction under this Act shall only be exercised by the High Court. . .and such jurisdiction shall, subject to the provisions of this Act, be exercised in accordance with the law applied in matrimonial proceedings in the High Court of Justice in England."

37. By virtue of Sections 14 and 15 of the African Christian Marriage and Divorce Act; see also note 42 below.

38. The explanation in Wason v. Wason (1967) E.A. 682.

39. Section 5 of the Act.

40. Section 12 of the Act.

41. As provided by Section 3 of the Act.

rape, sodomy, or bestiality.[42]

The divorce statutes are unfair in the sense that they vest in women only the power to mobilize the law on grounds additional to those mutually shared with men. There seems to be no reasonable rationale in denying husbands these additional grounds in matrimonial law. Provisions for the maintenance of a spouse and children should be enjoyed by both parties to a monogamous marriage in order that equality of the sexes is reflected. The Matrimonial Causes Act provides for an automatic liability on the part of the husband to pay maintenance to the wife and children where a divorce or nullity order is given;[43] it however does provide that where a wife has committed adultery, or is guilty of desertion or cruelty, the court may order her property to be used for the benefit of the husband and children (Section 27). Also where any other order is given, a wife's fortunes are to be taken into account in computing the amount the husband can be ordered to pay (Section 25). The Subordinate Courts Act does not direct the courts to take cognizance of these factors. Husbands as well as wives should have the right to enjoy these privileges. These measures would eliminate the differential treatment of men and women which is based on the false belief that women are the weaker sex and therefore need special protection under the law.

It is to be noted that at the time of printing there was before parliament the Marriage Bill, 1976. The Bill has some novel improvements: holding putative fathers jointly responsible for the maintenance of their illegitimate children; giving women some minimal security of tenure in matrimonial homes; and indirectly attempting to destroy polygamy. Also significant is the Law of Succession Act, 1972 which might be made operative after publication of this article; it too provides some security of tenure for females, married and unmarried, in their paternal and/or matrimonial homes. [44]

*Polygynous System*

Polygynous or potentially polygynous marriages are contractable under Islamic religious laws or under African customary law.[45] Because of the dynamic, flexible customary legal systems, there are divergencies in practices of different ethnic groups and even of clans within a single ethnic group. This is made more widespread by the fact that there are no uniform codified rules of general application but merely social practices that have over many successive generations acquired the status of law. Even among Islamic laws, the provisions in the Sharia, which is the source

42. These latter grounds may also be used by a wife to petition for Divorce or Judicial Separation under Section 8 (1) of the Matrimonial Causes Act.

43. Sections 25 (2) (3), 26 and 30.

44. For a more detailed discussion of the implications of the Marriage Bill, 1976 see: S.B.O. Gutto, "Will the Marriage Bill Benefit Society?" in Joe Magazine. September 1976, pp. 8-9. See references to this in New York Times, October 23, 1976. p. 6.

45. See notes 15 and 16 above.

of Islamic law adjudicated in the Kenyan Courts,[46] are subject to slightly different communal or customary interpretations and practices which in turn lend some flexibility to the general practice. Despite these differences, however, there are some well established rules of general application; in addition, the superimposition of colonial administration and policies has helped in establishing and implementing some of these more rigidly.

Polygynous or potentially polygynous marriages function within a discriminatory framework. There is no rule that bars women from contracting polyandrous unions. The apparent unequal treatment of women by the African customary practice of polygyny is therefore not a rule of law but merely social practice that could be upset if social values change and alternative practices such as polyandry take precedence, although there is no indication that such a reversal in society will occur within the foreseeable future.

Some section of the female populace appears to give support to polygyny and to consider that as long as the strength of economic power lies largely with men, the institution is necessary to support otherwise helpless women and thus serves an important socio-economic function.[47] The tolerance is however imposed by unequal role allocation in the society and should not be interpreted as equitable.

Like monogamous marriage, polygynous or potentially polygynous marriage is a union between a man and woman or women which is meant to last for life, excepting the little practised Islamic *muta* which involves contracts of temporary marriage for a specific time period.[48] Under this system also, a prescribed minimum age is required before a man or woman may enter into a marriage. For both Islamic and African customary models, the minimum age for marriage purposes is the onset of puberty or the fulfillment of some initiation ceremony marking adulthood. Yet most girls are married immediately upon acquiring the necessary qualifying attributes while their male counterparts mature well past these stages as they accumulate sufficient wealth to pay *mahr* to their prospective wives, in the case of Muslims, or marriage-gifts to the bride's parents in the case of African customary marriages.

As in monogamous systems, free consent of the parties to a marriage is another prerequisite to contracting a lawful polygynous marriage, both under African customary laws and under Islamic law. In both cases, the

46. As decided in Salina v. Thabit (1908) 2 K.L.R. 131.

47. This was the author's opinion after listening to the debate on polygyny by a cross-section of women particpants at the Conference on Assembling and Collecting Data on the Participation of Women in Kenya Society, 11th - 15th August, 1975 (Nairobi).

48. Only the Ithna Ishari school practice this: Prof. J.N.D. Anderson, "Comments with Reference to the Muslim Community," East African Law Journal, v. 1 & 2 (1969), pp. 5-20.

requirement is qualified in some special cases. The reality of the inequality between the sexes regarding the power to give free consent emerges clearly in polygynous systems.

Marriage-gifts, be they customary bride-wealth or Islamic *mahr*, project inequality in the status of husband and wife. The consideration always moves from the male to the wife or the wife's parents. It is true that the practice has in the past fulfilled some socio-economic needs. The Islamic *mahr* must be paid to the wife or, if the wife dies before the husband has completed payment, to her successors; if he dies, she or her successors have the first priority in his estate to claim the agreed amount.[49] This may be likened to a type of marriage settlement or fixed maintenance allowance for the wife. The customary gifts to the bride's parents operated as a thanksgiving and material fulfillment of the labor gap created by the permanent departure of the daughter. In the traditional context the bride became an asset to the bridegroom's family.

Thus the institutions served useful purposes in the past when men exclusively controlled the means of livelihood and the matrimonial homes were patrilocal. At present family patterns, especially among the urban-dwellers and people in high population density areas, show rapid change towards a neolocal matrimonial system. Both the bride and the bridegroom become almost equally independent of their parents. This makes payment of bride-wealth or marriage gifts to the bride's parents unjustifiable. The women are also increasingly, albeit at a slow rate, breaking through the monolith of proprietary control by men. For this reason, in the interests of justice and equality, it may be argued that either a reciprocal duty to pay a marriage-settlement be imposed on either spouse depending on their fortunes or the *mahr* rights of Muslim wives be severed altogether.

Another area in which the Islamic polygynous system accords unequal treatment to women is the question of choosing a marriage partner. Whereas Muslim men are allowed to marry any woman observing the *kitabiyya*, (persons of recognized religious books e.g. Christians but not Hindus and pagans), a Muslim woman is prohibited from marrying anyone who is not a Muslim.[50] This means that although a Muslim woman has the right to withhold her consent to a marriage, she may choose only from the Islamic community or else renounce her faith. It is submitted that women ought to enjoy the latitude awarded to men in this respect.

49. The implications of the consideration are amply discussed in S. Abdulla v. Zirena Abedi (1909) 3 E.A.L.R. 96; Abdulreheman v. Ali (1916) 6 E.A.L.R. 145. It should however be noted that the last case was wrongly decided as the Judge misconceived that non-payment of a mahr invalidates a marriage. A mahr is a consequence of marriage, a debt owned to a wife; until she is paid, the wife has the right to refuse cohabitation with the husband.

50. ". . .the islamic rules. . .prohibit a Muslim man from marrying a Hindu or pagan woman, or a Muslim girl from marrying anyone other than a Muslim. . ." Prof. Anderson, op. cit., p. 7.

On the question of maintenance within a polygynous marriage, the husband is required to provide for his wife/wives. In Muslim law, the *mahr* itself operates as a deposit for the future sustenance of the wife and her children. Even after the *mahr* is paid, Muslim women have justiciable rights to be maintained by the husband. Under African customary laws, the fact that the matrimonial homes have so far been patrilocal implies automatically a duty on the part of the husband to provide for the wife and children. It is argued here that reciprocal obligation of maintenance (depending on the fortune of each party) should be legislated.

Rules governing divorce within polygynous marriages under African customary laws did not discriminate for the most part as to the grounds and treatment. Traditional rules have been very flexible on this point, but neither husband nor wife could unilaterally divorce the other without positive support from their families. The judicial machinery leaned heavily on reconciliation and compromise for the purposes of family cohesion. Only cases that threatened irreparable damage to the whole family fabric were allowed dissolution. The present rate of fragmentation of traditional society has greatly weakened these in-built checks and balances.

The Islamic divorce models display an unjustified bias against women, notwithstanding the contention that they are based on divine commands which man has no power to challenge. A Muslim husband can, in a minute, unilaterally repudiate a marriage and divorce the wife merely by pronouncing three *Talakas* ("I divorce thee, I divorce thee, I divorce thee"). A wife may only do this if the husband has contractually delegated the power to her to divorce him (*talaki tafwid*). The next option open to the wife is to convince her husband by paying some valuable consideration, to agree to a mutual divorce (*khul*).[51] The only independent ground is to petition a Kadhi to dissolve the marriage (*faskh*)[52] where she has good reason, for example in cases where the husband has repudiated Islam.

These absolute powers of divorce, unilaterally exercised by husbands alone, are not only unfair but may have adverse effects on a married woman's contribution to the welfare of the family due to an acute sense of insecurity. It is time that Muslim women were armed with similar rights as their husbands, or that the men were stripped of their powers.

**Social Security and Welfare Legislation**

As traditional mechanisms for social security and welfare weaken, the state must take over these functions and ensure proper sustenance for persons who are excluded from gainful employment by reason of immaturity, old age, physical or mental deformities, and even lack of

51. Explained fully in Salum v. Asumani, (1969) E.A. 255.

52. Implications explained in Seyyed Omar v. Asha Said, (1942) 20 (1) K.L.R. 49.

employment. Social security and welfare legislation to this end tend to be discriminatory in two ways: (1) constraints either by exclusion or proscription of certain groups in society within which women are a majority; and (2) exclusion of women by virtue of their sex from participation in certain institutional arrangements in society.

*The National Social Security Fund Act, [Chapter 258, Laws of Kenya]*

The above act replaced the Provident Fund Act (which was Chapter 191, Laws of Kenya up to 1965) in November 1965,[53] although its origin can be traced to the early 1950s. The colonial state had appointed a small committee of experts to study the possibility of having a national social security contributory provident fund and to recommend ways of carrying out the scheme. This was done and in June, 1963 the committee presented a draft bill popularly called the Turner Bill. This was accepted and enacted *in toto* by the independent parliament in 1965. Only employed men aged sixteen and above were legally required to be registered as contributors.[54] The effect was that females who had the same attributes as men were excluded from registration. It was not until January 17th, 1975 that this legal constraint was removed.[55] It is to be noted, however, that despite the nominal registration of females under the revised terms of the Fund, up to mid-March, 1976, no order was given to require them to make the financial contributions which would make them beneficial members.

It appears that the level of registration of women has fallen short of government projections. Considering that an employer commits a punishable statutory offence by failing to register an employee, it is not easy to explain by legal logic why the program of registration has not been carried out effectively.

The Social Security scheme set up under the legislation harbors some inherent limitations that make the distribution of benefits potentially and actually inequitable both for the total national population and more particularly for the female populace. Contributions are required only from employees and employers in the formal sector. The benefits therefore accrue to only a small fraction of the total working population in the nation, since people informally employed far outnumber those formally employed. Furthermore, it is very likely that women form the bulk of the informally employed.[56]

53. The Act was made effective on 23/11/1965 by Legal Notice No. 308/1965.

54. National Social Security Fund (Registration) Order, 1975 made effective through Legal Notice No. 309/1965.

55. See National Social Security Fund (Registration) Order, 1975 made effective by Legal Notice No. 8/1975.

56. The term "informal sector" is used here in the context employed by the UNDP/ILO Report Employment Incomes and Equality (1972); its magnitude is covered on pp. 4-6, and also in Chapters 1 and 13 and Technical Papers 3 and 22 of that report.

Within these limits, the scheme benefits its members in seven main ways. The first, which is of a general nature, is derived by all members since employers are compelled by law to contribute in amounts equal to the monthly contributions of a member. Since the Fund operates in many respects on a banking-cum-insurance basis, the employee stands to gain double what he contributes. (The scheme is compulsory.) These savings are protected from bankruptcy proceedings (Section 15).

Second is the age benefit. This is, in a sense, a withdrawal benefit for a member when he attains the age of 60 (Section 20) and wishes to be repaid all his contribution and interest thereon. It is to be noted that a member may only withdraw from the scheme by qualifying under certain provisions and not by his own wish alone.

Third is the survivor's benefit (Section 21) which is claimable out of a deceased member's contributions by his dependent relatives or other persons entitled to inherit his fortunes.

Fourth, the invalidity benefit (Section 22) is claimable by a member who is disabled (mentally or physically) and is totally or partially incapacitated. He must also have attained the age of 50 or be unable to earn a reasonable livelihood by virtue of incapacity.

The scheme also gives a member the power to withdraw and claim withdrawal benefit (Section 23) provided he has attained the age of 55 and has stayed without employment for a period of one year prior to applying for withdrawal. This seems to be a very stringent imposition and it might be more appropriate if the reasons for withdrawal were not tied to a specific age requirement but were rather dependent on other factors like being unable to secure a job.

As a sixth benefit the scheme permits members who are emigrating permanently to places outside East Africa to withdraw from the scheme and claim their contributions as emigration grants (Section 24).

In 1971 the scheme added a seventh and final benefit, the hospital inpatient benefit which endows a member and family with the right to free inpatient hospital treatment in all general wards of government hospitals.

In conclusion, the N.S.S.F. embodies some useful social security measures. However, it is urged that measures be taken to ensure that all women employees are registered and that women being registered become contributors immediately so that they may benefit from the scheme which has been denied them with no good reason.

*The National Hospital Insurance Act, [Chapter 255, Laws of Kenya]*

This was passed by Parliament in 1966 to replace similar colonial legislation[57] which failed to benefit the general public. The Act imposes a

57. The Act became operative December 7, 1966 and on that date replaced the then European Hospital Relief Fund (Chapter 149) and Kenya Hospital Fund (Chapter 250).

compulsory contributory health scheme which is more of a revenue-collecting mechanism for the government than a system beneficial to the contributors or the population as a whole. Its major discriminatory attributes are: (1) the meager benefits derivable are legally restricted to the higher salaried classes in society; (2) the benefits are realizable only to urban dwellers — a minority of the population (women form the bulk of the rural population) — because of the imbalance in the distribution of vital infrastructure such as hospitals.

A paid employee becomes compulsorily eligible for membership on attaining the age of 18 years and earning a salary of 1,000 Kenyan Shillings per month (Section 5). The monthly contribution is K.shs.20. Eligibility for compulsory membership is waived only for a married woman (not a married man) whose income is aggregated with that of her husband and assumed to be the earnings of the husband for income tax purposes (Section 8). In such a situation the wife's coverage depends on whether her husband has named her as the beneficiary wife. A member is permitted to name only one wife or husband, if any, and his or her children as beneficiaries; and in the case of a polygynous union, the additional wives can only be covered as single women or when the husband chooses to contribute an additional amount specifically for them.[58] The latter arrangement is called 'Special Contribution' for beneficiaries who do not qualify under the compulsory standard contribution.

Persons who do not qualify for the compulsory standard contribution by reason of the stipulated salary of K.shs. 1,000 per month can only be made members under the special contribution option. It must be noted that people are generally ignorant of this option and few have exercised it. At any rate, it is argued that the minimum prescribed qualifying salary is too high for the majority of the employed in Kenya and thus confines the scheme to the higher salaried classes. Generally few women are eligible in proportion to men.

Other limitations of the scheme which adversely affect women either as general members or as women members/beneficiaries are built into the conditions for reception of benefits. The benefits are only a subsidy to cover about 75 percent of the actual hospital expenses; the contributor must meet the remaining costs. The subsidy benefits only cover a maximum of 108 days in a year. If a member or his or her named beneficiaries were to be hospitalized for an aggregate period of more than 108 days in a year, the contributor has no recourse to the scheme, unless he or she makes a special plea to the Minister for Health who may or may not grant the subsidy. Further, a member, special or standard, may not claim any benefit at all if he/she or the named beneficiary is at the time

58. Section 5A which was added by Act No. 4 of 1972.

of the illness found to be entitled to compensation for the hospitalization and treatment from some other source (Section 36). This means that an employee whose hospital bills are paid for by the employer under the Workmen's Compensation Act,[59] or who gets free medical treatment through the hospital-inpatient benefit under the National Social Security Fund (N.S.S.F.), *supra.*, is not entitled to any benefits under the scheme in spite of his or her monthly contributions.

Although the N.S.S.F. benefit is restricted to inpatient treatment in Government hospitals, it does not preclude a contributor from claiming from the employer under the W.C. Act (*supra*) or under the N.H.I. The N.S.S.F. benefit is also more equitable; most employees are covered, their polygynous wives are also beneficiaries, and there is no maximum time limit given for duration of hospitalization. Like the N.S.S.F., however, the N.H.I. only covers inpatient treatment and therefore excludes the more numerous instances of out-patient treatment that are sometimes very expensive especially in the high-cost hospitals.

There is a condition that before any claims are met, a member must surrender his or her membership card which must be completed up to the month preceding the one in which the claim is made. Injustices arise in this case to members, especially the self-employed, who may be hospitalized for such a long time that they are not able to keep up with the monthly payments for lack of money.

For the mothers who are beneficiaries either as members or named beneficiaries and who are treated during maternity, the scheme offers little help. It is only useful in this case when the mother concerned is confined to a hospital. No claims may be made in respect of treatment to a newly-born baby until ten days after birth, and even then the claim in respect of monies spent on the child cannot exceed K.shs. 150 irrespective of the actual amount spent.[60] Thus in cases of premature births which necessitate weeks of incubation and confinement great personal expense is involved.

Members must use specially declared hospitals which number less than 100 or one of a few small government hospitals[61] in order to qualify to claim a subsidy under the scheme. In mid-March 1976 the distribution of these hospitals revealed a strong urban bias both in number and class. Women form the bulk of the rural community who have access only to scattered out-patient dispensaries and clinics. Nairobi, with a population of less than one-twentieth of Kenya's total population, has one quarter of all the specially declared hospitals. It has three out of

59. Chapter 236, Laws of Kenya.

60. National Hospital Insurance (Claims and Benefits) Regulations, 1972 which were brought into operation by Legal Notice No. 15/1972

61. These are declared by the Minister under Section 29 of the Act.

four of the best equipped hospitals in the country with the remaining one situated in Mombasa. Out of the first 18 high class hospitals in which the declared daily allowance claimable is K. shs. 75, K. shs. 70, or K. shs. 65 per day, 39 percent are in Nairobi and the rest are divided among the other larger urban centers.

In view of the foregoing analysis, it is reasonable to conclude that the act benefits only a small urban elite. Inbuilt procedural provisions provide additional discrimination.

*The Widows and Young Children's Pensions Act [Chapter 195, as amended in 1971]*

This act provides women with special legal protections not accorded to men. The act provides that a man, whether married or not, on attaining the status of "public officer" is eligible to voluntarily contribute to a fund that is for the benefit, in the case of death, of his widow or orphans. A woman public officer may only contribute if she is married and only after passing a strenuous selection procedure. The law stipulates that she may be allowed membership by petitioning the President and ". . .on proof, to the satisfaction of the President, that her husband is wholly or mainly dependent on her. . . ." (Section 4-2). This is yet another example of the virtual exclusion of women from viable schemes in which, aside from the criterion of sex, they are eligible to participate.

In addition, the pension ceases if a benefiting widow cohabits with a male person, notwithstanding marriage or financial capability. The premise here seems to be that whenever a man and woman cohabit, the male partner must maintain the female.

There are two areas in which the Act needs amendment in order to be nondiscriminatory. First, it should allow anyone who so wishes to join not just those who are "public officers." Second, all women, married or not, should be eligible. Married men whose wives are contributors will feel reciprocally dependant on their wives thus leading to a sense of equality.

*The Vagrancy Act, [Act No. 61 of 1968]*[62]

The act defines a vagrant, *inter alia,* as: "any person having neither lawful employment nor lawful means of subsistence. . . ." (Section 2). The government argues that the law is a social security measure to protect vagrants by restricting them to the rural areas where means of livelihood are available, and thus not allowing them to go hungry and homeless in the towns. However, the exclusion of female interests in land registration seriously effects their ability to survive in the rural areas. The government land registration policy dispossesses women of tenure they had in family holdings and vests in men and the very few women who succeed in becoming registered indefeasible titles which they would never have inherited under the traditional system of land tenure.

62. Made effective in February, 1969 by Legal Notice No. 50/1969.

The Act gives police the right to arrest without warrant "any person who is apparently a vagrant" (Section 3) and empowers the courts to "restrict the movement of that person to his home district during a period of three years." Popular observation shows that women are the major target of this legislation which is not unlike colonial laws that it purported to repeal or those obtaining in South Africa. Usually the operations for clean-ups are mounted on the eve of major conferences that have become commonplace in Nairobi.

The Vagrancy Law needs to be immediately repealed or else substantially amended so as to cover only beggars who are physically incapacitated and are in need of rehabilitation. Able-bodied Kenyans, particularly women, should not be the subject of police laws that declare them criminals because they are poor. The repatriation of people, with no access to and/or control of viable agricultural land, to their districts or origin is divisive and tends to suggest that urban areas are sancturaries of the bourgeoisie where the poor should not tread.

*Maternity Benefits*

Until May, 1976, the general law in Kenya regulating maternity benefits, contrary to popular belief, did not confer on female employees the right to paid maternity leave. In fact it was expressly stipulated that female employees, married or unmarried, in Kenya were entitled to *unpaid* maternity leave: women in all industries, except agriculture, for a maximum of 12 weeks[63] and those employed in agricultural industry for a maximum period of ninety days.[64] The law stated that childbirth is not a sickness and therefore employers are not required to give paid maternity leave despite the legal requirement that they give paid sick leave.

It was not uncommon for mothers to work until the onset of labor pains nor was it uncommon for them to return to work a day or so after giving birth. This was a matter of economic necessity since they could not forego wages for the necessary maternal leave. There were a few exceptional industries and employers in Kenya who did provide paid maternity leave. These helped, despite the law, to provide mothers in a few sectors of the economy with paid maternity leave and it was these exceptional cases that led to the popular opinion that the law in Kenya provided women with the right to paid maternity leave.

In 1975 the President decreed that working women, married and unmarried, were to be entitled to paid maternity leave. However, a Presidential decree in Kenya is not law unless it is made a declaration

63.Section 13, The Regulations of Wages (General) Order, 1975, made under the Regulation of Wages & Conditions of Employment Act, Chapter 229, Laws of Kenya as made effective in January 1975 by Legal Notice No.1/1975.

64.Section II, The Regulations of Wages (Agricultural Industry( Order, 1976 made under Chapter 229 and made effective in January 1976 by Legal Notice No. 23/1976.

under a State of Emergency.[65] Mere Presidential decrees may become *de jure* laws only when the public to which they are addressed readily accepts them. This was not the case with the maternity decree since the employers stood to lose through it.

In 1974 the Vice President also made a public declaration that females serving in the armed forces, married or unmarried, were entitled to maternity leave. It was not clear whether this was with or without pay. However, it gave unmarried mothers security of tenure in their jobs since, until that time, any female employee in the armed forces, including the police, lost her job on becoming pregnant. Since the government is the sole employer of persons in the armed forces (excluding the private paramilitarists like Security Guards) the declaration was effective.

In the teaching profession, up to June 1974, unmarried mothers could only avail themselves of unpaid maternity leave. The Secretary of the National Union of Teachers, however, declared (after reaching agreement with the employers) that from July 1974 all females in the teaching profession, single or married, were to be entitled to two months' paid maternity leave. A few other industries have adopted this kind of mutual arrangement between management and employees either through trade union provisions or directly through service contracts.

More recently, the legislature passed the Employment Act No. 2/1976 made effective on 3 May, 1976 by Legal Notice No. 69/1976. It purports to provide working mothers with entitlement to two months' paid maternity leave but Section 7 (2) qualifies this by saying that, "a woman who has taken two months maternity leave shall forfeit her annual leave in that year."

**Conclusion**

Discrimination against women is an underlying fact in Kenyan society. Changes in law and a reorientation of the whole social, political and economic foundation of society are necessary to rectify this situation. In particular, access to formal education and equal wages are crucial factors in eliminating the gap between men's and women's social well-being.[66] The inequality in distribution of formal education services between the sexes results in allocation of more lucrative economic roles to men.[67]

65. These are legalized authoritarian (non-liberal democratic) powers that were excessively used by the Colonial administration in all the British Colonies in Africa under the Emergency Powers Order -in-Council, 1939 and which were copied by the independent states at independence. In Kenya we have these under the deceptive title of Preservation of Public Security Act, Chapter 57, Laws of Kenya.

66. The original version of the paper discussed these two matters in detail by analysing the existing data concerning the distribution of women in the labor force, educational attainments, wage differentials, and control of urban property.

67. Women represent only 39.3% of those who have completed any class between Sta. 1 and 8. Furthermore, according to a government report (1971), Employment and Earnings in the

Furthermore, by leading in the fields of education, employment and wages, it is apparent that men also lead in the ability to acquire property.[68]

The legal system, which rests on inadequate constitutional provisions against discrimination and exploitation of women, needs to provide stronger directives against this. Proposals for reform, as expressed in this paper, include: the repeal of obsolete laws; the reactivation of enforcement machinery for the antidiscriminatory laws already codified; the repeal of laws identified as affording differential treatment to the sexes on the pretext that they protect the "weaker" sex; the establishment of equal legal responsibility of women and men regarding joint actions such as producing illegitimate children; legislative intervention in areas where social practice shows inequality of treatment between the sexes (education, employment, wages, and loans); and lastly, the provision of a simply understood and easily mobilized enforcement machinery with strict provisions for implementation of these reforms.

Since legal regulations are seen as express policies of the political administration, the absence of legal regulations may be considered as inarticulated policies of the same administration. In other words, the absence of laws prohibiting practices that discriminate against females can be inferred to mean that these practices are lawful in the eyes of those who wield power in the state. An example may make the point clearer: if in a society there is no law prohibiting the sale of firearms to private citizens, it is simple logic to conclude that in that society it is lawful to sell firearms to private citizens. Likewise, if the legal system does not prohibit discrimination against women, presumably it is lawful to discriminate. The author considers it sheer hypocrisy for a government to speak of observance of fundamental human rights when its legal system is permeated with laws such as the foregoing.

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Modern Sector, women hold only 7.9% of the top-level administrative positions.

68. In an investigation of application and acceptance rate for small industrial loans (I.C.D.C.) to females, I concluded that women are not discriminated against qua women alone but more so because they lack the prerequisite qualifications (liquidity, land title-deeds, high social status) necessary for I.C.D.C. loans. The few who possess these qualifications are favorably treated.