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EXPLORING THE DUALITY OF MARRIAGE IN KENYA THROUGH THE FOCUS OF MATRIMONIAL PROPERTY: HARMONISING PUBLIC INTEREST AND THE PRIVATE RELATIONAL CONTRACT

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I**, Muriuki Josphat Nderitu,** do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:  .....

Date: 24/ 12/ 2024

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....JWathuta.....

Dr Jane Wathuta.

Date**:** 22-01-2025

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List of abbreviations

1. UDHR – Universal Declaration on Human Rights
2. ICCPR- International Covenant on Civil &Political Rights

Key words

1. Kenya
2. Matrimonial property
3. Private relational contract
4. Duality
5. Marital agreements

List of statutes

Kenyan Legislations

1. Marriage Act 1948 chapter 150 (repealed)
2. African Christian Divorce Act (repealed)
3. Constitution of Kenya, 2010
4. Matrimonial Property Act, 2013

South African Legislations

1. Deeds Registries Act, No. 47 of 1937.
2. Matrimonial Property Act, No. 88 of 1984.

French legislations

1. French Civil Code 1804

Swiss legislations

1. Swiss Civil Code 1915

List of cases

1. ANM & RMM (suing in their own behalf and on behalf of AMM (Minor) as parents and next friend) v FPA & Attorney General (Constitutional Petition 10 of 2017)
2. CYC v KSV 2014 eKLR
3. Durham v Durham (1985)
4. F.S v W.K & another (2015)
5. Gissing v Gissing (1970)
6. Hyde v Hyde 1866
7. JOO V MBO 2023 eKLR
8. Kivuitu v Kivuitu 1991 eKLR
9. Mwathi v Mwathi (2006)
10. Peter Mburu Echaria v Priscilla Njeri Echaria 2007 eKLR
11. Peter Ndungu Njenga vs Sophia Watiri Ndungu [2000] eKLR
12. POM v MMK 2023 eKLR
13. PWK vs JKG 2015 eKLR
14. Tabitha Wangechi Nderitu v Simon Nderitu Kariuki 1998 eKLR
15. UMM v IMM 2014 eKLR

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Abstract

Marriage, as a social institution, presents a complex duality, with states often treating it simultaneously as a public interest institution and a private contractual arrangement. This study embarks on an in-depth exploration of this duality, focusing on matrimonial property and navigating the intricate balance between public and private aspects of marriage. By examining legal frameworks, societal norms, and historical contexts, the research seeks to elucidate the origins and evolution of this duality. The investigation unfolds against the backdrop of contrasting approaches to matrimonial property and its division over the years, among them is the place and effectiveness of ante and post-nuptial agreements. The divergent approaches to matrimonial property show the two aspects of marriage. Additionally, the contradicting decisions in matrimonial property are a compelling example of Kenya exhibiting elements of both approaches. Practices and laws reflect an amalgamation of the public interest and private contract perspectives. The study aims to untangle this complexity by clarifying when public intervention is warranted and exploring justifications for such intervention.

Central to the inquiry is an examination of laws pertaining to matrimonial property and their implications for intervention strategies. Despite the silence of the law on the predominant approach to marriage, the practical application reveals a blend of public and private elements. The study dissects these legal nuances to provide insights into the prevailing approach and proposes pragmatic solutions for the approach used in the division of matrimonial property. The research endeavours to contribute to a deeper understanding of marriage dynamics and intervention strategies in contemporary society. Additionally advocating for the effective use of marital agreements as an integral tool to harmonise this duality. By addressing the complexities inherent in the intersection of private relationships and public interest, the findings aim to inform policymakers, legal professionals, and society at large. Ultimately, the study seeks to promote a balanced approach to intervention, safeguarding individual autonomy while upholding the broader societal interests associated with marriage as a fundamental institution.

CHAPTER 1

1.1. BACKGROUND

Me and you….. Or is it the people, me and you?

Marriage has several definitions, the original being that it is the voluntary union of a man and a woman to the exclusion of others[1]. The Universal Declaration on Human Rights highlights the main element of marriage which is consent between the two intending spouses and attaining of majority age.[2] The scope of this paper is Kenya, hence contextualising it to Kenya, marriage is the voluntary union of a man and a woman which can be monogamous or polygamous and has to be registered under the Marriage Act.[3]

As a social institution, marriage has always been distinguished by its dual character, which is the result of a complex interaction between private relational contract and public interest. It is important to understand what these two terms mean. A private relational contract is sui generis characterised by the existence of a relationship. A contract is relational if several behaviours exist that require a relationship such as reciprocity and maintaining solidarity if the contract lasts for a significant duration, and if the benefits and burdens are shared rather than divided based on a metric system.[4]These requirements are met by the marriage institution. Moreover, it has several elements of a contract which include, an offer which is the proposal, the acceptance which is the acceptance of the proposal, and consideration which can be deemed as dowry and giving themselves to one another. Further, there is the execution of the contract which is the signing of a marriage certificate which is done in all forms of marriage as per the Marriage Act of Kenya.[5]Finally, there exists an exit clause that is the provisions of the Marriage Act on the dissolution of marriage under grounds such as cruelty, desertion, adultery, extreme deprivation, and irretrievable breakdown of marriage.[6]

Public institution context of marriage means that the marriage institution involves more than the spouses. It trickles from them to the social community, the religious community, and even the government to some degree. Marriage is a public institution of public concern that reflects the norms and values of a particular community. It has cultural, religious, and legal significance. It is paramount to recognize the importance of this view. Marriage results in the

[1] Hyde v Hyde 1866, English Court of Probate and Divorce.
[2] Article 16, Universal Declaration on Human Rights 1948.
[3] Section 3 (1), Marriage Act no 4 of 2014.
[4] Macneil I, 'Relational contract theory as sociology: A reply to Professors Lindenberg and de Vos' 143 Journal of Institutional and Theoretical Economics 2, 1987, 274.
5 Section 21, Marriage Act N.o 4 2014.
6 Section 66 (6) Marriage Act N.o 4 2014.

birth of children and the acquisition of matrimonial property; it is for this sake that marriage is perceived as an institution of public interest. The UDHR and the ICCPR[7] state that the family should be protected by the state and society,[8] giving the state a responsibility to *protect* the family institution. Moreover, domestic violence, further emphasises the place of the state in the marriage institution, validating public interest. Additionally, marriage results in the common good of the community and leads to economic growth as well as the growth of social capital.[9] This translates into marriage being tied to the common good necessitating public interest.[10] The state comes in to protect the interests of the children and enforce the rights of the victims of domestic violence. Additionally, it also comes in when the divorcing spouses want to divide the matrimonial property. This paper will focus on using matrimonial property as the lens through which, this duality is elucidated on.

Further, returning to the Kenyan context the courts have had several approaches to these two perceptions of marriage. In various cases, the courts have shown a great reverence for the public interest aspect of marriage, especially under the guise of promotion of family and member rights[11] and general social welfare. Similarly, in Ndegwa Wachira V Wanjiru Wairimu (2016) and In Re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR the guiding principle between the courts is the protection of the party's rights and interests warranting court intervention specifically in the case of a child born out of marriage.[12] Consequently overriding the practices of the culture to promote the second factor which is to promote justice in the institution of marriage and its subsequent results, that is, family.

On the contrary, the courts have also portrayed an opposing approach. For instance, PWK vs JKG 2015 eKLR and M B K v M B 2016, the central ideology of the courts was that marriage was a private relational contract guided by the agreements made between the spouses with minimum interference by external parties. Moreover, in the context of prenuptial agreements, it was solely governed by the mutual agreement of the spouses who were parties to the agreement itself.[13] Similarly, in the division of matrimonial property upon dissolution of a

[7] Article 23 (1) International Covenant on Civil Political Rights (ICCPR) 1966.
[8] Article 16(3), Universal Declaration on Human Rights 1948.
[9] The Witherspoon Institute, *Marriage and the Public Good: Ten Principles*, Princeton, New Jersey, June 2006, 11.
[10] he Witherspoon Institute, *Marriage and the Public Good: Ten Principles*, Princeton, New Jersey, June 2006, 12.
[11] ANM & RMM (suing in their own behalf and on behalf of AMM (Minor) as parents and next friend) v FPA and Attorney General, Constitutional Petition 10 of 2017 *2019) KEHC 7369 (KLR), 28 May 2019, (Judgment).
[12] In Re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR .
[13] M B K v M B (2016) eKLR.

marriage, the guiding factor was the contribution of each of the spouses as well as the prenuptial and postnuptial agreements.[14]

Interestingly the struggle with uncertainty further plagues the courts. Illustrations of F.S. v W.K. & another (2015) and Mwathi v Mwathi (2006), involving matrimonial property, show underlying belief among the courts that marriages are predominantly public institutions. The court tries to reference the private nature of a marriage contract by recognising that its affairs are majorly concerning the two in the marriage. Yet in both cases, an evident struggle is prominent when the courts attempt to justify the promotion of equitable distribution of matrimonial property in line with public interest over the considerations of the contributions to the acquisition of the property which is in line with the private relational contract nature of marriage. Finally, the Matrimonial Property Act of 2013 adds to this uncertainty by stating, "ownership of matrimonial property shall be vested in the spouses based on the contributions made by each spouse to the acquisition of the property."[15]

The legal framework has divergent notions of marriage, creating a great disconnect in our jurisdiction. This dichotomy, which contrasts public expectations with the intimate dynamics of personal connections, raises interesting concerns about the tensions and ambiguities inherent in the institution. Marriage-related societal attitudes have changed over time in response to evolving norms, ideologies, and legislative frameworks. The dynamic interplay between the public and private domains has sparked continuous discussions regarding marriage's place in modern society, which has ramifications for matters like gender norms, matrimonial property division, and the privity to marital agreements.

1.2 PROBLEM STATEMENT

The stark contrast between these perspectives presents a dilemma and creates confusion when dividing matrimonial property. The private contract is evident in acquiring matrimonial property where the nature and type of contribution are based on the agreement between the spouses. The public interest is borne in the division of the property since the courts decide each spouse's interests based on the court's determination of valid contribution.

Compounding this confusion are the varying approaches judges take when dividing matrimonial property. Some judges adopt the equitable distribution rationale reflecting the

[14] PWK v JKG (2015) eKLR .
[15] Section 7, Matrimonial Property Act N.o 49 (2013).

public institution concept, while others focus on the contributions made by each spouse toward property acquisition. As a result, these differing viewpoints hinder the development of clear criteria for the division of matrimonial property. Furthermore, prenuptial and postnuptial agreements have been merely recognised but are not given full effect in Kenyan law thus they easily fall victim to dismissal.

Ideally, the division of matrimonial property should mirror the acquisition of the same by conferring ownership and quantifying the contributions in a way that echoes the original intentions and desires of the spouses. This ideal respects the public interest nature by allowing intervention in a way that is consistent and just.

Addressing this challenge requires a careful balance between increasing state involvement and preserving the privacy of families and couples, especially in the division of matrimonial property. Therefore, the key issue lies in effectively managing this balance between intervention and autonomy and determining the appropriate entities and timing for such intervention.

1.3. HYPOTHESIS

This study hypothesizes that the duality of marriage has led to uncertainty in the division of matrimonial property. Consequently, courts apply divergent approaches which at times result in unjust division metrics. Additionally, this study hypothesizes that this duality threatens key tools in the division of matrimonial property such as ante and post-nuptial agreements. These tools are reduced to ceremonial mentions in the Matrimonial Property Act. Moreover, the Act inclines to the private aspect of marriage by stating that ownership is vested in the spouses as per their contribution to the acquisition of the matrimonial property. In contrast to this legislative ambiguity, the courts have demonstrated a discernible preference for the public institution approach in their decisions. However, they also acknowledge the private relational contract between the spouses, suggesting a tension between these two perspectives that is emblematic of the broader legal landscape.[16]

Thus, the study hypothesizes that there is a critical need for strategic guidelines governing prenuptial and postnuptial agreements to help the courts navigate around the division of matrimonial property given these two divergent approaches. Moreover, the study hypothesizes

[16] Kiage P, Family Law in Kenya: Marriage and Divorce, LawAfrica Publishing Ltd, Nairobi 2016 , 44.

that the availability of the choice of property regime to the spouses is needed to result in uniformity of court decisions.

1.4 RESEARCH OBJECTIVES

1. To analyse the root of the duality and the manifestation of the duality in marriage in Kenya.
2. To assess the manifestation of this duality in the resolution of matrimonial property and its division in Kenya and the challenges as a result of this duality.
3. To show the effectiveness of prenuptial and postnuptial agreements as a tool of Matrimonial property division as seen in various states and further propose the adoption of legislations autochthonous to marital agreements.

1.5 RESEARCH QUESTIONS

1. What is the root of the duality and the friction between the two natures of marriage existing in Kenya?
2. What are the effects of the duality of marriage evident in matrimonial property and its division?
3. What is the effectiveness of the use of ante- and post-nuptial agreements to navigate this duality in matrimonial property as seen in other states?

1.6 SIGNIFICANCE OF RESEARCH

The study will then help reduce the friction and lack of direction about whether the institution of marriage is a matter of public interest or a private matter purely between spouses, especially in the Kenyan context.

This research will be of great help to three classes of people. First the courts and lawmakers, second the couples yet to marry in the country and the society more so the ethnic communities. As established the approach in Kenya is one that is an amalgamation of the two approaches of marriages, owing to this, the clarification from this research will help the courts and communities (this being ethnic community leadership) know when to intervene and to what extent to intervene especially with regards to matrimonial property. For the couple, it will give them an understanding of their autonomy while helping them understand that intervention by the government and courts has a reason and to what degree it is allowed. Finally, the lawmakers will be enlightened to make sound laws that show the balance between intervention and autonomy of the individuals.

1.7. THEORETICAL FRAMEWORK

This study is grounded in the theory of *moderate communitarianism*, which emphasises the need to balance individual rights and autonomy with the public good.[17] Additionally, moderate communitarianism premises that the individual and the community exist interdependently and thus are not in direct opposition.[18] Conversely, radical communitarianism posits that the individual emanates from the society, meaning that they get their rights because they are recognised in a society, the notion of "I am because we are". The shortcoming of this notion is that it fails to consider the autonomous nature of human beings by banking their personhood on their position in society, consequently implying that individual rights only exist after recognition, giving the community rights primacy over individual rights.[19] On the other hand, the underlying belief among the various authors of the African context of moderate communitarianism theory is that personhood is inherent stemming from human nature and the dignity of the person. Owing to this an individual cannot be said to have rights just because the community recognises him.[20]

By acknowledging both aspects of marriage, this study aims to establish a balance that promotes harmony between liberalism[21] and Structural Functionalism. Human beings are inherently social, and their relationships, particularly marriage, reflect this nature. Marriage is defined as the voluntary union of a man and a woman to the exclusion of others.[22] Structural Functionalism underscores the importance of this institution, asserting that the functionality of social institutions relies on their interconnectedness within society. Marriage, as a foundational element of the family unit, is pivotal for societal structure. This *structural functionalism* theory posits that the public has a role in marriage because it serves as a fundamental building block of society. However, it often overlooks the individual rights and autonomy of the couple.

In contrast, the Kenyan Marriage Act defines marriage as a voluntary union between a man and

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[17] Etzioni A, 'Communitarianism,' *Encyclopaedia Britannica*, 17 March 2024 https://www.britannica.com/topic/communitarianism on 4 August 2024

[18] Asante G, 'How communitarianism clashes with individual's rights and freedoms,' *African Communitarianism*, 2019 https://www.grin.com/document/503420#summary-details.

[19] Menkiti IA, 'Person and community in African thought,' in Wright RA (ed), *African Philosophy: An Introduction*, University Press of America, Lanham, 1984,4.

[20]. Hellsten K, 'Human rights in Africa: From communitarian values to utilitarian practice,' *Human Rights Review*, 2004, 61–85.

[21] Hellsten K, 'Human rights in Africa: From communitarian values to utilitarian practice,' *Human Rights Review*, 2004, 61–85.

[22] Hyde v Hyde (1866), The Court of Probate and Divorce in the UK.

a woman that can, in some cases, allow for polygamy.[23] This highlights the concept of privity of contract, indicating that marriage involves only those directly participating. However, marriage is a unique and sacred contract, often considered sui generis.[24] It is best characterised as a relational contract, which requires certain behaviours such as reciprocity, solidarity, sustained duration, and shared benefits and burdens rather than a strict division based on metrics.[25] These characteristics are fulfilled by the institution of marriage. Nonetheless, this theory tends to overlook the public dimension of marriage, focusing instead on the couple without acknowledging the societal implications.

The limitations of both individual theories become apparent, as each focuses solely on one party—the public or the couple—while neglecting the other. This makes communitarianism a suitable framework for understanding the nature of marriage, as it encompasses the needs and rights of both individuals and society as a whole. Therefore, the question of how this theory applies in the context of marriage. A moderate communitarian approach recognizes that marriage has a dual nature: it is both a private relational contract involving the autonomy and individual rights of the couple and a social institution integral to the larger society, as suggested by Structural Functionalism. The recognition, affirms the main belief in this theory, that individual and community rights coexist without a hierarchical order, thus supporting my hypothesis on the need for a clear balance between the autonomy of the individuals and the state intervention.

1.8. LITERATURE REVIEW.

1.8.1 On the transformation of marriage into this duality.

To begin with, there is a distinction between the African concept of marriage and the Western concept of marriage that oscillates around private relational contracts[26]. As this paper traces back to the root of duality, the point of convergence of scholars is the acknowledgment of the divergent approaches to marriage, in existence before colonisation.[27] Marriage was originally seen as the focus of existence. The underlying belief was that it was the coming together of the community that is the *departed, the living, and the yet-to-be-born.* Further, the commonality

[23] Section 3, Marriage Act N.o 4 2014.
[24] Laura L, 'Contract or covenant? Marriage as theology,' *CrossCurrents* 48(2), 1998, 173.
[25] Macneil I, 'Relational contract theory as sociology: A reply to Professors Lindenberg and de Vos,' *Journal of Institutional and Theoretical Economics* 143(2), 1987, 274
[26] Kiage P, Family Law in kenya: Marriage and Divorce, LawAfrica Publishing Ltd, Nairobi 2016 , 40
[27] Kiage.P, Family Law in Kenya,Marriage and Divorce, LawAfrica Publishing Ltd, Nairobi 2016 , 1

in the understanding of marriage is that it is the coming together of the living and the ancestors/dead given that it involves the coming together of two families and their pasts and present.[28] It is where all generations of the community and its members become actors and actresses in the event.[29] It is the focus of existence since it is the base of the family as a social unit. Marriage was polygamous. It was a very normal thing for a man to marry multiple women who were at times generations apart[30], the first wife being almost his age and the last being the same age as his daughters. This was highly motivated by fertility and the desire for status that comes with property. With the African concept of marriage, we see why public involvement was a norm at the time. The interlinking of generations through marriage culminated in a sense of responsibility and devotion to the family and community.[31] The man and the woman came together as a result of responsibility to each other and their families rather than just love. This strengthened and also gave stability to their relationships. Colonisation had a net effect on the understanding and nature of marriage.

The coming of the British had a net effect on the Kenyan understanding and nature of marriage. As aforementioned the Western thought of marriage oscillates around the private contract in marriage. Flowing from this the English common law had a net effect on the understanding of marriage in Kenya,[32] case in point, Re Ogola's estate where the learned Simpson J stated that when one has contracted in marriage under the Marriage Act section 37 they were not allowed to enter into another marriage the focus was on the nature of marriage as a monogamous one that is *contracted* between one man and woman[33]. This in turn eradicated the free-flowing nature of African marriages.[34] Fast forward to post-2010 Kenya, the system in place has some salient features being, the definition of marriage encapsulates polygamous marriage, recognition and registration of customary marriages, agreement to separate enforceable by the courts, the requirement for ADR mechanisms before the courts allow for divorce, spousal maintenance and equitable distribution of matrimonial property.[35] Impressing on this, are the various courts' decisions post-2010, the prominent idea being the eminence of government

[28]Ogoma Daniel E, REFLECTION ON AN AFRICAN TRADITIONAL MARRIAGE SYSTEM, Department of Political Science & International Relations Landmark University, 2014, 96

[29]Ogoma, *Reflection on an African Traditional Marriage System*, 96.
[30] Kiage P, Family Law in Kenya: Marriage and Divorce, Law Africa Publishing Ltd, Nairobi 2016 19
[31] Ogoma, *Reflection on an African Traditional Marriage System*, 100
[32] Hyde v Hyde definition of marriage as the voluntary union between a man and a woman to the exclusion of others introduced the dry notion of contract in marriage. Kiage p, family law in Kenya
[33] Re Ogola's Estate, Simpson J, KLR 18 1978
[34] Kiage P, Family Law in Kenya: Marriage and Divorce, LawAfrica Publishing Ltd, Nairobi 2016, 42
[35] Kiage P, Family Law in Kenya: Marriage and Divorce, LawAfrica Publishing Ltd, Nairobi 2016 ,48

intervention in the institution of marriage. The private relational contract nature of marriage is assigned a ceremonial role which is seldom referred to. It is paramount to recognise the primacy given to the public interest institutional nature of marriage, is because of the importance of the institution as the bedrock of society and its stability. Giving absolute liberty to the parties in the name of adhering to the private relational contract in marriage would be an impediment to justice and its elements.

1.8.2 On the amalgamation and degree of intervention

Marriage involves a private contract between two individuals that is intrapsychically determined and defines the terms of their relationship.[36] The private contract is the primary impetus of the marital relationship, and its failure to be implemented can lead to conflict. [37]Marital relationships are increasingly seen as revolving around an implicit agreement or contract, with expectations of reciprocity. Conversely, marriage is also a public institution. The base premise is that marriage leads to the formation of the family which is one of the moving parts of society. As a result, there can be no state that fails to advocate for the formation of families and marriage.[38] Similarly, one of the tenets of this advocacy is intervention justified by the protection of the children and ensuring the parents do it accordingly.[39] They focus solely on the children and how the state works to keep them safe by minimising the chances of divorce.

Intriguingly, the epitome of this ambivalence and duality is matrimonial property. Post-2010, there was the radical equality movement. In a move to promote constitutional values, a prevailing ideology of equal distribution of matrimonial property was developed. A race to veer from contribution as a metric for the division of matrimonial property began.[40] The justification being the need for the promotion of equality and eradication of discrimination. On the other hand, other courts believed that the constitutional provisions did not plan on the equal division of property but rather equitable, case in point is Agnes Nanjala William v Jocob Petrus Nicola.[41] Further, even with the transformative constitution and relevant laws, prenuptial and postnuptial agreements are not well provided for. Their validity is not catered

[36] Sophie L, 'The private contract in marriage,' *Social Service Review* 43(2), 1969, 155
[37] Sophie, 'The private contract in marriage,'157
[38] Finnis J, 'Marriage: A basic and exigent good,' *Notre Dame Law School Legal Studies Research Paper* 9, 2013.
[39] Article 53 (1e), Constitution of Kenya 2010.
[40] BMS Advocates LLP, *Matrimonial Property Rights in Kenya under the Matrimonial Property Act 2013 and Marriage Act of 2014*, 13.
[41] BMS Advocates LLP, *Matrimonial Property Rights in Kenya*, 15

for nor is it confirmed, the focus being primarily on the state in marriage. Therefore, the agreements are not given any regard leading to encroachment into the couple's autonomy[42].
On how this study fits into this field.

It is evident that the dual nature of marriage has been acknowledged. However, this recognition has not gone far enough, as it is often accompanied by uncertainties within the courts and an encroachment on the individual autonomy of couples.

The primary aim of this study is to provide clarity on the circumstances under which the state should intervene in marital matters specifically matrimonial property and when the autonomy of couples should be respected as well as define what protection of family by the state entails. By establishing a clear set of guidelines, this study seeks to eliminate the indecision that currently exists and the divisions evident in the court's decision-making processes. This initiative will lead to a more uniform approach across all courts, making the legal framework surrounding marriage as predictable as it ought to be. Ultimately, this will promote greater stability and understanding for couples as they navigate their relationships.

1.9 METHODOLOGY

The study will focus on an examination of a combination of secondary and primary sources to elucidate the topic. The primary sources are statutes for instance Marriage Act No. of 2014 as well as relevant case laws. Furthermore, secondary sources will also form an integral part of guiding this study. Secondary sources are: books articles, research papers, and even online journals.

During this study, I will primarily engage in a doctrinal analysis. This will be applied when scrutinising the primary sources being relied on: case law and statute. This analysis is paramount given that the study heavily relies on a deep delve into the details of the law and its interpretation by the courts. Additionally, content analysis will be conducted when looking into the secondary sources. This will help when deducing the views and underlying beliefs of authors on the research topic. Moreover, since the study calls for a consideration of the past and the evolution of the institution of marriage and the genesis of the duality in marriage, a historical analysis will be conducted to help answer this question. The forms of analysis will be conducted and limited to the Kenyan context.

[42] BMS Advocates LLP, *Matrimonial Property Rights in Kenya*, 14

After the perusal of the sources and the resultant analysis of the same, the study will employ inductive reasoning. The study is guided by the reality in the field, thus real-life events will be used to determine existing patterns related to the study being done, these patterns will then inform and confirm my hypothesis. This study will also be characterised by a comparative study. The sturdy will consider South Africa's Matrimonial Property Act, the Swiss Civil Code, and the French Civil Code. South Africa was selected due to the transformative approach to human rights evident even in proprietary rights, additionally, it is also in the global south. Switzerland was chosen as a benchmark since it is among the few countries with laws specific to pre and post-nuptial agreements. While France is not in the global south and has a civil law system, it was chosen since it is a benchmark for laws governing matrimonial agreements as well as the clarity and specificity evident in the French civil code which has been a timeless source of law in France, evolving with time. In summary, this comparative study will inform the application of the recommendations, the availability of choice of matrimonial property regime, and the use of prenuptial and postnuptial agreements in matrimonial property division.

1.10 CHAPTER BREAKDOWN

The study will be comprised of:

Chapter 1;

This will be the introduction to the research topic which will form the cornerstone as a fundamental foundation for the paper. Additionally, it will introduce the study holistically while shedding light on why the study is important It will discuss some important terms that are key in the study coupled with highlighting the components of this study. The components include the research objectives, questions, hypothesis, and theoretical framework.

Chapter 2;

This chapter will tackle the history of marriage and the underlying duality in it. This will be assessing the approaches to marriage in the Kenyan context across the years. This will show evidence of marriage as a public interest institution and a private contract and friction between the two natures evident in Kenya.

Chapter 3;

This chapter will discuss the manifestation of tis duality in matrimonial property in the Kenyan context. More specifically the present jurisprudence on matrimonial property. It will shed light on the Marriage Act and Matrimonial Property Act and discuss the salient approach advocated for by both Acts, through inference. Moreover, this chapter will discuss

the various forms that public intervention takes given that this is an African context. Subsequently, the chapter will also look at the confusion emanating from the clear stipulation of the degree of intervention and respect for individual autonomy.

Chapter 4;

This chapter will highlight the possible recommendations and possible solutions applicable to the Kenyan context. These solutions will guide in achieving an equilibrium between public intervention and private relational contract in the context of matrimonial property. The chapter will also use various countries as benchmarks for purposes of formulation of legislation governing Ante and post-nuptial agreements. Further, it will clarify how these solutions will benefit all parties involved, specifically by recommending the granting of a choice of the matrimonial property regime to apply to the spouse.

Chapter 5

This will form the final chapter of the study and will be the conclusion. This conclusion will integrate all key aspects discussed in the preceding chapters and form the summary of the whole study in a holistic manner.

CHAPTER 2. THE ROOT OF THE DUALITY OF MARRIAGE IN KENYA

2.1 MARRIAGE IN TRADITIONAL AFRICAN COMMUNITY IN KENYA

Introduction.

Marriage has had different purposes and perceptions over the different temporal phases in Kenya. This being said it is paramount to refer to Kenyan heritage. This section of the paper will cover various community practices in the institution of marriage, as well as highlight the manifestations of the duality in marriage. The communities being referenced are the *Agikuyu* and *Ameru.* For specificity, the areas of interest with regards to these communities are, the marriage ceremonies as well as the governance systems of the marriage institution and subsequent families.

Justification.

The main reason behind the selection is that these two communities are Bantu communities. The Bantus are the majority in Kenya and have been the majority over the years forming 70% of the population.[43] Moreover, the culture and customs of the various Bantu communities mirrored each other. Additionally, the interaction between the Bantu communities and other communities such as the Maasai (Nilotes) led to the exchange of customs[44]. Owing to this, the two communities can be considered suitable case studies.

2.1.1 The Agikuyu.

The Agikuyu community is generally found in central Kenya. Marriage among the Agikuyu had very specific purposes. The most important being that it was a platform for bearing children who subsequently gave the parents status and prestige in the society. Additionally, the institution was a tool to maintain cohesion in the community. This was because the completion of the marriage rites is equated to the signing of a marriage contract that binds not only the spouses but also the kinfolk of the spouses. Further, marriage was seen as a platform for protecting both the community interest and the family interest.[45]

Ceremony.

As is customary in many communities, various steps preceded the marriage ceremony. First, the interested young man had to go with a friend to visit the hut of the potential mate's mother;

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[43]Hellenic Consulate, 'Indigenous Kenyan people,' http://www.kenyagreece.com/kenya#:~:text=Indigenous%20Kenyan%20people%20fall%20into,70%20percent%20of%20the%20population. on 1 January 2024.

[44] Lawren WL, 'Masai and Kikuyu: An historical analysis of culture transmission,' *Cambridge University Press* 9(4), 1968, 576.

[45] Jomo K, *Facing Mt Kenya: The Tribal Life of the Agikuyu*, The Heinemann Group of Publishers, London, 1961, 163.

here he was to make his intentions known to the mother of the young lady. The young lady had the option to accept or deny the advance. On the occasion that she was open to the advances, she was deemed to have *consented*.[46] The young man would then be sent home and would be required to inform his parents of his parents of his intentions to marry. In the event that she was not interested, the young man would leave and would then ask his parents to try and persuade her parents, nevertheless, the young girl had the final say in the matter.[47]

The negotiations would begin, initiated by the second stage which entailed the parents preparing sugarcane beer to take to the girl's home, to act as a formal proposal for the girl's hand in marriage. These negotiations then culminate in the fourth and last step which is commonly known as *ruracio* which is simply: the blessing of the couple and payment the bride's price which mainly comprised of specific goats, sheep and cattle and most importantly beer for the ceremony. This beer was referred to as *njohi ya gothugumitheria.*[48] The negotiation process was spearheaded by both family and community elders, among them were the elder relatives of both the groom and the bride.

The climax of this ceremonial process was the wedding day. The Agikuyu wedding day was well known for its theatrics, among which was the abduction of the bride on the day.[49] The women in the groom's family would consult with the bride's family. This was to help them identify where the bride would be, be it fetching wood or water or working on the farm. The in-laws would then abduct her as she screamed for her family and cried since she knew she was not going to see them for a period of time[50] this was known as kiriro. She would then be taken for the ceremony where there would be feasting and song and dance. This was followed up with the blessing of the bride and groom. This was specifically done with the sacrificing of a fat ram whose fat would be boiled and the oil used to anoint the bride as she was being embraced into the community, this was the adoption ceremony.[51]

Evidently, community involvement was at the heart of the negotiations as well as the wedding ceremony. Nonetheless, the private aspect of marriage is still evident in the mutual love and consent by both bride and groom.

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[46] Jomo, *Facing Mt Kenya* 166
[47] Jomo, *Facing Mt Kenya* 167
[48] Being African, 'Marriage in the Kikuyu culture,' https://beingafrican.com/marriage-in-the-kikuyu-culture/ on 12 October 2017
[49] Jomo, *Facing Mt Kenya* 171
[50]Kiruki M, 'Ngurario: The Agikuyu cultural marriage ceremony,' https://kirukimwithimbu.wordpress.com/2020/06/28/ngurario-the-agikuyu-cultural-marriage-ceremony/ on 28 June 2020.
[51] Jomo, *Facing Mt Kenya* 173.

Governance systems.

The Agikuyu moved from an arbitrary leadership to a conciliarity leadership, centred around councils of elders. The basis of the various councils was the family, this is because for one to be an elder, one had to have married and had a family.[52] Second, the first council system was at the family level, here the father was the head of the family and the clan formed its own council comprised of all the married men in the clan.[53]

In the family, with the father/husband as the head, he divided labour and property among his wives. The division was as per his discretion and the agreement with the wives based on their needs.[54]

Further, the independence of the family was respected even with the existing interdependence with the larger community. The larger council of elders became involved in the marriage only in situations that had the potential to have a ripple effect on the community. For instance, divorce was allowed for both the husband and the woman.[55] Just as in modern times, there were grounds for divorce such as barrenness, cruelty, and infidelity. For the sake of maintaining cohesion, the community was involved in confirming the grounds. For instance, when claims of barrenness were raised by the husband, there would be the introduction of a male from the husband's age group to sleep with the wife so as to confirm the allegations. [56]

In cases of cruelty, as a wife sought divorce, the community would build her a home a distance from her husband to keep her safe from his abuse. The husband would also be punished by the community for his cruelty and subsequently fined a few sheep for his transgressions against his wife and the family.[57] If he managed to show that he was willing to change he would have his wife back and the divorce would be avoided.

Lastly, the religious customs and practices done within the family were governed and marshalled by the council of elders. This was to ensure that the customs were being followed to maintain the rich culture that was the community's identity.

The duality.

As commonly known, marriage in traditional African communities is a community affair. This public interest nature of marriage is evident in the involvement of the community during

[52] Jomo, *Facing Mt Kenya* 200.
[53] Jomo, *Facing Mt Kenya* 215.
[54] Jomo, *Facing Mt Kenya* 28.
[55] Jomo, *Facing Mt Kenya* 184.
[56] Jomo, *Facing Mt Kenya* 184
[57] Jomo, *Facing Mt Kenya* 186.

marriage negotiations, wedding ceremonies, in divorce situations when confirming grounds for divorce, and when punishing the transgressor among the spouses, and in the religious practices of the family.

The justification for the involvement of the public and community is that marriage bears various interests autochthonous to the family and the community. For instance, the family provides protection for the community through the sons borne as well as fathers who sire these sons. Moreover, the establishment of the community has the women as its bedrock since they are the homemakers of the community and their work is to nurture as well as create a foundation for the generations.[58]Lastly, the institution of marriage was tied to the reputation, social status, and prestige of the spouses and their kinfolk as well, this in turn created an obligation for the kinfolk to be involved.[59]

The private nature is evident in the consensual nature of the marriage. Moreover, the fact that the marriage was strictly between the spouses and that is to the exclusion of others even in a polygamous marriage. Additionally, the arrangements for the division of property and labour, based on the discretion of the husband and the agreements with his wives, show that the nature of marriage and its intricacies is mainly private and between the spouses. The community does not get involved in such intricacies nor does it dictate how the division should be done.

2.1.2 The Ameru

The Ameru, is also a Bantu community within Kenya. Thus most of traditional marriage practices are similar to those of the Agikuyu.

Ceremony.

The marriage ceremony mirrored that of the Agikuyu, with the same elements of the consent of the two intending spouses, coupled with the negotiation talks spearheaded by the elderly uncle of the groom. [60]

The only difference in the practices is in the confirmation of chastity of the bride. This confirmation was done by the aunt of the bride together with a few women to confirm that the hymen was intact, once this was confirmed, the aunt would sprinkle garlic powder on the bride as a sign of confirming her purity.[61] If the girl had engaged in premarital sex, her entourage,

[58] Jomo, *Facing Mt Kenya* 180.
[59] Jomo, *Facing Mt Kenya* 189.
[60]Mbae S, 'Sustainability of Christian marriage in Meru Catholic Diocese, Kenya: A pastoral challenge,' *African Journal of Emerging Issues (AJOEI)* 2, 18.
[61] Njuguna G, Makio M, Jun B, Shiori I, Eliud M, Mugambi S, *Family Dynamics and Memories in Kenyan Villages*, Directorate of Antiquities, Sites and Monuments, Nairobi, 2020, 118

that was charged in preparing the wedding would stop their work and depart, the young girl would then be married off to an old man in the community. Conversely, if her intended husband was still interested in marrying her, he had the discretion to do so, though it was to be done in secret, without the knowledge of the majority of the community.[62]

Governance system

The marriage institution and the subsequent family were established under the customary laws of the community. These customary laws were under the mandate of the Njuri Ncheke.[63]The purpose of the laws was to maintain social order as well as guide the people in spirituality. This then justified the involvement of the council of elders in marriages as well as the family.[64]
The belief among the Ameru was that man's nature was close to that of the supreme being and thus he was given dominion over all things. This then translated into the patriarchal governance system in the society. The roots of this patriarchal nature are in the family which had the father as the head of the family.[65] Stemming from this, the role of the husbands and fathers, extended to the community, their main role was the protection of their families, which meant going above and beyond and protecting the borders of the community.[66] The father was the head of the family and was charged with the responsibility of governing the affairs of the family, including the moral discipline of the children and the wife. Nonetheless the power to discipline was not absolute it was highly checked by the community. In specific instances, if the punishment of the wife or the children was unwarranted and was not proportionate the community would intervene and the husband would be punished by the council of elders, in addition to this the wife would be taken back to her community, that is her family.[67] This was a step geared towards maintaining the dignity of all in the community including the wife.

Additionally, both the husband and the wife had the capacity to seek divorce on various grounds such as cruelty, barrenness and infidelity denial of sexual intercourse, witchcraft, and desertion. While the spouses had the discretion to seek divorce, the community was deeply invested in the confirmation of these grounds. For instance, if there was infidelity of a wife, the community

[62] Njuguna et al, *Family Dynamics and Memories in Kenyan Villages*, 120
[63] Njuguna et al, *Family Dynamics and Memories in Kenyan Villages*, 116.
[64] Njuguna et al, *Family Dynamics and Memories in Kenyan Villages*, 133.
[65] Njuguna et al, *Family Dynamics and Memories in Kenyan Villages*, 116.
[66] Njuguna et al, *Family Dynamics and Memories in Kenyan Villages*, 126.
[67] Njuguna et al, *Family Dynamics and Memories in Kenyan Villages* 124

would then try to determine whether the husband had given his consent either expressly or it could be implied.[68]

Finally, in the governance system of the family, family planning was of great importance to the community. Owing to this, the community dictated when a husband and wife were to have sex with the intention of having children. The spouses were compelled to take oaths that they would refrain from sexual intercourse for a period, more specifically until the preceding child had completed their weaning phase.[69] While this was in force, the husband was implored to engage in activities outside his homestead, more specifically engaging in wars or raids or other forms of manual labour so that he could expend all that pent-up energy thus minimising the chances of engaging in activities with the wife.[70]

The duality,

The prima facie perception is that the traditional Ameru marriage system is predominantly a community affair making it a public institution. However, some aspects allude to the private relational contract nature. The following is evidence of the same, the consensual nature of marriage coupled with the permanence of this relationship, shows that the marriage was largely a private affair between the spouses. Additionally, the availability of divorce at the discretion of any of the two spouses shows that they had the choice to opt out of the marriage at any point. On to the public nature of the marriage institution, the involvement of the community in the marriage ceremony is the starting point of community involvement. Subsequent involvement is evident in the upbringing of the children; for instance, the mother had a duty to nourish her children and any malnourishment of the children was punishable by the society.[71] Furthermore, the community took part in correcting children by punishing them in cases of misbehaviour: which was done regardless of the presence of the parents. Additionally, the imposition of the family planning mechanisms showed the involvement of the community in their private sexual affairs. These mechanisms mainly included vows, which when broken welcomed punishment for both the spouses.[72] Lastly, similar to the Agikuyu, the community was highly involved in

[68]Ameru, 'Divorce,' https://www.ameru.co.ke/divorce/#:~:text=To%20the%20Ameru%2C%20if%20one,oath%20to%20neutralise%20the%20uchawi on 17 January 2018.
[69] Njuguna et al, *Family Dynamics and Memories in Kenyan Villages* 121
[70] Njuguna et al, *Family Dynamics and Memories in Kenyan Villages* 122
[71]Njuguna et al, *Family Dynamics and Memories in Kenyan Villages* 122.
[72] Njuguna et al, *Family Dynamics and Memories in Kenyan Villages* 122.

divorce matters, more so aiming at the restoration of the status quo in the family which had a ripple effect on the community.

The main justifications for community involvement were as follows: that the marriage institution and family were established under the customary laws, therefore, for the maintenance of social order[73], the council of elders had justifiable grounds to intervene with the family institution to maintain this order. Additionally, the children were considered a continuation of the community, owing to this, ensuring their moral and physical well-being was imperative for both the parents and the community as a whole.

2.2 MARRIAGE IN COLONIAL KENYA

The advent of colonialism was preceded by the coming of Christianity through missionaries. Missionaries came with the sole purpose of spreading Christianity as well as improving the civilisation through basic elements such as health mechanisms, education, and social systems.[74] In their efforts, the missionaries made two main assumptions: that African societies lacked an educational system, second was that their lifestyle lacked civility. It is important to acknowledge that the improvements brought about in the health sector, improved the lives of the African people and reduce their mortality rates, the humanitarian medical aid by the likes of Dr John.W.Arthur, helped the people where traditional medicine did not work, for instance during the malaria outbreaks.[75]

Nonetheless, the assumption that there was an absence of an educational system among Africans led to the imprinting of missionary education on Africans. The education system had two main components; it was Christian-themed as well as focused on formal education. This had a domino effect on the traditional societies' cultures affecting most of its essential building blocks such as marriages, family, and rites of passage.[76] This section of the paper will briefly mention the Abagusii and Aembu to show the effect of missionary education and religion on the marriage institution.

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[73] Njuguna et al, *Family Dynamics and Memories in Kenyan Villages* 115.
[74] Tom C, *Missionaries, the State, and Labour in Colonial Kenya c. 1909–c. 1919: The 'Gospel of Work' and the 'Able-Bodied Male Native'*, 179.
[75] Meg, 'The Christian Missionaries and Health in Kenya,' https://kenyablog.com/the-christian-missionaries-and-health-in-kenya on 22 July 2017
[76] Lizza M, *Colonialism and its Implication on Family Stability Among the Aembu, Kenya, 1895-1965*, Chuka University, September 2022.

2.2.1 The Abagusii and Aembu communities

Among the Abagusii marriage was seen as the alliance between two kinships and thus there was an interwoven communal tie to the marital system. The community was involved in the divorce system and the running of the family institution. Moreso concerning the well-being of the wife, her mistreatment by the husband was considered a great sense of immaturity, and warranted rectification by the community through the disciplining of the husband.[77]

he advent of colonialism was characterised by Christianity and formal education. This had its effects on the traditional communities, the involvement of the colonial system in the marital institution was done via the judicial system.[78] To enforce this, religion played a big part. Among the Abagusii, the people shifted their marriages to Christian marriages so as to be accommodated into the church. This was because those who had been married in the customary system were segregated from the church and were subsequently excommunicated from the church. This meant that they could not access some benefits from the church, such as the baptism of their children.[79] This led to many women and children shifting their ways of life so as to be accommodated in the churches so as to fit in and access both education and recognition within the church circles.[80] Consequently, marriage was privatised due to the insistence on the adherence with the Christian requirements of marriage especially among the Abagusii.[81] The westernisation of the marital system led to the transformation of the gender roles among the Abagusii, women were now seen as competition rather than companions.[82] The reality is that, even with some people conforming to the church's requirements, others still held on to the traditional systems and beliefs and owing to this the system still stood, thus creating a duality in the approach to marriage.

The same was evident among the Aembu. Colonisation brought about individualism, primarily, every man stood by himself and for his own family. The genesis of this is the rift that came about due to the introduction of the new religion as well as the western education.[83] Those who took their children to Western schools and subscribed to the Christian faith coupled with the colonialist requirements, tended to relate among themselves and secluded themselves from the others.[84] Due to this, the others withdrew from correcting the children of the

[77] Orera N, *Colonial Legacies and Their Implication to Marriage Relations Among the Gusii of Kenya (1895-1960)*, Kenyatta University, 6(1), 2023, 2.
[78] Orera, *Colonial Legacies and Their Implication*,4
[79] Orera, *Colonial Legacies and Their Implication*,5
[80] Orera, *Colonial Legacies and Their Implication*,5.
[81] Orera, *Colonial Legacies and Their Implication*,6
[82] Orera, *Colonial Legacies and Their Implication*,6
[83] Lizza, *Colonialism and its Implication on Family Stability*, Chuka University83
[84] Lizza, *Colonialism and its Implication on Family Stability*, Chuka University83

"conformers" given that they did not have any ground to interfere due to the new approach to marriage as well as the culture adopted by the conformers.[85] Nonetheless, the traditional culture was not eroded during this period. Some people held on to the way of life and this saw the rise of an era, which was characterised the merger of the Western ways of life which was very novel, and the traditional ways of life, making the duality more prevalent and pronounced.[86]

2.2.2 The laws governing marriages in colonial Kenya

The occupancy of Kenya by the British (colonial systems), came with various implications. These implications include the imposition of English laws in the Kenyan context. At first, it was a direct paste of the English laws, then this transformed into the contextualisation of Kenya. Owing to this, this section will discuss two main statutes: the African-Christian Divorce Act Chapter 151 and the Marriage Act 1948 Chapter 150 specifically Section 37. Additionally, the section will also look into two cases related to marriage and its nature decided in the colonial era.

Marriage Act 1948 chapter 150 & African Christian Divorce Act

This section of the repealed act considers all marriages under the customary and native systems as an invalid marriage.[87] This indirectly implies that customary marriages were not recognised by the law and thus, primacy was given to Christian marriages which were highly referenced in the act.

Additionally, for Africans, a specific act was enacted to consider Africans who had converted to Christianity. This act had the sole purpose of recognising their marriages under the law due to the reason that they had become Christians. The African-Christian Divorce Act in its heading specifies that it caters to African-Christian marriages as well as their dissolution.[88] Effectively these two Acts undermined customary laws and systems and emphasis on Christian and civil marriages which were more individual-oriented and consequently private.

Case discussion.

The tools originally used to govern the marital institution were statutes and judicial systems. the implementation of the English laws was based on the fact that Kenya was a British

[85] Lizza, *Colonialism and its Implication on Family Stability*, Chuka University84.
[86] Lizza, *Colonialism and its Implication on Family Stability*, Chuka University89.
[87] Section 37, Marriage Act (Repealed)1948 Cap 150
[88] African -Christian Divorce Act 1931 (Repealed) Cap 151

protectorate and thus the laws adopted in Kenya mirrored English law. This included the principles and concepts that were the bedrock of English law.

Bringing this back to marriage, the understanding of the institution of marriage was that it was the union of one man and woman under Christendom, to the exclusion of others. Christianity was seen as the basis of marriage. For a period, only such marriages were recognised in English law.[89]Later on, civil marriages were legalised in the United Kingdom by an act of parliament in 1836.[90] These two aspects of marriage were now translated into the Kenyan context, Christian and civil marriages were brought and this came with their private outlook on marriage.

The main proponent of marriage under English law was its contractual nature. This section will briefly discuss two cases and show the adoption of this proponent of marriage.

In *Durham v Durham (1985)* the court stated that the contract of marriage is a simple affair that entails the engagement of a man and a woman to the exclusion of all the rest[91]. This is similar to the sentiments of the court in *Hyde v Hyde* discussed in the background.

In *Re Park v Park* Sir James Hannen stated that the same factors that guide a contract and determine its validity, apply to the contract of marriage. These factors include consent, and sound mind, and since marriage is a civil contract it can also be avoided when these factors are absent.[92]

The big question becomes what was the effect of these laws and cases. These cases and laws solidified the private contractual nature of marriage. Fuelled by the direct and indirect discrimination occasioned in this era in an attempt to undermine customary practices, these laws achieved their intended purpose. Many African converts shifted their allegiance to the western system thus creating friction between the converts and those who resisted. This friction was multifaceted, it manifested itself in the battlefields as well as in the cultures of the people, more specifically in the social institutions.

Owing to this, the invisible tension in the pre-colonial period materialised through the battle of supremacy between the Western and traditional Africans. Thus, this was the root of the duality in marriage, the Western private contractual understanding against the African communal nature of the marriage institution.

[89] Marriage Act 1753 (United Kingdom law)
[90] Marriage Act 1836 (United Kingdom law)
[91] Durham v Durham Family Division of the High Court of Justice in England (1985)
[92] Re Park v Park Court of Appeal of England and Wales (1953)

Conclusion

In conclusion, marriage has transformed over the different phases. The inherent reality is that this transformation has led to the incorporation of both public institutional and private contract nature of marriage. This is due to the effect of Christianity and the introduction of English laws, coupled with the fact that culture is an integral part of Kenyans. Marriage is the cornerstone of society. Owing to this its duality and the uncertainty it breeds has a ripple effect on various tenets of society among them matrimonial property, its rights, and approaches to its division. The manifestation of this duality in matrimonial property will be discussed in the following chapter.

CHAPTER 3: DUALITY OF MARRIAGE AND MATRIMONIAL PROPERTY

Introduction

This chapter will focus on the translation of the duality in marriage into matrimonial property. This part of the paper will look into three main things: what matrimonial property is, the translation of the duality into matrimonial property, and the effects of this translation. In this discussion, the paper will be confined to the current legal framework of matrimonial property.

3.1 Definition of matrimonial property

The Matrimonial Property Act 2013 defines Matrimonial Property as the matrimonial home or homes; (b) household goods and effects in the matrimonial home or homes; or (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.[93] Additionally the act elucidates that property acquired before the marriage, property inherited[94] or that held in trust and held in trust under customary law, does not amount to matrimonial property[95].

The nature of this property in discussion implies that its existence is contingent on a preceding marriage. Owing to this the duality of marriage also translates into matrimonial property.

3.2 The translation of the duality of marriage in matrimonial property

Matrimonial property is governed by two main regimes, a country may adopt the *community property accrual regime* or the *separate property regime*.[96] The community property system holds the belief that all property is held jointly from the point of entry into the marriage.[97] A distinction arises between this pure community property point of view and the quasi-community property point of view. The latter states that property acquired outside the area where the spouse is domiciled will be considered community property.[98] The foundational basis of this regime is that marriage is a sui generis relationship between the spouses which leads to a social and economic partnership between the spouses which result in equal interests in property acquired during the marriage and these interests remain even at the dissolution of marriage.[99]

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[93] Section 6, Matrimonial Property Act Cap 152 [Act No. 49 (2013)
[94] Section 13 Matrimonial Property Act Cap 152 [Act No. 49 (2013)
[95] Section 6(2) Matrimonial Property Act Cap 152[Act No. 49 (2013).
[96]Konno F, *The Division of Matrimonial Property in Kenya: A Feminist Approach*, Strathmore University Law School, 2017, 26.
[97]Ojienda T, *Conveyancing Law and Practice*, 2009, 115..
[98] Example Section 125, California Family Code.
[99] Ellis B, Protecting the right to marital property" Ensuring a full equitable distribution award with fraudulent conveyance law' 30Cardozo law review, 4 (2009), 1710.

The other regime is the *separate property regime*, which stipulates that each spouse has the capacity to hold property in their own name.[100] It is important to recognise that this system has a challenge when dealing with property that is held registered in the name of either spouse or under both names.[101]

In Kenya's context, it has adopted a modified community regime which has an element of separate ownership. The Matrimonial property act provides for a presumption of joint ownership where the property acquired during marriage is deemed to have been acquired for the family's benefit and thus joint ownership.[102] This provision alluded to the pure community property regime. At the same time, each spouse is given the capacity to hold property separately especially that which was acquired before the marriage, showing the element of a separate property regime.[103]

As established private contractual nature of marriage is suis generis and thus the translation of this in marriage is one of its kind as well, the private contract in marriage is evident in the acquisition of the matrimonial property. This is seen in the form of contribution, which can be either monetary or non-monetary.[104] The accepted non-monetary contribution is domestic work and management of the matrimonial home, child care, companionship, management of family business or property; and farm work.[105] In all these forms of contributions, the amount or type contributed is based on the decision of the spouses and to their best capability.

Additionally, the spouses are at liberty to enter into antenuptial agreements which dictate the division of property and how it is to be done,[106]moreover, the spouses can also enter into postnuptial agreements which are entered after entering into the marriage.[107] These agreements are governed by the laws of contracts. These little-known agreements have been recognised by the courts and have been upheld.[108] Emphasising this private nature, is the provision on ownership if matrimonial property, the act stipulates that "ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and

[100] Quijano, Matrimonial property law reform in Canada, 382.
[101]Kariuki F, Ouma S, Ng'etich R, Property Law, Strathmore University Press, Nairobi,2016 page 263
[102] Section 14, Matrimonial Property Act Cap152 [Act No. 49 (2013)
[103] Section 13 Matrimonial Property Act Cap 152 [Act No. 49 (2013)
[104] Kivuitu v kivuitu 1991 eKLR
[105] Section 2 Matrimonial Property Act Cap152 [Act No. 49 (2013)
[106] Section 6 Matrimonial Property Act Cap 152 [Act No. 49 (2013)
[107] Dalling S, *Regulating Prenuptial Agreements: Balancing Autonomy and Protection*, Durham University, 2013, https://etheses.dur.ac.uk//7768 on 22 October 2015.
[108] CYC v KSV 2014 eKLR

shall be divided between the spouses if they divorce or their marriage is otherwise dissolved."[109]

As a public interest institution, matrimonial property becomes a matter of public interest in the advent of the division of the matrimonial property. The constitution recognises the family unit as the foundational unit and thus it requires protection.[110] Moreover, equality of the rights of spouses recognised by the same constitution, before during, and at the dissolution of marriage,[111]justifying the public interest nature of matrimonial property. This is because involvement is required to ensure the equality of rights is maintained even in the dissolution and division of matrimonial property. In the case of *Peter Ndungu Njenga v Sophia Watiri Ndungu,* the judge stated that the court did not have jurisdiction to alienate suit land between spouses where neither spouse has died nor when the coverture is unbroken.[112] This means that matrimonial property becomes of public interest upon the dissolution of marriage. Additionally, the courts are obliged to consider various factors when dividing matrimonial property. These factors include; custom, future generations, and the access and utilization of ancestral land.[113] These factors point to the nature of marriage as a transgenerational union that ties those gone and those yet to come hence facilitating the public interest nature of marriage. Finally, matters of matrimonial property are seen to transcend the litigation interest of the parties since the division of matrimonial property is a polarising matter and thus falls into the scope of public interest. This justifies the involvement of the courts.[114]

Given that matrimonial property becomes of public interest upon its division, various issues plague the courts.

First is contribution, and second is equality of rights.

3.2.1 Duality in Contribution

Contribution takes two forms monetary and non-monetary forms. All through the temporal scope, monetary contribution has been the metric used to determine the level of interest one had in the matrimonial property. In Gissing v Gissing, the courts stated that it was only through financial contribution, whether directly or indirectly, towards the acquisition of matrimonial property that one could be entitled to a beneficial interest in the property.[115] This rationale was adopted widely and for a long time, this meant that other forms of contribution were completely

[109] Section 7 Matrimonial Property Act Cap 152 [Act No. 49 (2013).
[110] Article 45 (2) Constitution of Kenya 2010
[111] Article 45 (3) Constitution of Kenya 2010
[112] Peter Ndungu Njenga vs Sophia Watiri Ndungu [2000] eKLR
[113] Section 11, Matrimonial Property Act Cap 152 [Act No. 49 (2013)
[114] JOO V MBO 2023 eKLR
[115] Gissing v Gissing (1970) UKHL 3.

disregarded especially if they could not be quantified in monetary terms. This notion was modified in *Tabitha Wangechi Nderitu v Simon Nderitu Kariuki,* where the court added that the spouse should show their contribution to the acquisition of the assets since it is not enough for them to sit on the backs of the other spouse with their hands in the pockets.[116] This notion was widely accepted especially with regards to property jointly owned by registered under the name of one spouse. Furthermore, the court went a step further in *Peter Mburu Echaria V Pricilla Njeri Echaria* and stated " where both spouses have made contributions to the acquisition of property but their contribution is unascertainable, the court should apply the maxim of equality is equity while heeding to the caution in Gissing v Gissing."[117] This maxim mirrors the private relational contract, since it places emphasis on the division of property based on the contribution made by each of the spouse based on their initial marital relational agreements.

With the evolution of the legal framework, came the realisation that contribution can not only be confined to monetary metrics. Owing to this the court shifted from ascertaining beneficial interest in the property via constructive trust[118] as in Echaria v Echaria. In Kivuitu v Kivuitu, the court recognised the value of non-financial contributions in the form of domestic chores and childbearing. This was done by contrasting a wife in rural and urban areas, the one in rural areas may do the chores which if it was in an urban setting they would pay a house help to do, in turn saving money which can be diverted towards the acquisition of the matrimonial property.[119] Pall JA recognised childbearing as a contribution, this was based on the fact that it contributed to the welfare of the family since it facilitated the progression of the respondent.[120] The elevation of nonmonetary contributions in matrimonial property is seen as respecting the nature of marriage as a social relationship.[121] Recognition of nonmonetary forms of contribution shows the public interest nature of marriage given that these forms of contributions are quantified by the court which intervenes to consider the possibility of inequality in the financial capabilities between the spouses. The quantification of these contributions mirrors the same public interest.

[116] Tabitha Wangechi Nderitu v Simon Nderitu Kariuki 1998 eKLR
[117] Peter Mburu Echaria v Priscilla Njeri Echaria 2007 eKLR
[118] Kariuki F, Ouma S, Ng'etich R, Property Law, Strathmore University Press, Nairobi,2016 page 268
[119] Kivuitu v Kivuitu 1991 eKLR
[120] Tabitha Wangechi Nderitu v Simon Nderitu Kariuki 1998 eKLR
[121] Kariuki F *et al ,* Property Law ,275

3.2.2 Equality of rights

Article 45 (3) of the constitution of Kenya 2010 states that parties to a marriage have equal rights before, during and at the dissolution of the marriage. The foundation of this is human dignity that is owed to all human beings,[122] as well as the eradication of discrimination based on gender, race, and ethnicity.[123]

Equality advocated for has been applied in article 45 (3), has been applied to the context of matrimonial property and this has caused discourse in the legal field owing to the divergent interpretations by the courts.

The transformative nature of the Constitution carried with it a radical wave of equality and this was echoed by the courts. In the case of Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes, the court of appeal stated that the article meant a 50:50 slit of the matrimonial property between the spouses. [124] The purpose of this understanding and interpretation was to protect the marginalised spouse who may be at a lesser advantage as compared to the other, it was the ideal tool used to even out the playing ground between the two spouses.

Nonetheless, strict adoption of the 50:50 split would have resulted in the exploitation of the marriage institution. Owing to this the court in UMM v IMM adopted a different interpretation of Article 45 (3). The court stated that "the Matrimonial Property Act fleshes out Article 45 (3) by giving provision for the consideration of contributions. The court further stated that at the dissolution of marriage, each party should walk away with what each deserves which is determined by their contribution to the acquisition of the property."[125] The rationale used was that the 50:50 split would imperil the marriage by allowing fortune seekers to contract the marriage and sit back without making any contribution as they await to reap the benefits that accrue from the matrimonial property.[126] This is similar to the reasoning highlighted in Tabitha Nderitu v Simon Nderitu Kariuki, each rationale with the aim of protecting the sanctity of marriage which is more than just an economic platform that the 50:50 split approach would be turning it into.

Recently the Supreme Court had a chance to comment on Article 45 (3) in the case of JOO v MBO 2023. The court recognised the discretion of the courts in the division of Matrimonial Property where the courts are to be guided by the contributions of the spouses whether monetary or non-monetary in the acquisition of the matrimonial property. Emphasis was made

[122] Article 28 Constitution of Kenya 2010
[123] Article 27 Constitution of Kenya 2010
[124] Civil Appeal No. 127 of 2011
[125] UMM v IMM 2014 eKLR
[126] Kariuki F *et al ,* Property Law ,273

that the equality of rights highlighted in article 45 (3) was in respect to contribution and acquisition of matrimonial property.[127] The court cited the equity maxim of 'equality is equity' and stated that Article 45 (3) underscores the concept of equality as one that ensures that there is equality and fairness to both spouses, in ensuring that all parties have the same rights at the dissolution of a marriage based on their contribution.[128] This concept of equity thus is in line with the requirement of the consideration of contributions as the metric for beneficial interests.

3.3. The effect of the translation of the duality in matrimonial property

The private approach to matrimonial property enshrined in the contribution to the acquisition of the property, its nature, amount, and the existence of the separate property regime as well as the provision for ante and postnuptial agreements is intertwined with the public approach seen in the division of property.

The first challenge that arises is the fact that prenuptial and postnuptial agreements can be set aside by courts if the terms are unjust.[129] While this is good for purposes of protecting the rights of the parties to the agreement, it is important to note that there is ambiguity on what is deemed to be unjust. The vagueness becomes a pandora's box which can be used to invalidate any agreement entered into between the spouses.

The second challenge stems from the intricacies of the division of matrimonial property. Courts have had conflicting decisions as to the nature of contribution. For instance, in Tabitha Wangechi Nderitu v Simon Nderitu Kariuki, the high court stated that reproductive labour did not amount to contribution, in the appellate court, reproductive labour was then recognised as a form of contribution. Similarly, in Echaria v Echaria, the courts focused on the financial contribution of the wife either directly or indirectly to the acquisition of matrimonial property for them to be granted a beneficial interest in the property via constructive trust.[130] On the other hand, the court in Kivuitu v Kivuitu recognised non-monetary forms of contribution as contributions which is deemed to be sufficient to grant a party beneficial interest in the matrimonial property. This recognition and its codification in section 2 of the Matrimonial Property Act (2013), was the advent of the confusion as to what amounts to non-monetary contributions and how you quantify it to determine what amount to be granted. Owing to this, the non-monetary contributions may be used in a manner that leads to the misappropriation of

[127] JOO v MBO 2023 eKLR
[128] Oraro & Company Advocates, *Splitting the Difference: Supreme Court Hands Down a Landmark Decision on Matrimonial Property Rights in Kenya*, May 2023, https://www.oraro.co.ke/wp-content/uploads/2023/05/Splitting-the-Difference-Supreme-Court-Hands-Down-a-Landmark-Decision-on-Matrimonial-Property-Rights-in-Kenya-1.pdf.
[129] Section 6 Matrimonial property Act Cap 152 (Act No 49 2013)
[130] Kariuki F *et al* , Property Law ,268

matrimonial property due to either the undervaluing or the exaggeration of the non-monetary contribution.

Moreover, the courts' contrasting approaches to equality of rights lead to uncertainty. Some courts have interpreted Article 45(3) to mean the 50:50 split of matrimonial property. This was evident in the case of Agnes Wanjala William v Jacob Petrus Nicolas Vander Goes, where the court construed the 50:50 split. In contrast, the court UMM v IMM and JOO v MBO held that the equality of rights in article 45 (3) should be in respect to the contributions stipulated in section 7 of the Matrimonial Property Act 2013, this led to the adoption of the maxim of equity is equality. Owing to these divergent determinations by the courts (on both contribution and equality and its implication on matrimonial property), uncertainty continues to plague the nation[131] as to which approach would be adopted in the division of property going against the fundamental characteristic of the law that it should be predictable and certain.

Lastly, the third challenge is matrimonial property division and cohabitees. Cohabitation is a reality that has been accepted by both citizens and courts. It has been recognised as a family-forming union and not a marriage.[132] Section 6 of the Marriage Act 2014 recognises various marriages, and cohabitation is not one of them. As established, marriage is an integral requirement for the existence of matrimonial property. Owing to this since cohabitation is not considered marriage matrimonial property in theory does not exist in such arrangements. Nonetheless, courts have recognised that cohabitation is a family-forming union and thus a presumption of marriage was established by the courts in *Hortensiah Wanjiku Yaweh versus Public Trustee (Civil Appeal 13 of 1976).* The requirements to be met the parties must have lived together for a long time. The parties must have the legal right or capacity to marry. The parties must have intended to marry. There must be consent by both parties, the parties must have held themselves out to the outside world as being a married couple, the onus of proving the presumption was on the party who alleged it, and the evidence to rebut the presumption had to be strong, distinct, satisfactory, and conclusive. The standard of proof was on a balance of probabilities.[133]

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[131]Juma PM, *Division of Matrimonial Property in Kenya: JOO v MBO Revisited*, ssrn-4315886.pdf, 11.
[132] Abega E, 'Presumption of Marriage under Kenyan Law,' Begi's Law Office Chambers, https://www.begislaw.com/presumption-of-marriage-under-kenyan-law/#:~:text=On%20the%20basis%20of%20statute,It%20only%20presumes%20it on 31 July 2020.

[133] Hortensiah Wanjiku Yaweh versus Public Trustee (Civil Appeal 13 of 1976

Even with this presumption in force, it does not confer marriage status between the cohabitees.[134] The courts have established that the presumption of marriage is the exception and not the rule, showing that it does not confer marriage status.[135] Cohabitation has been recognised in various states such as Alberta Canada, as Adult Interdependent Relationships which exist between two adults. Owing to this, property acquired between the two cohabitees is to be governed by ordinary laws that apply to property rights between strangers.[136] Nonetheless, the courts go further and consider the contributions to the acquisition of property, for instance in POM v MMK the Supreme Court considered the financial contribution of the two cohabitees to confer beneficial interest leading to a 70:30 split between the two parties. The courts contradict themselves and the laws around the presumption of marriage by treating cohabitation as a marriage while it is not recognised as a marriage.

Conclusion

In conclusion, the duality of marriage has translated into matrimonial property. The private contract nature is evident in the acquisition of the matrimonial property, by the discretion the spouses have in choosing the nature of the contribution and amount of contribution. Additionally in the capacity to enter into prenuptial and postnuptial agreements, coupled with the existence of the separate property regime. The public interest point of view is evident in the court's role in the division of matrimonial property. Moreso, determination of what amounts to contribution as well as quantification of non-monetary contribution. This public interest has resulted in confusion as to what amounts to contribution and too much discretion in the quantification of non-monetary contribution. Exacerbating the situation is the courts' indecision on the matter of equality.

This duality leads to a lack of clarity and certainty on the division of matrimonial property as well as which regime to adopt between the separate property regime or the community property regime. The private contract clashes with the public interest when the courts dictate what contribution should be thus negating the original arrangement between the spouses.

[134] Abega, 'Presumption of Marriage under Kenyan Law.'
[135] POM v MNK 2023 eKLR
[136] POM v MMK 2023 eKLR

CHAPTER 4: THE PLACE OF ANTE & POSTNUPTIAL AGREEMENTS IN THE DIVISION OF MATRIMONIAL PROPERTY

Introduction

The challenges highlighted in the preceding chapter highlight the thorn in Kenyan matrimonial property cases. The lack of consistency in court decisions on the division method and system to be used, furthermore, there is a lack of clarity on which form of matrimonial property regime reigns in Kenya. Owing to this, this purpose of this chapter is to recommend ways of addressing the predicaments. Part of the solutions include: legislation of laws that are specific to prenuptial and postnuptial agreements and the introduction of a choice on the regime to govern spouses' matrimonial property division. Introduction of laws specific to marital agreements will improve the private contract in marriage further promoting the autonomy of the spouses in a way that reduces the clash with the public interest nature. Prenuptial and postnuptial agreements offer couples the opportunity to proactively manage their finances, protect individual assets, and establish clarity regarding financial responsibilities within the marriage.[137] Clarity on the obligations in the marriage reduces chances of imposition by courts thus reducing the friction with the public interest institution nature of marriage.

In each of these recommendations, a case will be made based on the successes in other countries. The choice of countries is based on the success of the matrimonial property laws, while others are due to the close similarities between them and Kenya both economically and socially.

4.1 Legislation of laws specific to marital agreements

Prenuptial and postnuptial agreements are fundamental tools that can be used to reduce the burden of the courts. These agreements have been recognised by the Matrimonial property act in section 6(3), which has a caveat that they can be set aside by the court if they are unjust and are as a result of fraud.[138] The main challenge is the ambiguity as to what amounts to being unjust and fraudulent,[139] this culminates in the court having unguided discretion. Even though courts have stated that agreement between spouses whether written or oral ought to be fair and

[137] Subia Weber Law, *Understanding the Importance of Prenuptial and Postnuptial Agreements: Securing Your Financial Future*, https://subiaweberlaw.com/family-law/understanding-the-importance-of-prenuptial-and-postnuptial-agreements-securing-your-financial-future/.
[138] Section 6(3) Matrimonial property act.
[139] Wanjira A, *The Use of Marital Property Agreements for the Division of Matrimonial Property upon Divorce in Kenya*, January 2017, 49.

transparent,[140] fairness and transparency are not enough to guide the making of prenuptial and postnuptial agreements, or even the courts judgement on fraud and the unjust nature.

To remedy this issue, it is paramount for the legislation of laws that are specific to marital agreements.

This can be done in two ways, first coming up with an act purely for marital agreements, and second, amending the matrimonial property act to add sections that deal with the making and the test of validity of the marital agreements.

4.1.1 French civil code

The French civil code has been praised for its clarity and specificity.[141] The degree of detail is one that has been emulated by various nations, especially the francophone nations, however, this does not negate the reality that it still undergoes constant improvement due to the modernization of the law and human relations. Owing to this, the French civil code is used as a benchmark for the specificity of marital agreements in this instance.

Prenuptial agreements are governed by Article 1394 of the French civil code. It stipulates that all matrimonial agreements shall be drawn up in an instrument before notaire, in the presence and with the simultaneous consent of all the persons who are parties thereto or of their agents. At the time of the signature of the agreement, the notaire shall deliver to the parties a certificate on unstamped paper and without costs, stating his name and place of residence, the names, first names, occupations and residences of the future spouses, as well as the date of the ante-nuptial agreement. That certificate shall state that it must be lodged with the officer of civil status before the celebration of the marriage.[142] Additionally, the code goes further to stipulate that the agreement has to be entered before the celebration of the marriage and that it takes effect on the day of the celebration.[143] The requirements of consent formalisation (being in written form) and the timing, may seem obvious, nonetheless, these requirements are for the test of validity when considering the prenuptial agreements. Additionally, the French civil code gives room for any amendments to the agreement to be made before the celebration of the marriage. These amendments are to be made via an instrument or by the judgment of the court.[144]

[140] CYC v KSV 2014 eKLR
[141] Leon Julliot, THE REFORM OF THE FRENCH CIVIL CODE, University of Pennsylvania Law Review,1948, 1.
[142] Article 1394 of the French civil code 1804.
[143]Article 1395 French civil code 1804.
[144] Article 1396 French civil code 1804.

4.1.2 Swiss Civil Code

This code recognises both antenuptial and postnuptial agreements. The code states that these agreements can be concluded prior to and after the marriage celebration and the prospective spouses or the spouses may choose, set aside, or modify their marital property regime only within the limits of the law.[145] Additionally, there are legal requirements that form the test of validity for the agreements. Among them, a person wishing to enter into a marital agreement must have the capacity for judgment. Thus, minors or adults subject to a deputyship that covers the conclusion of a marital agreement require the consent of their legal representative.[146]The marital agreement must be executed as a public deed and signed by the parties and, where applicable, by the legal representative.[147] The flexibility encapsulated by this code is evident it provides room for clarity, clarifying the grounds for revocation of a marital agreement and providing room for the spouses to enter into new marital agreements because circumstances may change. [148]

The various provisions highlighted above, show the progressive approaches to matrimonial property as well as to marriage. The reality is that the duality of this institution means that, friction between the private contract nature of marriage and the public interests institution nature is inevitable. Owing to this steps such as this reduce the amount of friction and thus promote the healthy coexistence of this nature. Having specific guidelines as to the making and validity of marital agreements promotes the autonomy of the couple while giving room for the courts to revoke or intervene in specific circumstances.

4.2 Freedom of choice of the matrimonial property regime

In this section, the countries in consideration will be France and South Africa. South Africa has been adopted as a metric due to the similarities it has to Kenya, first, it is in the Global South just like Kenya. Additionally, its diverse cultures as well as its reverence for the cultures, is similar to Kenya. Furthermore, the two countries have been classified as having emerging economies that have great potential. Finally, South Africa is one of the few African countries that give citizens this option in their matrimonial property laws.

[145] Article 182 Swiss Civil Code 1915.
[146] Article 183 Swiss Civil Code 1915.
[147] Article 184 Swiss Civil Code 1915.
[148] Article 191 Swiss Civil Code 1915.

4.2.1 South Africa

The matrimonial property system in South Africa is diverse. the automatic regime that applies is the in-community matrimonial property system, nonetheless, couples have the opportunity to opt out of it via antenuptial agreements.[149] Owing to this the couples are at liberty to choose which property law regime is to govern them and to which they are to be bound. The choice is between the default community property regime and the out-of-community property system.[150] The divergence between the two regimes is that in the in-community property regime, all estates of the spouses are combined into one estate. The catch is that this includes all property acquired before and after the marriage.[151] The division of the property is done between the two at the dissolution of the marriage. Out-of-community property system, has two main elements: exclusion of the accrual system and the inclusion of the accrual system.

Exclusion of the accrual system means that both spouses retain their property especially that acquired before the marriage. The exclusion of the accrual system only takes effect when there is a valid prenuptial agreement.[152] In contrast, the inclusion of the accrual system was adopted to reduce the harsh effects of strict separation of property. It works in a way that separation is still in effect but the spouse whose property has less value and brings in very minimal profit is entitled to 50% of the difference in value between the two estates.[153]

4.2.2 France (French Civil Code)

In France, two main property regimes are at the disposal of couples. The regimes are community property regime and separate property regimes. Nonetheless, a third regime exists which focuses on the participation in the acquisition of matrimonial property. The couples are at liberty to choose which property regime governs them.

The community property regime is the default property regime. Just like South Africa, it takes effect if the spouses fail to come up with an agreement as to which property regime applies to them.[154] Moreover, just like Kenya, property acquired by either spouse via succession is not considered to be part of community property.[155]

The separate property regime is based on the assertion, where spouses have stipulated in their ante-nuptial agreement that their property will be separate, each of them keeps the

[149] Bonthuys E, "Family Contracts" 2004, South African Law Journal, 881.
[150] Konno, *The Division of Matrimonial Property in Kenya*49
[151] Church J, "Proprietary consequences of marriage" in Joubert WA (ed) The Law of South Africa (2006) 74.
[152] Konno, *The Division of Matrimonial Property in Kenya* 51
[153] Section 21-23 South Africa Matrimonial Property Act, No. 88 of 1984.
[154] Article 1400, French Civil Code 1804.
[155] Article 1405 French Civil Code 1804.

administration, enjoyment, and free disposal of his or her personal property.[156] Where, during the marriage, one of the spouses entrusts to the other the administration of his personal property, the rules of agency shall apply. The agent spouse is however exempted from accounting for the fruits if the power of attorney does not expressly oblige him or her to do so.[157] These two provisions show the respect and reverence of prenuptial agreements which show the private contract in marriage. The reliance on these agreements gives a clear roadmap for the courts when dividing the property owing to the fact that the division is guided by the terms of the antenuptial agreements, giving room for certainty.

Lastly the participation in acquisition regime. Where the spouses have declared that they married under the regime of participation in acquisitions, each of them keeps the administration, enjoyment, and free disposal of his or her personal property, without distinguishing between that which belonged to him or her on the day of the marriage or which has come to him or her after by succession or gratuitous transfer and that which he or she has acquired for value during the marriage. During the marriage, that regime operates as if the spouses were married under the regime of separation of property. At the dissolution of the regime, each spouse is entitled to participate by halves in value in the net acquisitions found in the patrimony of the other and estimated owing to the double appraisal of the original patrimony and of the final patrimony. The right to participate in the acquisitions may not be assigned as long as the matrimonial regime is not dissolved. Where dissolution occurs through the death of one spouse, his or her heirs have, on the net acquisitions made by the other, the same rights as their predecessor in title.[158] Simply put, this regime resembles the South African out-of-community accrual system, in which both spouses hold their property separately and are at liberty to deal with it as they please. Nonetheless, at dissolution, the difference between the values of the properties is divided between the two spouses.

Conclusion

In conclusion, these two tools evident in South Africa, France, and Switzerland, seem ideal tools to be applied. Legislations that are autochthonous to marital agreements give a basis for both ante and postnuptial agreements, shifting from mere recognition to functional tools of matrimonial property division. Additionally, this reduced the friction between private contracts and public involvement since involvement is contingent on the validity or invalidity of the agreements. Furthermore, the existence of the choice of property regimes creates

[156] Article 1536 French Civil Code 1804.
[157] Article 1539 French Civil Code 1804.
[158] Article 1569 French civil code 1804.

certainty as to the division metrics of the matrimonial property given that it is guided by the choice of regime as opposed to contribution and the uncertainty that ensues due to the divergent approaches and decisions of the courts on non-monetary contribution and its quantification. Nonetheless, it is paramount to recognise that while these solutions tackle some of the issues at hand with respect to the duality of marriage, they are not ultimately comprehensive to be relied on solely. One of the most pressing issues that these solutions can't remedy is child custody issues, Prenuptial, and postnuptial agreements cannot predetermine arrangements regarding child custody or child support. Courts retain ultimate authority to decide these matters based on the child's best interests, as these are governed by public policy rather than private agreements. Owing to this, these recommendations should be adopted with other possible solutions to help address the multifaceted duality of marriage.

CHAPTER 5: CONCLUSION

Introduction

This study has embarked on elucidating the duality of marriage, by looking at the origins of the duality. This was done by centering the focus on a few communities in precolonial Kenya among them the Agikuyu, Ameru, and Abagusii. Building on this, it was imperative to venture into marriage in colonial Kenya. This study also sheds light on the sui generis contract in marriage, owing to the fact that it is not purely an economic contract but one that is relational due to the social obligations and realities that orbit marriage.

Stemming from this foundation, clear evidence of this duality in post-colonial Kenya is required. To bring this clarity, the study focused on matrimonial property to help filter the nature of marriage as a public interest institution and a private relational contract. The culmination of the study was the recommendations to eradicate the legal gap that causes the confusion that arises when dealing with marriage, and more specifically, matrimonial property division.

Findings

The first objective was to understand the root of the duality of marriage. Here, the study went in-depth into understanding marriage practices in various communities. The broad assumption is that marriage was purely a communal affair was disproven. The reality is that some private aspects were very evident, more so with regard to the division of resources and labour in a household. The communal nature of marriage is an overriding aspect especially in Kenyan communities, since marriage involves various families and communities and also gives rise to families which are the building blocks of society. The conclusion of this objective is that duality has always existed; the difference is that in precolonial Kenya, there was minimal friction between the two natures of marriage, given that primacy was given to the community over the individual. This then changed with colonialism and the subsequent laws that were adopted, which championed individualism, thus exacerbating the friction between the public nature of marriage and the private contract in marriage.

The second objective was to see the translation of this duality of marriage in matrimonial property. The aim of this objective was to substantiate the legal gap using matrimonial property as evidence of this gap. Various elements of matrimonial property were taken into consideration, mainly the acquisition and division in Kenya. The study then focused on the indecision and divergent approaches adopted by courts in Kenya over the years. The main issue being the contribution to the division of matrimonial property as well as the

interpretation of Article 45 (3) of the constitution of Kenya 2010 by the courts. The findings of this objective were that there is a lack of consensus by the courts when it comes to contribution and quantification of non-monetary contributions breeds uncertainty in the law and thus may be a breeding ground for opportunists. Lastly, marital agreements have not been given a strong basis in the law. They are merely recognised by the Matrimonial Property Act 2014.

Recommendations.

These recommendations were based on an assessment of other regimes that have shown success, among them the French civil code, Swiss civil code, and South Africa Matrimonial Property Act, No. 88 of 1984.

The main recommendation was the introduction of legislation that governs marital agreements, which creates a balance between the private relational contract and the public interest by respecting the autonomy of couples. Additionally, the introduction of the choice of matrimonial property regimes that govern marriage choice at the discretion of the couples. This will then foster certainty and coherent court decisions.

Conclusion

In summary, the dual nature of marriage cannot be eradicated due to the role of the community and its importance coupled with the autonomy of couples. There is no dispute that the country has come a long way in its development of marriage and matrimonial property laws. Nonetheless, the uncertainty born out of the divergent court decisions still plagues marriage and matrimonial property division. Owing to this, the way forward is to reduce the friction between the two and the uncertainty that stems from the duality. The task falls heavily on the legislature to come up with legislation to govern marital agreements. Finally, the hypothesis of this study has been met since the need for guidelines governing the division of matrimonial property has been established from the case discussions made in the study.

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