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From Relegation to Elevation: The Place of Customary Marriages under Kenya's Matrimonial Law

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Abstract

Kenya's Marriage Act of 2014 was passed with the effect of harmonizing all matrimonial laws in operation in the country into one statute. The Marriage Act provides that all marriages in Kenya have equal legal status, and requires that all marriages, including those concluded under customary law, must be registered. This article analyses how customary marriages have been treated under Kenya's law in three distinct time periods – the colonial, post-independence and contemporary Kenya. It argues that while customary marriages were treated as inferior during the colonial and post-independence periods, in contemporary Kenya, the Marriage Act has had the effect of elevating customary law marriages so that they are equal to marriages under other systems. Further, the article assesses the status of women married under customary law and demonstrates that the Marriage Act has resulted in the greater protection of the rights of married women in Kenya.

Key words

Gender; customary law; marriage; family law; African feminism

Resumen

La Ley de Matrimonio de Kenia de 2014 se aprobó con el efecto de armonizar todas las leyes matrimoniales vigentes en el país en un solo estatuto. La Ley de Matrimonio establece que todos los matrimonios en Kenia tienen el mismo estatus legal, y exige que todos los matrimonios, incluidos los celebrados bajo el derecho consuetudinario, deben ser registrados. Este artículo analiza cómo se han tratado los matrimonios consuetudinarios en la legislación de Kenia en tres periodos distintos: la Kenia colonial, la posterior a la independencia y la contemporánea. Sostiene que, mientras que los matrimonios consuetudinarios fueron tratados como inferiores durante

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los períodos colonial y posterior a la independencia, en la Kenia contemporánea, la Ley de Matrimonio ha tenido el efecto de elevar los matrimonios de derecho consuetudinario para que sean iguales a los matrimonios bajo otros sistemas. Además, el artículo evalúa la situación de las mujeres casadas con arreglo al derecho consuetudinario y demuestra que la Ley del Matrimonio ha dado lugar a una mayor protección de los derechos de las mujeres casadas en Kenia.

Palabras clave

Género; derecho consuetudinario; matrimonio; derecho de familia; feminismo africano

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1. Introduction

Kenya is a postcolonial state that was under British colonial rule from 1895 until 1963. Before colonization, the ethnic communities living in the territory had distinct systems of law, religion and governance (Ghai and McAuslan 1970). British colonial authorities applied a system of indirect rule, where they co-opted leaders from the African communities to rule over those communities (Kanogo 1987). Further, the court system was structured in a two-tiered manner, where English law was applied in cases involving Europeans and Asians while African customary law was applied in cases involving Africans (Harvey 1975).

When Kenya gained independence in 1963, English law was adopted as the country's formal law, and it remains the applicable law in all matters, with the exception of personal matters which include marriage, divorce, succession and child custody (Harvey 1975). This is expressly provided for in the Judicature Act of 1977. Section three of that Act lists the hierarchy of laws in Kenya as follows: the Constitution which is the supreme law of the country; statutory laws, including Acts of Parliament of the United Kingdom; common law, doctrines of equity, statues of general application in force in England on 12th August 1897 and the procedural law in force in the courts in England as of 12th August 1897; African customary law in civil cases where one or more parties is affected by it, so long as it is not repugnant to justice and morality or inconsistent with any written law.

The courts in Kenya still apply customary law in personal matters, but its application is to be subjected to the repugnancy test (we will see later in this paper that during the colonial period, the repugnancy test was used to apply Victorian and Common Law principles in the interpretation of customary law). In contemporary Kenya, the repugnancy test has been used to determine whether customary law falls afoul of human rights principles (Bwire 2019). Hence, where customary law has been found to be discriminatory, courts have applied principles of human rights and equality in order to avoid the discriminatory outcomes of applying customary law. In applying the provisions of the Judicature Act, the courts have often relied on constitutional principles, including human rights standards in interpreting customary law. Customary law is therefore seen as operating in the shadow of law, because formal law principles are applied in its interpretation (Galanter 1981). Nonetheless, the application of the repugnancy test so as to apply human rights standards and limit the harshness of customary law remains problematic. Bwire (2019) argues that African customary systems are in a constant state of flux and evolution, and therefore they have the inherent ability to rid themselves of negative aspects. Abdullahi (2002) further argues that where human rights norms are imposed upon customary systems, it is likely that cultural transformation will not occur. Cultural transformation is more likely to occur organically from within, given that most African customary systems are imbued with intrinsic values that align with human rights norms (Abdullahi 2002).

With regard to marriage, one can choose to marry under a customary law system, instead of the formal law system, and the law that will be applied in the context of such a marriage is the customary law of the ethnic community to which one belongs. Similarly, for persons who profess the Islamic faith, the applicable law is the Islamic law

and, in the country's, judicial system, *kadhi* courts specialize in the application of Islamic law in personal matters.

Kenya therefore has a plural legal system, which came about as a result of the country's colonisation. The customary system of law of each community in the country applies in parallel to English common law as well as religious law. While legal plurality is visible in a number of areas including the administration of property rights to land and even employment and labour relations, it is perhaps most visible in the area of personal law which includes marriage, divorce, child custody and inheritance. Kenya's express recognition of the application of customary law in civil law matters, while at the same time subjecting it to the repugnancy test as well as other provisions of the formal law has meant that customary law is perceived as being inferior to other systems of law operating in the country.

In the context of marriage, Kenya passed the Marriage Act of 2014 to consolidate all systems of marriage into one statute. The Marriage Act of 2014 repealed the following Acts: the Marriage Act (Cap. 150); the African Christian Marriage and Divorce Act; the Matrimonial Causes Act; the Subordinate Court (Separation and Maintenance Act); the Mohammedan Marriage and Divorce Registration Act; the Mohammedan Marriage, Divorce and Succession Act; the Hindu Marriage and Divorce Act. Until the passing of the Marriage Act, there was no formal statute that expressly made provisions on customary marriages. In interpreting issues such as the validity of customary marriages, courts often relied on witness testimony in order to ascertain that the requirements of such marriages had been fulfilled. The 2014 Act now requires that all marriages concluded under any system of law in Kenya should be registered. Hence registration in this context is to be taken as conclusive proof of the existence of a marriage. This requirement applies also to customary law marriages.

Against this background, this paper analyses the extent to which the Marriage Act of 2014 has succeeded in elevating the status of customary unions so that they are equal to other forms of marriage recognized under the Act. The paper further seeks to analyse the extent to which the status of customary marriages under the Marriage Act impacts the status of married women in the country. The general argument made in the paper is that the Marriage Act has imposed provisions of formality on customary marriages, and given the historical position where formal law was applied to interpret customary law in ways that were discriminatory and the relegated customary marriages to inferiority, this might be cause for alarm. The imposition of formal requirements on customary marriages by the Marriage Act may suggest that the Act does not elevate customary marriages to equality with other types of marriages, and that such formal requirements might further relegate the status of customary marriages. However, a deeper analysis of the provisions shows that in fact the status of customary marriages has improved and with this, the status of married women has also improved.

Methodologically, the paper uses a historical approach to analyse the ways in which customary marriages have been interpreted under the law during three distinct periods, including the colonial (1897–1963); post-independence (1963–2010); and post-2014 when the Marriage Act of 2014 was enacted. It analyses cases which were determined during each time period in order to highlight the place of customary marriages during each time period, and specifically, to determine whether in fact these marriages have been deemed

inferior to marriages concluded under formal systems. The paper further uses an African feminist theoretical approach to discuss the impact of judicial interpretations of customary law marriages on the rights of women. An African feminist approach in this context allows for an analysis of the lived experiences of African women (Mikell 1995). It is appreciated that these experiences are informed not only by gender, but also by other axes of identity, including race, ethnicity and religion (Mama 2019). An African feminist approach is also nuanced and problematizes mainstream ideas (Tamale 2020). For example, African customary law has often been problematized as being discriminatory against women. This is reflected even in human rights instruments, such as the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol), which in Article 6, expresses that monogamy is encouraged as the preferred form of marriage. The inference here is that polygamy affects the enjoyment of the rights of women in Africa. An African feminist perspective looks at the experiences of inequality and discrimination as resulting from the intersection and interplay of various systems of law (Tamale 2020). Thus, the discrimination faced by women married under customary law is not simply as a result of customary law, but rather, such discrimination is more likely to result from the way in which customary law interacts with formal law.

The paper is divided into three key sections, the first of which discuss the place of customary marriages in colonial Kenya, the second discussing the place of customary marriages in post-independence Kenya and the third which analyses the place of customary marriages under the Marriage Act of 2014.

2. The Impact of Legal Pluralism on Marriage Systems in Kenya

The introduction of religion, particularly the Christian religion and also the introduction of English common law in Kenya significantly impacted customary marriages. Thus, during the colonial period, Kenya had five distinct systems of marriage, each governed by a different system of law. These were: customary marriages; civil marriages governed by statutory law mirrored on the English common law; Hindu marriages; Christian Marriages; and Islamic marriages.

The introduction of Christian doctrine and the Common Law as distinct legal systems governing marriages led to the emergence of complex marriages, where it was not clear which system of law would be applicable in the marriages that were being concluded at that time. At the time therefore, marriages by Africans were made complex because Kenya's legal system combined elements of English law and customary law (Kameri-Mbote 2013). Thus for example, for Africans who wanted to pursue the Christian faith, the issue of marriage was one of great significance for them. Such Africans believed that it was important for them to contract marriages in line with the Christian teachings. Under Christian doctrine, marriage is intended to be monogamous (Cotran 1968). At the same time however, many of these Africans also believed in the customs of the communities to which they belonged (Cotran 1968). It was therefore not uncommon for African men to enter into a Christian marriage and then subsequently enter into a marriage under customary law or vice versa. This situation created a number of challenges when it came to succession following the death of the husband – and the question often would be "what was the nature of his marriage and who is/are his wife/wives?"

During this period, in cases such as *Re Ruenji's Estate (1977) KLR 21* and *In Re Estate of Boaz Harrison Ogola (Re Ogolla), eKLR [1978]* it was held that where an African man married under statutory law and subsequently married another woman under customary law, the customary law marriage was not recognized. This remained the position both during the colonial period and during the immediate post-independence period (Lewin 1939, Kiage 2016). In post-independence Kenya, the courts and the legislature were keen to address the injustices that came about as a result of the failure and/or refusal of colonial authorities to recognize customary marriages. Thus, in order to address the situation where an African man contracts both statutory and customary marriages, Parliament amended the *Law of Succession Act* by adding Section 3(5) which provides that

> Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act.

In addition to the emergence of complex marriages contracted both under statutory and customary law, the introduction of parallel legal systems applying to marriages in colonial Kenya inevitably led to the problematic interpretations of customary marriages. Thus for example, in *R v Amkeyo (1952) 19 E.A.C.A,* the interpretation of the court was that customary marriages were not valid marriages because they required the payment of dowry, which the colonial authorities interpreted as "wife purchase". Here, the courts applied Common Law principles in interpreting aspects of customary marriages, whereas they should have applied customary law. The application of Common Law in interpreting customary marriages was not unique to Kenya, as it was applied in jurisdictions such as Nigeria, Tanzania and Uganda, often resulting in absurdity (Lewin 1939). In addition, customary law was also subjected to the repugnancy clause, so that it was only applicable to the extent that it was not repugnant to justice and morality. The contention here is that colonial authorities used the repugnancy test to subject African customary law to Victorian cultural norms and Common law standards. Thus, the repugnancy clause was used to determine whether customary law was in line with what was considered acceptable under the Victorian culture and the Common law. This is a further example of how colonial authorities applied the law in such a manner that relegated customary marriages to an inferior position to that of formal law marriages.

The result was that customary marriages were perceived and treated as inferior to other systems of marriage. The further outcome was that the status of African women was negatively impacted, and it is African women who bore the brunt of the unfair interpretations of customary law. For instance, where a court ruled that an African man could marry one woman under a system that only provided for monogamy and then marry a subsequent one under a customary law, the first marriage, where the wife believed she was the only wife, was automatically converted into a polygamous marriage. Further, the wife married under customary law would have to prove, often with great difficulty, that she was in fact a wife under customary law and that all marriage rites necessary under the custom of the community under which she was married were fulfilled.

3. The Place of Customary Marriages in Colonial Kenya

Before colonialism, all communities had their specific customary law which governed all marriages. Under these customary systems, all marriages were polygamous or potentially polygamous. For a marriage to be valid, the parties had to complete the specific rites provided for under the customary law of the community to which they belonged, and upon completion of these rites, the marriage was deemed to have been contracted. Cotran (1968) outlines the various rites that parties to customary marriages needed to conclude in order for the marriage to be deemed valid, and these rites are similar in the different communities. Thus for example, the slaughtering of a goat was a common rite, as well as the payment of dowry (which in other contexts is paid by the bride's family, but in the Kenyan context, it is paid by the husband and his family to the wife's family) in the form of livestock. To sum it up, Cotran (1968) outlines the following as being essential elements that must be met in order for a customary marriage to be considered valid: capacity, consent, payment of dowry, and cohabitation.

In determining the validity of customary marriages, courts in colonial Kenya would apply principles and values external to customary systems in interpreting the various elements that were needed for a customary marriage to be concluded (Lewin 1939). For example, in *R v Amkeyo (1952) 19 E.A.C.A,* which was a criminal case, where the accused was alleged to have stolen some goods and had later communicated some facts about the matter to his wife. The question before the court therefore was whether the communication between the accused and his wife was privileged. In answering this question, the court focused on the union between the accused and his wife and asked the question as to whether it was indeed a marriage. The court found that the union between the accused and his wife could not be considered a marriage, because of the practice of payment of dowry, which was wife purchase and not marriage.

A critique of this case is that the intention of the court was to ensure that the doctrine of privilege relating to spousal communication, would not be applicable to the accused. The aim was to compel the accused's wife to testify against him. The decision relating to marriage was simply a means to an end, and it perhaps reveals the total disregard that colonial authorities had for customary law, only deeming it useful to the extent that it achieved colonial aims and objectives. There was a level of disingenuousness in the way that colonial authorities chose to interpret the payment of dowry in customary marriages, without being concerned about what the general outcome would be for all other couples married under customary law. More importantly, *R v Amkeyo (1952) 19 E.A.C.A* highlighted that in fact the very rites which were meant to be concluded under customary law in order for a valid marriage to be contracted, would be the very same issues that would be used to deny the existence of a marriage. As already noted, for a marriage to be valid under customary law, the payment of dowry is an essential element that must be fulfilled and yet this was deemed to be "wife purchase" by the court in *R v Amkeyo*.

Polygamy was also a problematic issue for the Christian missionaries, hence the introduction of the concept of conversion. Here, Africans who chose to profess the Christian faith were encouraged to convert their customary marriages into Christian ones. The African Christian Marriage and Divorce Ordinance was enacted in order to facilitate such conversion (Morris 1972). The reasoning here is that African Christians

who wanted to follow the Christian way of life could not at the same time continue to be in marriages governed by customary law. This was particularly so given that Christian doctrine emphasised monogamous marriages, while customary law allowed for polygamy. It is notable that other systems of marriage were not open to such type of conversion – only customary marriages could be subjected to conversion. The conversion of customary marriages into Christian ones was very common because during the colonial period, Christianity became the major religion in the country (Gifford 2009). Currently 85.5% of the population professes the Christian faith (Kenya National Bureau of Statistics 2019). The prevalence of Christianity is attributed to the work of the missionaries, who operated alongside colonial authorities in promoting the spread of the faith (Spenser 1975). For this reason, the conversion of customary marriages into Christian ones was the most common form of conversion and it was also the only form of conversion that was expressly provided for through formal law. Additionally, conversion could only happen formally, so that a couple who wished to wish convert this customary marriage into a Christian one would have to do in church ceremony, preceded by the announcement of bans of marriage, and thereafter, they would be issued a marriage certificate.

In addition, African men continued to contract marriages to different women under the conflicting systems of customary law and Christian doctrine. So common was this practice of marrying different women under different systems of law, that it was not practical to enforce bigamy laws (Morris 1972). One of the reasons why bigamy was so rampant was because Africans were torn between the Christian faith and the need to follow Christian teachings. On the other hand, Africans still felt the need to belong and to remain attached to their communities and cultures (Kameri-Mbote 1995). The failure to enforce the laws on bigamy meant also that there was no redress for women who were affected by the practice of African men marrying multiple women under different systems of law.

All these issues resulted in the relegation of customary marriages, perceived as inferior to marriages contracted under other systems, particularly the Christian and civil marriages which provided for monogamous marriages. The status of women married under customary law during the colonial period was therefore a precarious one. While one could be married with all the necessary rites being completed, there was no guarantee that in fact she would be recognized as a wife under the law, and further that her rights as a wife would be respected, guaranteed and protected.

4. The Place of Customary Marriages in Post-Independence Kenya

The problems witnessed during the colonial period continued to be endemic during the post-independence period. There was therefore an attempt to resolve these challenges and a proposal was made to consolidate all the systems of marriage into one statute (Commission on the Law of Marriage and Divorce 1968). This proposal was opposed in Parliament and ultimately it was not adopted. The main reason why it was opposed is because of the perception that the consolidation of the marriage laws would further relegate the customary marriages under the legal system (*The Rejection of the Marriage Bill in Kenya*, 1979). Although one of the objectives of the reforms was to bring all marriages to par and make them all equal by consolidating all the existing statutes on marriage into one harmonized statute (Commission on the Law of Marriage and Divorce 1968),

parliament was concerned about how the inclusion of customary law marriages in a formal statute would affect those marriages. Parliament further criticised the proposed Marriage Bill for being un-African and also giving women too many rights (*The Rejection of the Marriage Bill in Kenya*, 1979). Having seen what happened during the colonial period, where in the interaction between customary marriages and the formal law system had resulted in negative interpretations of those marriages and the perception of their inferior status when compared with marriages under other systems, parliament was not convinced that including customary marriages in a formal statutory law would elevate them to equal status with marriages under other systems of law (Johnston 1971). We see here that the status of women married under customary law was of great concern. While one of the aims of the proposed reforms was to promote the rights of women married under customary law, parliament was concerned that the reforms would further erode customary marriages. Implicitly, there was a conflict between the need to protect women's rights on the one hand and the need to safeguard customary marriages from being further relegated under the law and made even more inferior to the formal marriages. During the colonial period customary law was interpreted in a manner that resulted in the relegation of customary marriages, which in turn meant that the rights of women married under customary law were not protected. By contrast, in post-independence Kenya, the proposal to reform marriage laws as a means of protecting the rights of women under customary law was rejected because it was perceived as a way of further relegating customary marriages to an inferior position. Both these extreme positions did not bode well for women's rights. Where customary marriages were seen as inferior, as in the case of *R v Amkeyo*, there was the danger that courts would interpret them as not being marriages at all, and women married under customary law as not being wives. Such a position could result in women being denied property rights in cases of matrimonial disputes and also in cases of succession. On the other hand, the formal recognition of customary law marriages through statute could affect the substance of these marriages through the imposition formal law principles, which can in turn legitimize discrimination. We have already seen the problematic ways in which formal law principles such as the application of the repugnancy test has been used to create the perception that one culture is superior to another.

With the failed attempts at reforming the law, during the post-independence period, courts continued to face the dilemma of how to deal with cases where African men concluded marriages to different women under different systems of law. This became particularly problematic in the context of succession cases, where courts had to determine who a wife was, where a man who married different women under different systems of law died intestate.

There were two differing decisions by courts in this matter. Firstly, the same position in *Re Ruenji (1977) KLR 21* and *Re Ogolla eKLR [1978]* was held *In the Matter of the Estate of Reuben Mutua Nzioka (Probate and Administration Cause No. 843 of 1986)*. In that case, an African man contracted a statutory marriage to one woman, but after his death another woman claimed to have been married to him under customary law. The court held that the deceased man lacked the capacity to enter into a customary marriage while the statutory marriage subsisted. Therefore, the judge held that the second wife could not inherit as a widow to the deceased. The judge stated that section 3(5) of the *Law of*

Succession Act was meant to aid a first wife married under custom as against a second wife married under statute.

This position was later challenged in *Irene Njeri Macharia v Margaret Wairimu Njomo & another eKLR [1996]*, where the Court of Appeal held that the decisions in *Re Ruenji (1977) KLR 21* and *Re Ogolla [1978] eKLR* were correctly made since at that time the *Law of Succession Act* was not yet in force. However, the Court of Appeal stated that the decision made *In the Matter of the Estate of Reuben Mutua Nzioka* was erroneous because section 3(5) of the *Law of Succession Act* applied to women married under customary law before or after a man contracted a statutory marriage, hence, the subsistence of a monogamous marriage was not a bar to a man contracting a subsequent marriage. This position was affirmed by the Court of Appeal in *Miriam Njoki Muturi v Bilha Wahito Muturi, [2013] eKLR*. The implication was that in fact, a monogamous marriage could be converted into a polygamous marriage. This was the dominant position held by the courts, and therefore all marriages in Kenya, even those conducted under a system of law that provided for monogamy, were potentially polygamous for purposes of succession.

Here, we see that for women, particularly those in monogamous unions, law did not offer any guarantee that their spousal rights would be protected and especially when it mattered most – during the process of probate and succession. The argument that it would be unfair to deny women married under customary law the right to inherit simply because they were married at a time when the man in question was already in subsisting monogamous marriage was often cited as a reason to recognize the subsequent marriages under customary law. On the other hand, we see that the rights of widows who were in monogamous unions were quite precarious. Under the law of succession, in the case of intestate succession, a widow who was in a monogamous marriage would be entitled absolutely to the personal and household effects of the deceased and a life interest in the whole residue of the net intestate estate. However, where there is more than one widow, the estate of the deceased would be divided among the widows depending on the number of children each widow has. Thus, a woman who though herself to be in a monogamous marriage, and thus entitled to the entire net estate of her deceased husband would, in the circumstance where other women claim to be wives, be forced to share that estate with these other wives. It would be worse for her if these other women have more children than her, because these other wives would get a bigger share of the estate. Given this scenario, the question then would be, what was the point of providing for monogamous marriages when the spousal rights under such unions could not be guaranteed during succession?

The problematic issue here is that there are two categories of widows: the formal law widows and the customary law widows. The rights of these two categories of widows are in conflict, so that a legal interpretation that seeks to protect the rights of one category runs the risk of affecting the rights of the other category. The courts struggled with various interpretations of the law, and their decisions oscillated between the polemic position of either finding in favour of protecting the formal law widows as in the case of *In the Matter of the Estate of Reuben Mutua Nzioka* or protecting the customary law widow as in the case of *Miriam Njoki Muturi v Bilha Wahito Muturi*. The courts were never able to find a middle ground where the rights of both categories of widows were equally protected. The solution to this impasse was to provide for a system of marriage that

would secure the rights of women married under any system of law. In particular, it was to hold men accountable for their actions in marrying more than one wife while they are still alive, rather than to deal with the competing rights of the formal and customary law widows upon the death of the men. As we will see later in this paper, this is what the 2014 Marriage Act attempts to do.

5. A note about divorce in colonial and post-independence Kenya

The customary law of most communities in Kenya provided for divorce. For this to happen, the elements of marriage had to have been fulfilled, and particularly the payment of bride price, because divorce was concluded upon the return of bride price to the husband by the wife's father. The return of bride price by the wife's father and it being accepted by the husband also had implications for child custody, because it meant that where a man accepted his bride price back, then he relinquished custody of his children and he was thereafter under no obligation to continue supporting and maintaining them. It was therefore open for a man to refuse to accept back his bride price if he wished to maintain custody of his children. This meant that the divorce could not be granted and the parties would remain married. What we see here is that divorce would happen if the husband agreed to let it happen. We also see that divorce had serious implications for child custody and maintenance. For women who wished to divorce their husbands but were unable to do so because the husband refused to accept back his bride price, customary law was deemed to be unfairly onerous on them (Cotran 1968). This was especially the case because if these women had relationships with other men and children were born out of such relationships, then those children would be considered the husband's children (Cotran 1968).

In post-independence Kenya, parties who were not satisfied with divorce proceedings under customary law could move to court, where the courts would apply a mix of both formal and customary law. Thus, courts would be guided by the provisions of the Constitution and the Judicature Act. The courts would apply the repugnancy clause in such cases. Thus, in divorce cases, the courts could sometimes apply formal law in their interpretation of customary law. This was done in order to promote the rights of women. Further, the parties had to prove the Common law grounds for divorce, such as adultery, cruelty or desertion. In order to interpret customary law in manner that was likely to promote the rights of women, judicial officers would rely on the testimony of experts in the customary law that they were dealing with (Cotran 1968). The judicial officers would apply human rights provisions to check the extent to which customary law was aligned to the former. This is illustrated in the case of *TSA v SO [1979] eKLR*, where Cotran, who was then a judge of the Court of the Appeal, held that it would be unfair to confine a woman to a marriage which she wished to exit and in which she was unhappy. In that case, the parties were married under Luo customary law and the marriage was polygamous. The appellant was the first wife. The divorce had been denied by the Magistrate's Court, because the wife had failed to prove that her husband had actually been cruel to her. However, the appellant had suffered cruelty at the hands of one of her co-wives, who constantly referred to her as barren. In a strict interpretation of what amounts to cruelty under Common Law, it could not be said that it was the husband who had committed the matrimonial offence. Yet, because the marriage was polygamous and there were other parties in the marriage, it could also not be denied

that the appellant had experienced cruelty in the marriage. The lower court also found that under customary law, the divorce had been frustrated because the husband had refused to accept back his bride price.

While the lower court denied the divorce, the Court of Appeal allowed the divorce on a number of grounds, as follows: this being a customary marriage, it was wrong for the lower court to only consider and apply the Common Law rules in determining whether the particulars of cruelty had been proved. The court should also have considered customary law principles that were important in determining whether a marriage ought to be dissolved. These principles under customary law were as follows: whether there were any children (in the present case, the couple did not have any children), whether the bride's father was willing and able to return the bride price, and it would or at least should be immaterial whether or not the husband accepted back the bride price. Finally, the Court of Appeal also determined that the marriage had irretrievably broken down.

We see from this decision that courts would rely on the repugnancy clause to re-interpret customary marriages and to change specific rules under customary law relating to divorce. While the reason for doing so was to protect the rights of women, which is commendable, nonetheless, the effect would be the treatment of customary law marriages as inferior to marriages under other systems. Further, the implication here is that women's rights are better protected through formal law, and conversely that customary law violates the rights of women. This view is contrary to the lived experiences of African women, which are often borne out of the interaction of customary law with formal law. Both these systems of law can result in discriminatory outcomes and they can also enhance and protect women's right. To further amplify this, Griffiths (1997) argues that in the classical sense, law is seen are distinct from rules that govern social interactions, however, such a view of law would necessarily be blind to the ways in which women interact with the law.

Further, it is curious that while Cotran (1968) had highlighted that if a man refused to accept back his bride price, then divorce could not be granted, he went ahead in *TSA v SO [1979] eKLR* to qualify that by stating that the only issue that really matters is whether in fact the bride's father is able and willing to return back the bride price. More importantly, while this may seem on the face of it as a principle that would operate to the benefit of women, it still means that a woman will be at the mercy of her father or in his absence, her male kin, should she wish to obtain a divorce. While the decision in this case was intended to recognize the wishes of a woman who wanted to divorce her husband, the principle applied by the court is one that would not operate in a manner that promotes the agency and autonomy of women.

The 2014 Marriage Act is seen as providing a solution that recognizes the significance of customary law and therefore elevating the place of customary marriages, while at the same time recognizing the role of formal law in the lives of African women.

6. The Place of Customary Law Marriages under the 2014 Marriage Act

Following the promulgation of the Constitution of Kenya in 2010, there was a requirement that various laws in the country would be enacted to ensure that the provisions of the Constitution were duly being implemented. One area where there was a need to ensure that the statutory law was in line with constitutional provisions was in

family law. Thus, Article 45 provides for the right to family and in particular, it emphasises the equality of spouses at the time of contracting a marriage, during the marriage and at the time of dissolution of the marriage. In order to give life to this provision, the Marriage Act and the Matrimonial Property Act were passed in 2014.

The Marriage Act does what was originally proposed in 1968 report of the Commission on the Law of Marriage and Divorce- it repeals all existing statutes on marriage and consolidated them into one statute, but it recognizes all the five systems of marriage that existed prior to its enactment. One of the key issues it further provides for is the registration of all marriages in Kenya. Section 3(3) provides that all marriages registered under the Act have the same legal status. This is an important provision that responds to the historical issue where customary marriages were perceived as being inferior to other marriages. Section 6 of the Act further recognizes the Civil, Christian and Hindu marriages as being monogamous, while customary and Islamic marriages are recognized as polygamous or potentially polygamous. These provisions raise a number of issues as to the place of customary law marriages, and whether indeed, all marriages in Kenya now have equal legal status. These key issues are outlined below:

6.1. Conversion of marriages from one system to another

Section 8 of the Marriage Act provides that a potentially polygamous marriage may be converted to a monogamous marriage. This means that customary marriages where there is only one wife and no subsequent wives have been married, may be converted into monogamous marriages. Section 8 does not limit such conversion to be from customary marriages to Christian marriages, as was the position under the African Christian Marriage and Divorce Act. Hence the implication is that one could convert either a customary or Islamic marriage which are the potentially polygamous marriages, into any of the other forms which are monogamous. It is important to note that the Marriage Act does not make any provision for the conversion of a monogamous marriage to a polygamous one. The implication here is that where a man who is married under any one of the existing forms of marriage that are monogamous then purports to contract a subsequent marriage under a system that allows polygamy, such a man would then be deemed not to have capacity to contract the subsequent marriage, and it would be void *ab initio*.

For purposes of succession, the effect of this provision is that any subsequent marriage conducted after a man contracts a monogamous marriage is not valid and women who were purportedly married under customary law cannot be considered as wives. This therefore seeks to provide clarity in a matter that has been problematic ever since the colonial period, and where the courts have had different interpretations. The Marriage Act of 2014 has now affirmed the position in *Re Ruenji (1977) KLR 21, Re Ogolla [1978] eKLR* and *In the Matter of the Estate of Reuben Mutua Nzioka (Probate and Administration Cause No. 843 of 1986).* This now means that the rights of women married under a monogamous system of law are protected, and wives married subsequently under customary law would not be considered as wives for purposes of succession. Through the requirement of registration, women married under customary law are protected because such a marriage will have to be registered, and it can only be registered if the husband has the capacity to contract such a marriage in the first place. Thus, a man who

already has a wife under a monogamous system of marriage cannot enter into a subsequent customary marriage with a different woman.

The position of the women married under customary law as subsequent wives however remains an issue for concern. This is because the law expressly provides that a man who is married under a monogamous system has no capacity to contract a subsequent marriage under a system of marriage that allows for polygamy, but this provision is not strictly being enforced. While such a man would rightly speaking be committing the offence of bigamy, the practice is so common and yet there have hardly been any prosecutions for bigamy. In the past, the remedy to the situation was simply to allow the subsequent wives to inherit so as to avoid any unjust outcomes for women married as subsequent wives. However, since this is no longer possible, it would then be useful to enforce the bigamy laws so as to ensure that women who find themselves being married as subsequent wives when the man has no capacity to marry them, have recourse to seek justice while the man is still alive.

Kenya could also borrow some lessons from South Africa in finding solutions to the plight of women who are married as subsequent wives by men who lack the capacity. Thus, for instance, the South African Law Reform Commission (2023) proposes that the government should promote awareness about the importance of registration of customary marriages, and also simplify the process and make it more accessible especially to those in the rural areas. This can be achieved by allowing local leaders to participate in the registration of customary marriages (South Africa Law Reform Commission 2023).

6.2. Registration of all marriages in Kenya

One of the grounds upon which a marriage may be voided is the failure to register it. Prior to this, customary marriages did not have to be registered to be recognized. What we see therefore is that for customary marriages, the requirement for registration is new, and the implication is that while one may complete all the rites under customary law but fail to register that marriage, then that would make the marriage voidable. This means that if the validity of the marriage is challenged in court and evidence is adduced to prove that the marriage was never registered, then that marriage would be voided, and it would be as though it never existed.

This means that in matters relating to succession, courts will now rely on evidence of registration of marriages in order to determine if one is a spouse for purposes of succession. Where courts had previously entertained claims by women married under customary law as subsequent wives even where the earlier marriage was intended to be monogamous, the requirement for registration has the following effects: firstly, the subsequent marriage cannot be registered as the man lacks capacity to contract the marriage and secondly, for purposes of succession, the court can now not entertain claims that one was a spouse under customary law yet they do not have a marriage registration certificate.

In this regard, in 2015, Justice Mumbi Ngugi in *Mary Wanjuhi Muigai v Attorney General & another [2015] eKLR*, held as follows concerning the issue of registration of customary marriages:

> It is noteworthy that in many cultures in Kenya, polygamy was accepted. It was not, however, subject to registration, and in the event of the demise of a husband, as a perusal of many decisions in the Family Division will reveal, the Court was often required to hear evidence to establish whether the women who claimed to be wives of the deceased were indeed wives and entitled to inheritance from his estate. This, in my view, was the reason why the registration of customary marriages was necessary – to bring some degree of certainty to a system of marriage practiced by many, yet was outside the reach of the law.

The position of the court here is that there was need to include the requirement for registration of customary law marriages in order to address the prior mischief that existed, where African men married wives under different systems of law, even where the earlier marriages were contracted under a system of law that did not permit polygamy. As we have already seen, in the context of succession matters, where a deceased man had contracted several marriages under different and conflicting systems of marriage, courts were faced with the dilemma of either upholding the rights of women in monogamous marriage to the detriment of subsequent wives married under customary law; or vice-versa. The dominant position was to accept the subsequent customary law marriage to the detriment of widows who were married under monogamous systems of law.

The requirement for registration provided for under the Marriage Act is intended to ensure that the necessary rites for concluding customary marriages are observed and further that the parties have capacity to enter into the union. In this way, the existence of a marriage certificate for customary unions should be sufficient proof of the validity of the marriage. What we see here is that the requirement for registration of customary marriages is intended to provide for the protection of women, who no longer have to use the long winded route of proving that they are wives by having to show that all the required rites for contracting marriages under customary law were completed. This therefore improves the position of women who are married either under a monogamous or polygamous system, and addresses the historical conflict in succession matters that existed between the rights of women married under monogamous marriages vis-à-vis those married under polygamous systems.

Further, the procedure for notification, as discussed below, affords wives-to-be, and particularly those being married as subsequent wives under customary law, the opportunity to understand whether the union they are getting into is one that will be deemed valid under the law. In terms of the procedure for registration of customary marriages, the Marriage Act requires that before such a married is concluded, the parties shall issue the notice of intention to marry which is provided for under section 25, as follows:

> (i) Where a man and a woman intend to marry under this Part, they shall give to the Registrar and the person in charge of the place where they intend to celebrate the marriage a written notice of not less than twenty-one days and not more than three months of their intention to marry.
>
> (ii) A notice given under this section shall include: the names and ages of the parties to the intended marriage and the places where they ordinarily reside; the names of the parents of the parties, if known and alive, and the places where they ordinarily reside; a declaration that the parties are not within a prohibited

relationship; the marital status of each party; the date and venue of the marriage ceremony.

For purposes of customary marriages, the contents of such notice are provided for under section 45 and they include:

(i) The specific customary law applied in the marriage of such parties;

(ii) A written declaration by the parties, that the necessary customary requirements to prove the marriage have been undertaken. This declaration shall contain the signatures or personal marks of two adult witnesses and each witness shall have played a key cultural role in the celebrating the marriage.

(iii) Confirmation that the parties to the marriage were 18 years of age at the time of the marriage; that the marriage is not between persons in a prohibited relationship; and the parties freely consent to the marriage.

It is curious that while section 25 is worded in a manner that requires notice of a marriage to be issued before the marriage is concluded, the wording in section 45 is not very certain. Thus for instance, section 45 requires a declaration by the parties to prove that the necessary requirements to prove the marriage have been undertaken, and the declaration should be signed by two witnesses who played a key cultural role in celebrating the marriage. The inference here is that the declaration should be made after the marriage has been celebrated. Nonetheless, if the procedure for registration is followed, it will ensure that in fact the necessary rites for the conclusion of customary marriages are completed. In addition, women who are married as subsequent wives will have information as to whether the marriage they are purporting to enter into will be considered valid or not under the law.

An important issue to note is that the requirement for registration introduces a level of formality to customary marriages, which is often a cause for concern, given that formality has the potential to water down or erode the significance of customary practices. For example, in the context of land in Kenya, the introduction of a formal law system that required conversion of land holding systems from the customary to the formal through registration was largely responsible for millions of the peasant poor being left landless (Okoth-Ogendo 1991). Further, the conversion of land holding from customary tenure to formal tenure also eroded the user rights that women had under customary law, but at the same time it did not provide for the creation of access rights for women under formal law (Nyamu-Musembi 2002). This resulted in women having limited control, ownership and access of land in Kenya. Lessons from the formalization and registration of land in Kenya paint a bleak picture for the protection of the rights of the poor, and also women's rights. It is therefore important to be cautious of the provisions of the Marriage Act which impose the formal requirement of registration on customary marriages.

However, the prevailing interpretation by the courts on the role of registration in the context of customary marriages, is that it is intended to promote the efficient administration of all marriages, including customary marriages (*Mary Wanjuhi Muigai v Attorney General & another [2015] eKLR)*. Registration is intended to achieve this by addressing the mischief that was caused by the previous lack of regulation in the way in

which people contracted marriages under different and conflicting systems of marriage. The requirement for registration ensures that all marriages recognized under the Marriage Act have equal status in law, and this in turn improves the status of women who are married either under customary law or other systems that only recognize polygamy.

While the prevailing jurisprudence in Kenya is that registration should not be used to disenfranchise those in customary marriages, but rather as a means of promoting efficient administration of such marriages, lessons from South Africa where the requirement for registration of customary marriages was introduced in 2000 would be useful. This is because in South Africa, customary marriages are valid even if they are not registered, and thus, like in the Kenyan case, registration is not intended to be the measure by which the existence of customary marriages is determined (De Souza 2013). However, in practice, registration become the measure for determining the existence of customary marriages when questions concerning the existence of such marriages arise (De Souza 2013). Thus, while the jurisprudence on role of registration of customary marriages in Kenya has so far been progressive, court decisions often change and it is possible for the law to be interpreted in alternative and problematic ways. Thus, it might be useful for Kenya to consider including an explicit provision in the Marriage Act that the lack registration by itself is not a ground for the voiding of customary law marriages. Thus, in determining the validity of customary marriages, registration should be only one of the factors for consideration and other factors, such as the fulfilment of the relevant customary rites, capacity and consent should also be considered.

6.3. The place of the woman-to-woman marriage

Section 3(1) of the Marriage Act emphasises the constitutional provision that marriage shall be between two consenting adults of opposite sex. This has been a cause for concern insofar as the woman-to-woman marriage is concerned. The woman-to-woman marriage is a form of customary marriage that has been practiced in a number of communities in Kenya, and which has been recognized by the courts as a valid marriage. In the context of succession matters, courts have used the same approach as in other customary marriages to determine the validity of the woman-to-woman marriage (Ojwang *et al*. 2016).

However, the requirement for registration of all marriages in Kenya means the woman-to woman marriage does not meet the requirements for registration, as it is a union between two women. It is important to note however that the woman-to-woman marriage does not offend the intention behind the constitutional provision that marriage shall be between members of the opposite sex. This because the woman-to-woman marriage is a system of traditional surrogacy that allows for a woman who cannot bear children to marry another woman, who will then bear children within the union, and such children shall, within customary law, be considered to be the offspring of the female husband (Ojwang *et al.* 2016). Thus, the union is not a sexual between the two women, but rather the younger woman is required to have sexual relations with the men of her choice or who might be chosen for her by her female husband. Nonetheless, the woman-to-woman marriage is not a union between members of the opposite sex, and therefore does not qualify for registration as per the provisions of the Marriage Act.

In 2022, the court in *In re Estate of John Mwambire Guracha (Deceased) (Succession Cause 30 of 2017) [2022] KEHC 10402 (KLR) (24 June 2022)* noted that there was inconsistency between the customary laws of communities that allow for woman to woman marriages on the one hand and the Constitution and the Marriage Act on the other hand. The court further noted that it was not the intention of either the Constitution or the Marriage Act to render invalid the woman-to-woman marriage which the courts have generally recognized as a valid marriage. The court further stated as follows:

> In the instant case the marriage so contested wholly met these criterions. Again for purposes of clarity woman to woman marriage in the context of African culture should not be confused with same sex marriage, which is prohibited by the *Constitution* and *Marriage Act*. It is a marriage entered into by the female husband, with the wife as a care giver to ensure the propagation of lineage by creating a stable family. The siring of children in a woman-to-woman marriage remains to be one of the key components of the union.

Thus, because the essence of the woman-to-woman marriage does not offend the intention behind the Constitution and the Marriage Act, and because the marriage cannot be registered, the court fell back on the approach of determining the validity of the marriage based on whether the required rites were completed. Here, the court relied on the many decisions that had recognized the validity of the woman-to-woman marriage, as well as the provisions of section 3(2) of the Judicature Act which requires courts to be guided by customary law in matters where both parties are subject to customary law, to the extent that the same was not repugnant to justice and morality. Given that previous court decisions had held that the woman-to-woman marriage was a valid marriage under customary law, serving the purpose of traditional surrogacy, then the woman-to-woman marriage passed the repugnancy test. Strictly speaking, the only test which the woman-to-woman marriage failed was the registration test. Consequently, the court held that the woman-to-woman marriage is recognized as one of the forms of customary marriages that exist in Kenya and in the absence of registration, the validity of such a marriage must be determined by looking at the extent to which the required rites were completed.

Here, we see the court applying a progressive approach in determining the impact of registration on a specific form of customary marriage. While the court still cited the repugnancy test which has often been cited as a provision used to relegate customary law to an inferior status, nonetheless, the reasoning of the court was to the import that where there is conflict between formal law and customary law, and where the technical application of formal rules would result in the invalidation of hitherto valid customary marriages, then it is important to eschew such a technical application of formal rules. The implication is that the requirement for registration of all marriages in Kenya must be understood against the background and context that explains why that provision was included in law in the first place. The same rule ought to be applied where there are points of conflict between formal law and customary law; thus in determining whether the woman to woman marriage can be regarded as a union that does not violate the Constitution and the Marriage Act, one ought to look to the background and context that explain why the requirement of marriage being a union between a man and a woman was included in the law in the first place.

This affirms the position of women married under the woman-to-woman marriage, while upholding the sanctity of the Constitution. The interpretation of the court in *In re Estate of John Mwambire Guracha (Deceased) (Succession Cause 30 of 2017) [2022] KEHC 10402 (KLR) (24 June 2022)* is one that therefore improves the status of women in the woman to woman marriage, first because it affirms the general validity of this marriage under customary law and further recognizes it as one that is aligned to the constitutional ideal of marriage.

7. Conclusion

This paper has demonstrated that customary law marriages in Kenya are not guided purely by customary law, but rather, they are subjected to aspects of formal law such as registration. The aim is to provide for the greater protection of the rights of parties to marriage. A key lesson here is that as social institutions such as family and marriage evolve and change, law also evolves so as to be more responsive to the needs of such institutions. Besides the statutory law on marriage, the courts have also played a significant role in interpreting problematic aspects of the statutory law. We have seen that during the colonial period, courts started applying formal law in the interpretation of various aspects relating to marriages under customary law, and the general outcome of this was to make customary marriages inferior to other types of marriages. Women married under customary law could thus have their marital status altered through judicial interpretations. During the independence period, courts sought to entrench the recognition of customary law marriages and to elevate their position from one of inferiority. However, this also resulted in discrimination against women, particularly those married under monogamous systems of law. We see therefore that the colonial and post-colonial courts have taken different positions regarding customary law marriages. Through the lens of women's rights, both these positions have been problematic and resulted in discriminatory outcomes for women.

The Marriage Act of 2014 has sought to bring a middle ground, where customary law marriages are recognized and accorded equal status as other systems of marriage, but at the same time, the rights of women married under a system that allows only monogamy are protected. Through the requirement for registration of customary marriages and the prohibition of conversion of monogamous marriage into polygamous ones, the law now provides measures that would address the mischief of men who are already married under a monogamous system contracting subsequent customary marriage, which has often been detrimental of both wives. The Marriage Act therefore promotes the rights of married women. Courts also continue to play a significant role in the development of Kenya's law on marriage. Thus, Kenya's law on marriage is a living, breathing law, intended to be responsive to the needs of the ever-changing society.

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