



Customary Law and Women's Rights in Kenya

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1. Introduction: The Need to Reconcile Customary Law and Women's Rights

Kenya is a legally plural state where several different legal and normative systems operate alongside each other. The interaction of legal systems is complex and often engenders conflict and competition. This paper deals with the relationship between customary law and women's human rights in Kenya, and examines the ways in which conflicts between the different legal systems impact on the human rights of women in Kenya. The paper argues that there is need to find ways of reconciling conflicts between customary law and women's human rights in order to enhance women's ability to actualize their rights. This paper also explores avenues that may be available to utilize customary law for the benefit of women.

Customary law plays a significant role in the lives of Kenyans. Customary norms and practices pervade people's relationships and dealings with one another. This is particularly so in the context of family relations. Debates about culture in Africa have largely focused on women in the context of the family and on the impact of custom on their enjoyment of rights. The family has been described as the site of struggle over symbols, entitlement to resources and decision-making.¹ It has aptly been observed that family law is: "the litmus test in any society with regard to legal norms and the status of women. It is also the area where law, ethnicity and ideology with regard to the rights of women merge to become a powerful ideological force."² Customary law plays a crucial role in the maintenance of cultural norms about the place of women in the family and society.

For Kenyan women, custom is particularly important as it defines their identity within society, and mediates their family relationships, entitlements and access to resources. In addition, informal justice systems which constitute the most accessible forms of dispute resolution utilize localized norms derived from customary law.

¹ Fareda Banda, *Women, Law and Human Rights: An African Perspective* (Oxford: Hart Publishing House, 2005).

² Radhika Coomaraswamy, "To Bellow Like a Cow: Women, Ethnicity and the Discourse of Rights", in Rebecca Cook, ed. *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Philadelphia Press, 1994) 39 at 48.

Customary law may be defined as consisting of the unwritten norms and practices of small-scale communities which dates back from pre-colonial times but has undergone transformations due to colonialism and capitalism. It is localized in nature and is as diverse as the communities involved, although there is general consensus on certain fundamental principles.³ It is unwritten and is characterized by dynamism and flexibility, as it develops and takes on different permutations in response to changing circumstances. The fluid nature of customary law, and the fact that it is unwritten, poses a challenge in determining its content in any particular case. In Kenya, customary law applies only in civil matters and hence is not applicable in criminal cases.⁴

It should be noted that customary, religious and statutory laws operate within the same social context and cover similar ground, particularly in the areas of personal law, which include marriage, divorce, inheritance, custody and guardianship of children and land tenure. However, there is a clear distinction between customary law and religious law. For example, while Islamic law (Sharia) may govern similar areas as customary law, such as marriage, divorce and inheritance, it is treated by the courts as a separate source of law and is dealt with by special Kadhis' courts.⁵

In Kenya, there is an intricate link between customary laws, customary practices and women's rights. Almost invariably, women occupy a disadvantaged position under customary law. This is because traditional African societies are governed on the basis of patriarchal structures where women's individual interests were subsumed under the interests of the group. Hence customary law contains aspects that often run counter to principles of gender equality and non-discrimination espoused in both domestic and international human rights instruments. The continued application of customary law in areas such as succession and marriage engenders conflict with statutory provisions. For example, the right of women to inherit equally with men

³ These principles include: the centrality of the family, supremacy of the group over the individual, and the importance of kinship ties. Some anthropologists have raised the question of whether the unwritten customs and practices of pre-industrial small-scale societies can be regarded as law: see for instance A.S. Diamond, *Primitive Law* (London: Watts, 1935) and A.R. Radcliffe-Brown, *Structure and Function in Primitive Society: Essays and Addresses* (Glencoe, Ill.: Free Press, 1952). Others, such as Malinowski and Gluckman were much more prepared to accept that such customs and practice constitute law: See Max Gluckman, *Ideas and Procedures in African Customary Law* (London: Oxford University Press, 1969); Branislaw Malinowski, *Crime and Custom in Savage Society* (London: Routledge & Kegan Paul, 1926).

⁴ See section 3 (2), Judicature Act (Cap. 2).

⁵ Kadhis' courts are classified as subordinate courts and are provided for under Article 170 of the Constitution of 2010. The Kadhis' Courts Act (Cap. 11) sets out their jurisdiction. This jurisdiction of Kadhis' courts is restricted to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the courts.

granted in the Law of Succession Act⁶ offends customary law practice that dictates against women inheriting immovable property, particularly land. However, the flexibility and dynamism inherent in custom, which is reflected in changing norms and practices, may also provide windows of opportunities available to utilize customary law for the benefit of women.

After a long and arduous struggle for comprehensive constitutional reform, Kenya now has a new Constitution which was promulgated on the 27th August, 2010.⁷ The Constitution of Kenya 2010 contains important gains for gender equality and equity and generally for the protection of human rights of all women and men in Kenya. A number of constitutional provisions have a direct bearing on customary law in relation to women's human rights, and in significant ways these provisions address some pertinent issues relating to women's position under customary law. Further, unlike the former Constitution, the Constitution of 2010 provides a platform for reconciling conflicts between customary law and statutory law.

2. Brief Background on Kenya

2.1. Social-cultural Background

Kenya is a multi-ethnic, multi-racial, multi-lingual and multi-religious society. There is a wide diversity of indigenous peoples, making up 43 ethno-linguistic groups, who together comprise the three major African linguistic groups: Bantu, Nilotic and Cushitic.⁸ Africans are the overwhelming majority, comprising the 99% of the total population of 28.5 million.⁹ Besides the African population, there is also a small but significant component of Arabs, Asians, and Europeans, who together make up 1% of the total population. This diversity is reflected in the different languages, history and cultural practices among the population. Among the African people groups, the majority are patrilineal and patrilocal.¹⁰ Some common themes running

⁶ Cap. 160.

⁷ The Proposed Constitution of Kenya was ratified in a referendum held on the 4th August, 2010 and was thereafter promulgated as the Constitution of Kenya, 2010 on 27th August, 2010.

⁸ Miraslova Prazak, "Kenyan Families", in Yaw Oheneba-Sakyi and Baffour K. Takyi, eds., *African Families at the Turn of the 21st Century* (Westport, Conn.: Praeger, 2006) 197 at 199.

⁹ This is the figure given in the 1999 census: Government of Kenya, Central Bureau of Statistics, Ministry of Finance and Planning, *1999 Population and Housing Census: Counting Our People for Development*, Vols. 1 and 2 (Nairobi: Government Printer, 2001). The most recent census was carried out in 2009 but the census report has not yet been made public.

¹⁰ In a patrilineal society, descent is traced through the paternal line (contrast matrilineal societies where descent is traced through the maternal line). Patrilocal refers to a social system where a married couple resides with or near the husband's parents (contrast matrilocality where residence is with the wife's family).

across African social and economic systems and patterns of family life include the centrality of the family, supremacy of the group over the individual and importance of kinship ties.

3. The Application of Customary Law in Kenya as a Post-colonial State

3.1 Pre-colonial period

Kenya was subject to British colonial rule from 1895 until 1963 when she gained political independence. The establishment of British colonial rule in Kenya was accompanied by the superimposition of English law over the indigenous people, who already had their own systems of governance. Under the indirect rule policy the British introduced a racially stratified dual legal system, with one system of law for Africans and another system for non-Africans. Thus Native Tribunals were established and run by ostensible traditional authorities, to apply “native law and custom” (or customary law) to Africans while English-type courts run by British magistrates and judges administered the received English law to govern non-Africans,¹¹ It should be noted that customary law was applied mostly in the area of personal relations, notably family law, land tenure and succession. The establishment of Native Tribunals meant that customary law was to be interpreted and applied by state courts. Other aspects of law, such as criminal law, contract and torts were governed by the received law consisting of English common law and statute law.

3.2 Post-colonial period

At independence, the overriding goal of the Kenyan government was to promote national unity in the face of ethnic, racial, religious and linguistic plurality. The multiplicity of indigenous justice systems engendered by customary law was perceived as a hindrance to social and economic development. A uniform legal system was therefore seen as desirable. The government therefore embarked on measures to integrate the dual structure of the legal system. In 1967 the native courts were dismantled and a unitary court system was established.¹²

The government also made concerted efforts to harmonize the customary laws of the various people groups with the received law. Two Commissions, one on Marriage and the other on Succession, were appointed in 1967, with the mandate of drafting uniform laws of marriage

¹¹ Yash Ghai & J.P.W. McAuslan, *Public Law and Political Change in Kenya* (Nairobi, Oxford University Press, 1970).

¹² These changes were effected through a number of statutes, namely the Judicature Act (Cap. 8), the Magistrate's Courts Act (Cap. 10) and the Kadhis' Courts Act (Cap. 11).

(and divorce) and succession respectively. The Marriage Commission in its 1968 Report annexed a Marriage Bill which was intended to constitute a unified system of marriage law. However, despite various attempts to enact it, the Marriage Bill has never been passed.¹³ The Report of the Commission on the Law of Succession experienced greater success as it culminated in the passing of the Law of Succession Act, which came into operation in 1981. Although the Act was intended to be the uniform law for all Kenyans irrespective of race or religion, this was not to be as exemptions were thereafter granted to certain categories of people, such as Muslims and some pastoralist communities. Other reforms included the introduction of individualized land tenure under the Registered Land Act.¹⁴ The result was to extinguish customary rights and interests in land that had been adjudicated and given individual tenure.

Hence, despite the attempt to harmonize the legal system the pluralistic base of the legal system remained. At present, the state legal system recognizes the applicability of customary and religious laws to varying degrees, particularly in the areas of personal law, such as marriage, divorce, inheritance and land tenure. Indigenous norms still govern the lives of the people, particularly in rural areas where the majority reside. Further, a variety of informal justice forums persist despite the presence of the state judicial system, albeit not in their “pure” traditional form. Examples include village elders, chiefs and other community justice structures. These structures, which apply popular localized norms, often constitute the only accessible and relevant justice system for the majority, particularly in rural areas where the majority of women in Kenya live.

3.3 Impact of Colonization on Customary Law

The emphasis in traditional African society was on family and larger kin groups characterized by strong extended family ties and community bonds. While it is apparent that children and women occupied an inferior position in traditional society, especially with regard to property, there were also protective mechanisms to ensure that their interests were taken care of. For instance, after a father’s or husband’s death the deceased’s property would be entrusted to one of the male relatives of the deceased who was obliged to look after the welfare of the deceased’s wife and

¹³ The Marriage Bill was presented before the Kenyan Parliament in 1968, 1979 and 1985 but was never passed. In 2007 a fresh Marriage Bill was drafted and is awaiting presentation to Parliament.

¹⁴ Cap. 300.

children. Similarly, women's rights of occupation and cultivation of the family land were ensured.

Colonialism and capitalism had far-reaching effects on customary norms and practice. In general, the interaction between colonial state law and customary law worsened the position of women. Colonialism and capitalism brought in their wake a general breakdown in community institutions and the dismantling of safeguards for protection of weaker people in society, particularly women. For instance the institution of the levirate, which was originally intended for the protection of the widow and her children, has been abused and has resulted in wives and their children being dispossessed by male relatives on the death of a husband. Similarly, the institution of bridewealth (also known as dowry) has been commercialized and women may be regarded as property which is seen as justifying practices like wife-beating. The individualization of land title and commoditization of land also jeopardized women's interests. For example in Kenya, the processes of land adjudication and consolidation almost invariably led to vesting of legal title to land in men as the heads of households. Under the Registered Land Act legal title to land confers absolute proprietorship with unfettered rights of possession, use and disposal to the exclusion of all other interest, including interest under customary law.¹⁵ Hence, women are disadvantaged as their rights of use and occupation under customary law are thereby jeopardized.

4. Nature of Customary Law in Kenya

4.1 Customary law: static or evolutionary?

Customary law is characterized by dynamism and flexibility, as it develops and takes on different permutations in response to changing social conditions. Some scholars are of the view that custom and customary law is actually an "invention" of colonial governments in collaboration with local leaders.¹⁶ Customary law is unwritten and is passed on through the practices and oral traditions of the community concerned. In Kenya, there was an attempt at codifying customary law soon after independence in order to make it easier for judges to ascertain its content. The attempt at codification did not fully materialize but instead took the

¹⁵ Section 30, Registered Land Act (Cap. 300).

¹⁶ See Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge: Cambridge University Press, 1985); Terence Ranger, "The Invention of Traditionalism in Colonial Africa", in Eric Hobsbawm & Terence Ranger, eds, *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983).

form of *Restatements* of the customary laws of marriage, divorce and succession which were published in 1968.¹⁷

Although the *Restatements* were not intended to be a code of customary law, they have acquired the status of a quasi-code, which judges have tended to treat as authoritative and binding.¹⁸ Most judges who apply customary law rely on accounts of customary law that record such law as if it were static and do not take into consideration changes which have taken place in Kenyan society since the *Restatements* were written in 1968. It has been argued that the courts' continued reliance upon customary law codes or quasi-codes, buttressed by the doctrine of precedent, has resulted in the ossification of customary law, thus stifling opportunities for development of customary law.¹⁹ Thus there are divergences between "judges' law" consisting of judges' pronouncements and "living law" consisting of people's practices on the ground.

In Kenya it is often difficult to distinguish between customary law and customary practices. This is due to the ever-evolving nature of customary practices, which makes it difficult to ascertain the content of customary law at any given time. As already mentioned, customary law is treated as a question of fact which must be proved in evidence. Questions therefore arise as to whether a particular customary practice has achieved the status of customary law. The courts mostly rely on the evidence of witnesses who are usually elderly males. These witnesses may have warped or biased views, particularly in relation to gender relations. This has important implications for women's rights as women's perspectives of customary law are not taken into account in judicial considerations of what constitutes customary law in a given case.

However, there is some indication of changes in customary norms and practices over time to accommodate new realities. Factors influencing these changes include education, women's economic empowerment, civic education, awareness of rights among others. In *Karanja v. Karanja*²⁰ the court recognized that as a result of women being educated and earning salaries, it is quite possible for both married and unmarried women to acquire their own land. Local

¹⁷ These were two volumes which were produced by Eugene Cotran and published under the general editorship of Anthony Allott, namely: Eugene Cotran, *The Law of Marriage and Divorce: Restatement of African Law, Kenya, vol. 1*: (London: Sweet & Maxwell, 1968) and Eugene Cotran, *The Law of Succession: Restatement of African Law, Kenya, vol. 2*: (London: Sweet & Maxwell, 1969) [*Restatements*].

¹⁸ The *Restatements* have been relied upon in a large number of cases, e.g. *Mwathi v. Mwathi* [1995-1998] E.A. 229; *Re Estate of Naomi Wanjiku Mwangi* (deceased) (Nairobi High Court Succession Cause No. 1781 of 2001) and many others. However, in *Atemo v. Imujaro* [2003] K.L.R. 435 the Court of Appeal cautioned against treatment of the *Restatements* as binding on every issue of customary law in Kenya.

¹⁹ Anne Hellum, *Women's Human Rights and Legal Pluralism in Africa: Mixed Norms and Identities in Infertility Management in Zimbabwe* (Avondale, Harare: Mond Books, 1999); Julie Stewart, "Why I Can't Teach Customary Law", in John Eekelaar & Thadabantu Nhlapo, eds., *The Changing Family: Family Forms and Family Law* (Oxford: Hart Publishing, 1998) 217;

²⁰ [1975] KLR 307.

women's groups and NGOs have been instrumental in facilitating these processes. For example, through *chamas* (women's rotating savings groups) women have been able to raise capital to buy property, own businesses on their own. Hence the customary perception that women cannot own or manage property is being put to question. There is also some evidence that inheritance practices are gradually (though very slowly) changing to accommodate the rights of daughters to inherit their fathers' estates in some instances particularly in situations where a daughter have been taking care of her father in his old age²¹. Some customary concepts, such as those relating to trusts, have in some cases operated to enable women to hold land on behalf of the family and to make decisions relating to apportionment and use of such land.²²

Some cultural practices are also undergoing change. There is some indication that there is less than full observance of certain burial rites and practices, such as *tero buru* and widow inheritance practiced by some communities. This is attributable in large part to the influence of public health campaigns by government and NGOs, particularly with the spectre of HIV/AIDS.²³ In some other regions, alternative rites of passage for women have been initiated minus the "cut" usually associated with female circumcision.

4.2 Choice of law dilemmas

The existence of multiple legal systems, where customary and statutory/common laws are recognized at the same time, gives rise to choice of law dilemmas. For example, the law of marriage in Kenya is governed by four systems of law, hence parties have choice of what system of marriage to use. However, the legal consequences of marriage and the rights and obligations of parties under the different systems are not uniform. For instance, a woman is entitled to maintenance from her husband under the statutory system of marriage but not generally under the customary law system. However, these legal systems do not operate in separate compartments, but interact with one another in various ways. People often traverse the boundaries between the legal systems, and in many cases, these boundaries are blurred. For instance, it is common for a couple to go through a customary marriage ceremony and

²¹Celestine Itumbi Nyamu, *Gender, Culture and Property Relations in a Pluralistic Social Setting* (J.S.D. Dissertation, Harvard University, 2000) [Property Relations] [unpublished].

²²Fiona McKenzie, "Gender and Land Rights in Murang'a District, Kenya" (1990) 17 *Journal of Peasant Studies* 609.

²²Nyamu, *Property Relations*, supra note 21.

²²McKenzie, supra note 22.

²³M.D. Okech-Owiti, "Some Socio-Legal Issues", in J.B. Ojwang & J.N.K. Mugambi, eds. *The S.M. Otieno Case: Death and Burial in Modern Kenya* (Nairobi: Nairobi University Press, 1989) 11.

subsequently enter into a statutory marriage. It is then not clear what system of law should govern that couple's relationship, and hence, what rights and obligations obtain in that relationship.

More positively, multiple legal systems offer the opportunity of forum shopping, where parties have the advantage of choosing the legal system which offers more benefits for them. For example, a woman married under both customary law and statutory law may choose to file a suit in the formal state courts, rather than in informal traditional forums, as the former may afford her more rights such as maintenance and a share in matrimonial property. However, the woman's choice may be constrained by lack of access the formal courts due to the high costs, geographical distance, complexity of procedure and other such factors. Such a woman may also be discouraged from filing suit in court by pressure from other family members and the threat of social disapprobation.

5. Recognition of Customary Law by the State and Incorporation into State's Legal System

5.1. Customary Law as a Source of Law in Kenya

The sources of law in Kenya are set out in Section 3 of the Judicature Act.²⁴ Subsection (1) lists these sources, in descending order of importance, as: the Constitution, all other written laws (including certain Acts of the U.K. Parliament), the substance of English common law, doctrines of equity and statutes of general application.²⁵ However, sub-section (1) contains a proviso which states that common law, equity and statutes of general application shall apply only in so far as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary. Section 3 sub-section (2) states as follows:

“The courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law.”

Thus it is clear from the Judicature Act that customary law is a source of law in Kenya. However, the application of customary law under section 3 (2) is limited in a number of ways. Firstly, the application of customary law is restricted to civil cases only, where at least one of the parties is subject to customary law.²⁶ Hence customary law is not applicable to criminal cases. It should be noted that under Section 77 (8) of the former Constitution, a person could not be

²⁴ Cap. 8.

²⁵ These latter English sources apply as they subsisted as at 12th August 1897.

²⁶ This would mean a Kenyan of African origin or anyone else who has subjected themselves to customary law.

convicted of a criminal offence unless that offence was defined, and the penalty for it prescribed, in a written law.²⁷ As customary law is unwritten law, this means that criminal offences found in customary law cannot apply in the Kenyan legal system. Customary criminal offences are therefore not part of Kenyan law.²⁸ The new Constitution of 2010 does not have specific provisions similar to those of section 77 (8) of the former Constitution but, in my view, the principle has not changed.

Secondly, customary law should not be inconsistent with written law. This suggests that where there is a conflict between customary law and a written law, such as a statute or constitutional provisions, then the latter should take precedence. However, this provision has been fraught with problems of interpretation which arose mainly from the proviso to section 82 (4) of the former Constitution. While section 82 (1) provided that no law should make discriminatory provisions either of itself or in its effect (sex being a prohibited ground of discrimination), the impact of that provision was watered down by subsection (4) (b) and (c) of section 82 which provided that the non-discrimination provisions of section 82 (1) would not apply to any law so far as that law made provision:

- (b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.
- (c) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons.

Thus the “claw-back” provision²⁹ of sub-sections (4) (b) and (c) expressly excluded the non-discrimination provisions of the Constitution in matters of personal law, and also allowed for customary law to be applied even where it was discriminatory. This provided ground for judges to rule in favour of customary law over common or statutory law notwithstanding the provisions of the Judicature Act. Hence, in the *S.M. Otieno* case, customary law relating to burial was held to have precedence over common or statutory law. Similarly, in succession matters, although the Law of Succession Act³⁰ clearly stipulates that the Act is to be of universal application to all

²⁷ The only exception to this rule was that a court may punish a person for contempt of law even where the act or omission constituting the contempt was not defined in a written law and the penalty for it was not so prescribed.

²⁸ Under the auspices of the Restatement of Customary Law Project, the government embarked on the restatement and unification of customary criminal offences with a view to their incorporation into the criminal law of Kenya: see Eugene Cotran, *Report on Customary Criminal Offences in Kenya* (Nairobi: Government Printer, 1963) [*Criminal Offences*]. Pursuant to that undertaking, some customary criminal offences were incorporated into the Penal Code (Cap. 63).

²⁹This sub-section is referred to as a “clawback” clause as it takes away with one hand what it has given with another (i.e. gender equality).

³⁰ Cap. 160.

succession matter, judges have in many cases interpreted the Act in such a way as to leave room for the application of customary law, often giving priority to customary law over statutory law, for instance in excluding the rights of daughters to inherit their fathers' estates.

The ambivalence in the Constitution is compounded by the uncertainty in the language of section 3 (2) of the Judicature Act. First, it is not clear whether customary law falls, in order of hierarchy, at the bottom of the ladder as a source of Kenyan law, or whether it should be treated as cross-cutting and outside the hierarchical order. Second, it is also not clear what the term "guided" really means. Does it mean that courts are not bound to apply customary law, or does it mean that courts must always have regard to customary law when making decisions?³¹ The precise meaning of the term "guided" was the subject of much argument in the *S.M. Otieno* case, but regrettably the decision in that case did not make a definitive finding on that question, thus the uncertainty remains.

Happily, the new Constitution of 2010 now deals quite decisively with this issue. Article 2 (4) clearly provides that any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency. This section clearly subordinates customary law to the Constitution and removes the ambivalence in the former Constitution with regard to customary and religious laws in the realm of personal law. Thus customary law cannot now be used to trump the provisions of the Bill of Rights in the new Constitution.

Thirdly, the Judicature Act subjects the application of customary law to the "repugnancy test", that is, customary law must not be repugnant to justice and morality.³² This means that a rule of customary law may not be applied where the court is of the opinion that it offends justice or morality. However, it should be noted that the application of this test is dependent on judicial discretion as to what constitutes justice and morality. In *Wambugi w/o Gatimu v. Stephen Nyaga Kimani*³³ it was held that customary law is applicable under section 3 (2) of the Judicature Act as long as the court is satisfied that the custom, if proved, is not repugnant to justice or morality. On the facts of the case, a custom that operated to bar women from inheritance (and hence discriminated against women) was found not to be repugnant to ordinary notions of justice. However, some judges have expressed disquiet about declaring customary law as repugnant to

³¹ The issue of the status of customary law was at the heart of the famous *S.M. Otieno* case.

³² The repugnancy clause was commonly used in former British colonies. The question has sometimes been raised as to whose standards of justice or morality are to be applied.

³³ [1992] KAR 292 (Court of Appeal).

justice and morality. In *Kamete Ene Ateti Marine v. Mosupai ole Ateti*³⁴ the court was of the view that customs and traditions are time tested and based on wisdom and experience, hence they should not be brushed aside lightly, however tempting it might be to do so, unless there are sound reasons for it, which have to be judicially determined.

5.2 Proof of Customary Law in Kenyan Courts

Since colonial times to the present, customary law has always, by virtue of its being unwritten, been treated as a question of fact which must be proven in court as a matter of evidence. Thus, despite being a source of law, customary law is treated differently from legislation, common law and equity which do not have to be proved in this way.³⁵ This principle was laid down by the Privy Council in the Ghanaian case of *Angu v. Attah*³⁶ where it was stated as follows:

“As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have by frequent proof in the courts become so notorious that the courts will take judicial notice of them.”

The justification for this was the difficulty that colonial courts found in finding out and applying customary law to cases coming before them. The difficulty arose partly from the multiplicity of the different customary laws, partly from uncertainty regarding the limits of operation of customary law in competition or conflict with statutory or religious law, and partly from the fluid nature of customary law itself.³⁷

Under section 51 (1) of the Evidence Act,³⁸ persons who are likely to know of its existence can adduce evidence concerning opinions relating to custom or right. In *Ernest Kinyanjui Kimani v. Muiro Gikanga & Another*³⁹ it was held that where customary law is neither notorious nor documented it must be established for the court's guidance by the party intending to rely on it. The necessity to prove customary law as a matter of fact has onerous implications for women litigants. This is because even though under the rules of procedure a woman has the same capacity as a man to call evidence and rebut it, in practice the people recognized by society as custodians of custom tend to be men (usually elderly). Women are generally not viewed as

³⁴ Nbi. High Court Civil Appeal No. 224 of 1995, cited in William Musyoka, *Law of Succession* (Nairobi, LawAfrica, 2006) at 17.

³⁵ Musyoka, *ibid.* at 286.

³⁶ [1916] Gold Coast Privy Council Judgments (PC) 1874-1928.

³⁷ A.N. Allott, “The Judicial Ascertainment of Customary Law in British Africa” (1957) 20 *Modern Law Review* 244.

³⁸ Cap. 80.

³⁹ [1965] E.A. 735.

knowledgeable in customary law and have to call on male witnesses. Yet many women may not have the financial or social resources to do so. The inability of women to give their perspectives of what constitutes customary law often results in a distortion of the content of customary law, so that courts apply rigid or narrow conceptions of customary law without considering changes that have taken place on the ground or in disregard of the socio-economic context in which a particular customary practice is observed.⁴⁰ For example, the enforcement of the customary norm that women are not entitled to maintenance on divorce fails to recognize that the social structures that previously existed to support women upon divorce no longer exist in modern times.

Under section 87 (1) of the Civil Procedure Act,⁴¹ a court may summon the assistance of competent assessors in any cause or matter pending before it in which questions may arise as to the laws or customs of any tribe, caste or community and such assessors shall attend and assist accordingly. Assessors differ from witness in that they are independent persons appointed by the court. These assessors are members of the local community who are deemed to be knowledgeable about relevant customary law. However, as already observed, knowledge or expertise in customary law is seen as vested primarily in men rather than women, hence such assessors will usually be men. This has detrimental effects on women's claims as the account of custom that the court receives comes from a predominantly male perspective.

The court may take judicial notice that a given customary practice has gained notoriety. Under section 60 of the Evidence Act,⁴² the courts shall take judicial notice of both written and unwritten law, and where the court is called upon to take judicial notice of any fact, it may rely on books and documents produced before it.⁴³ It is in this context that the *Restatements of African Law* take on particular significance. The courts in Kenya have in numerous cases treated these volumes as authoritative statements of customary law. For example, in *Mwathi v. Mwathi*⁴⁴ the Court of Appeal regarded statements contained in the Restatements on Kikuyu customs concerning the distribution of the estate of an intestate as binding or conclusive.⁴⁵ Similarly, in *Gituamba v. Gituamba*,⁴⁶ the same court treated Jomo Kenyatta's *Facing Mount*

⁴⁰ Hellum, *supra* note 19; Stewart, *supra* note 19.

⁴¹ Cap. 21.

⁴² Cap. 80.

⁴³ See also section 41, Cap. 80 and Rule 64, Probate and Administrative Rules .

⁴⁴ [1995-98] E.A. 229.

⁴⁵ See other cases cited in Musyoka, *supra* note 34 at 288.

⁴⁶ [1983] K.L.R. 575.

Kenya,⁴⁷ an anthropological account of the tribal life of the Kikuyu, as conclusive on questions of land inheritance among the Kikuyu. As earlier mentioned, the codification or quasi-codification of customary law has been criticized as having contributed to the ossification of customary law. It is heartening to note that in at least one case, *Atemo v. Imujaro*,⁴⁸ the Court of Appeal sounded a cautionary note against treating the *Restatements* as binding on every issue of customary law and, in recognition of the dynamic nature of customary law, observed that the law in those volumes may not be the same today.

5.3 Courts' jurisdiction in customary law

Unlike some other African countries,⁴⁹ Kenya has no special customary courts. However, the various courts in Kenya have varying levels of jurisdiction in customary law. Under the Constitution, the High Court has original unlimited jurisdiction in all civil and criminal matters. Though not specifically stated, this jurisdiction includes customary law jurisdiction. This means that it may hear any civil matter based on customary law. The Court of Appeal hears appeals from the High Court on all matters, including customary law matters. As the High Court and Court of Appeal are not expected to be experts in customary law, they usually rely on the evidence of witnesses and also on independent assessors to enlighten them on the content of customary law. They also pay high regard to the *Restatements* relating to customary law of marriage, divorce and succession.

Magistrate's courts, comprising resident and district magistrate's courts, are subordinate to the High Court and Court of Appeal. Magistrate's courts have jurisdiction to hear customary law cases⁵⁰, but this jurisdiction is restricted to customary law claims related only to certain matters. Under section 2 of the Magistrate's Courts Act, a "claim under customary law" is defined to mean a claim concerning any of the following matters under African customary law:

- 1) Land held under customary tenure
- 2) Marriage, divorce, maintenance or dowry
- 3) Seduction or pregnancy of an unmarried woman or girl
- 4) Enticement of or adultery with a married woman
- 5) Matters affecting status, and in particular the status of women, widows and children, including guardianship, custody, adoption and legitimacy; and
- 6) Intestate succession and administration of intestate estates, so far as not governed by any written law.

⁴⁷ Jomo Kenyatta, *Facing Mount Kenya: The Traditional Life of the Gikuyu* (Nairobi: Kenway Publications, 1938).

⁴⁸ [2003] K.L.R. 435.

⁴⁹ For example Botswana, Ghana, Zimbabwe.

⁵⁰ Section 9 (a), Magistrate's Courts Act (Cap. 10).

In 1991, special Land Disputes Tribunals were created under the Land Dispute Tribunals Act⁵¹ in order to deal with land disputes occurring in agricultural land within rural areas. These tribunals are constituted by panels of elders who are expected to apply customary law in the resolution of land disputes within their jurisdiction. “Elders” are defined as persons in the community to which the parties belong and who are recognized by custom in such community as being, by virtue of age, experience or otherwise, competent to resolve issues between the parties. In reality, the majority of these elders are older men. The tribunals have jurisdiction to deal with civil disputes relating to the following three areas: the division or determination of boundaries to land, including land held in common; claims to occupy or work land, and trespass to land. However, the administration of these tribunals has been fraught with difficulties such as corruption, bias and exceeding of jurisdiction.

6. Analysis of Key Domestic Case Law that Recognizes Customary Law

There are numerous cases in Kenya that show recognition of customary law, either generally or in relation to specific issues. Recognition of customary law may be positive or negative for women, depending on the effects of such recognition. The following is a selection of cases where customary law has been recognized.

6.1 General Recognition of Customary Law

At the heart of one of the most famous Kenyan cases, the *S.M. Otieno* case,⁵² was the question of the place of customary law in Kenya. S.M. Otieno, a prominent trial lawyer of the Luo community, died intestate in 1986. The respondents, members of the deceased’s Umira Kager clan, sued his widow, Wambui Otieno, seeking to have the deceased buried in his ancestral home in rural western Kenya in accordance with Luo customary law. On the other hand, the widow, who was of the Kikuyu community, wished to bury him in their suburban home in Nairobi in

⁵¹ Cap. 18.

⁵² *Otieno v. Ougo & Siranga* [1987] eKLR. The case generated massive publicity and verbatim accounts were published in Kenyan newspapers daily. The *Daily Nation*, Kenya’s leading newspaper, published a collection of print media articles and court proceedings of the case (Sean Egan, ed., *S.M. Otieno Case: Kenya’s Unique Burial Saga* (Nairobi: Nation Newspapers Publications, 1988). The international press also took a keen interest in the saga; see for instance “African Tradition and Modern Values: Tribal Loyalties are Often at Odds with Nationalism”, *International Herald Tribune*, February 13, 1987; “Kenyan Judge Awards Corpse of Modern Lawyer to Tribe”, *The Washington Post*, February 14, 1987. Scholars from the University of Nairobi published a collection of essays on the case: see J.B. Ojwang & J.N.K. Mugambi, *The S.M. Otieno Case: Death and Burial in Modern Kenya* (Nairobi: Nairobi University Press, 1989). See also Winifred Kamau, “S.M. Otieno Revisited: A View Through Legal Pluralist Lenses” (2009) 5 *Law Society of Kenya Journal* 59 and other works cited in this paper.

accordance with common law. Wambui's lawyers argued that Otieno had, through Christian urbanized life-style, and statutory marriage to a non-Luo woman, forsaken tribal custom for a modern life and that customary Luo burial law therefore did not apply in his case, but that rather, the applicable law was common law. Otieno's clan asserted that, on the contrary, Otieno's birth and upbringing as a Luo was paramount and that therefore customary law applied in the case. Unfortunately, it was not clear which of the two legal systems takes precedence in such a situation.

After drawn-out proceedings, the Court of Appeal finally declared that customary law was the applicable law in the case and consequently ordered that the deceased be buried in his ancestral home according to the customary practices of his clan. The court stated that customary law is the personal law of Kenyan Africans and there is no way an African citizen of Kenya can divest himself of the association with the tribe of his father if those customs are patrilineal, irrespective of the person's choice of lifestyle. Personal law means the law that relates to a person's status or identity and includes the law of marriage, divorce, succession, custody, and burial among others.

The case exemplifies the conflict apparent between customary law on the one hand, and statutory and common law on the other hand. However, the court adopted versions of custom advanced by patriarchal community elders which were biased against women. The ruling in this case had negative implications for gender relations as a woman's right to bury her husband under common law was trumped by customary law. It should be noted that burial is one of the areas of personal where discrimination was allowed by the former Constitution, and the court in this case sanctioned such discrimination. Further repercussions are that the case can also be used as a precedent under the *stare decisis* rule to justify use of customary law to deny women's rights under common law or statutory law.⁵³

6.2 Recognition of customary law in specific areas:

6.2.1 Succession: Although the Law of Succession Act is intended to be the universal law applicable in matters of succession, customary law is to some extent also applicable. As later discussed, some geographical regions of the country have been exempted from the application of the Act and in these regions, customary law is the applicable law relating to succession to agricultural land and livestock. Discretion has also been left to individuals to indicate in their wills any religious or customary law that they would wish to govern the administration of their

⁵³ See Patricia Stamp, "Burying Otieno: The Politics of Gender and Ethnicity in Kenya" (1991) 16 Signs 808.

estates. Customary law is also applicable to estates of people who died before the commencement of the Act in April 1981.

Outside the above situations, there remains controversy as to whether and to what extent customary law is also applicable in succession matters. While some courts have insisted on the exclusive applicability of the Law of Succession Act, other courts have maintained that customary law generally applicable in succession matters, even where there is no express provision for it in the Act. Under this approach, customary law has been applied to deny women the right to inherit their father's or husband's estate, as happened in *Mary Gichuru v. Esther Gachuhi*,⁵⁴ and in *Karanja v. Githara*.⁵⁵ In this regard, courts place much reliance on the assertions in Cotran's *Restatements* on the content of customary law.

Other courts have taken the view that customary law is applicable provided it is not repugnant to justice and morality vide section 3 (2) of the Judicature Act. This was the stance taken in *Wambugi w/o Gatimu v. Stephen Nyaga Kimani*⁵⁶ On the facts of the case, a discriminatory custom that operated to bar women from inheriting her father's land was found not to be repugnant to ordinary notions of justice. Indeed, the custom was held to be a salutary one as it ensured that the land remained in the family.⁵⁷

By contrast, there is a growing body of jurisprudence which espouses the view that customary law should not apply where it offends the principles enshrined in international human rights instruments, such as the and the Additional Protocol to the African Charter on Human and Peoples Rights. For instance, in *Mbinga v. Mbinga* (2006), Lady Justice Khaminwa appealed to the principles of non-discrimination enshrined in international treaties to which Kenya is a signatory, namely the Universal Declaration of Human Rights (UDHR) and Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)CEDAW, to override a customary law that allowed discrimination against married daughters in inheritance matters. In a bold articulation of gender equality, the judge noted that the custom of disinheriting daughters (female children) went against the current jurisprudence in international law which was making a concerted effort to ensure that there was no discrimination on the ground of gender. Kenya was a signatory to general international treaties

⁵⁴ Civil Appeal No. 76 of 1998

⁵⁵ Civil Case No. 2039 of 1998

⁵⁶ [1992] KAR 292 (Court of Appeal).

⁵⁷ See generally Musyoka, supra note 34.

which clearly demanded that all customs and laws which discriminated against a person on the ground of gender must be discarded to ensure that the equality of female persons with that of males was guaranteed. Accordingly the judge declared the discriminatory custom repugnant as mandated by the Judicature Act.

Similarly, Lady Justice Wendoh in *Re Estate of Musyoka* (deceased) (2005) noted that Kamba customary law, which was relied on by one of the parties in a bid to exclude a woman from inheritance, is discriminatory on the ground of sex and contrary to the Law of Succession Act. The judge then proceeded to apply the UDHR, CEDAW, and the Additional Protocol to the African Charter on Human and Peoples' rights notwithstanding the fact that these instruments had not expressly become part of the domestic law of Kenya. She stated that international law is applicable in Kenya as part of our law so long as it is not in conflict with the existing law even without specific legislation adopting them. It should be noted that most of the judges who subscribe to this approach have received gender training under the Jurisprudence of Equality Program (JEP) which was spearheaded by the Kenya Women Judges Association in the early 2000s. Such an approach is laudable and will serve to provide useful precedents for the future. It is further bolstered by the Constitution of 2010 which in Article 2 (5) and (6) expressly provides that the general rules of international law as well as all treaties or conventions ratified by Kenya shall form part of the law of Kenya.

6.2.2 Marriage

By virtue of section 3 (2) of the Judicature Act, customary law is recognized as a system of marriage in Kenya, which is as valid as any of the other systems of marriage. Where a marriage is contracted under customary law, it is customary law that is expected to regulate all aspects of the marriage, such as capacity to marry, age of marriage, requisites of marriage, rights and duties in marriage, etc.

In *Hortensiah Wanjiku Yawe v. Public Trustee*⁵⁸ it was held that the common law presumption of marriage (i.e. marriage by long cohabitation and repute) could apply irrespective of the form of marriage. Hence the presumption could apply even in a customary marriage

⁵⁸ Civil Appeal No. 13 of 1976 (unreported).

which is potentially polygamous. The presumption was in this case applied where the parties had failed to establish evidence proving that they had been married under customary law. The effect of the decision was that the woman applicant was able to claim part of the deceased's estate in her capacity as the deceased's wife under customary law. The decision in this case was followed in a number of subsequent cases, such as *Esther Wanjiku Njau v. Mary Wahito*,⁵⁹ and is now firmly established as a principle.

6.2.3 Matrimonial Property

In *Karanja v. Karanja*⁶⁰ it was held that the English Married Women's Property Act, 1882 (MWPA) was applicable to customary marriages. This ruling was advantageous to women as it meant that women married under customary law could apply to court for apportionment and distribution of matrimonial property. This was contrary to the argument by the respondent husband in that case that customary law did not give rise to the imputation of a trust in favour of the wife in respect of property jointly acquired property between the husband and wife.

6.2.4 Land tenure

The Registered Land Act⁶¹ was passed in 1963 to govern land that had been converted to individual land tenure from communal tenure. Registration under this Act confers absolute proprietorship of the land which extinguishes all non-registrable interests, including interests under customary law such as rights of occupation, cultivation and use.⁶² This is disadvantageous to certain categories of people, such as women, children and younger males as title to land is not normally registered in their names. However, in *Gathiba v. Gathiba*⁶³ and other subsequent cases the concept of customary trust was recognized as a matter of judicial notice. Under this concept, a customary trust is imputed in order to protect customary interests of occupation, cultivation and use, notwithstanding the express provisions of the Registered Land Act. This recognition of customary law interests operates to the advantage of women and other categories of people who would otherwise be disenfranchised from the land.

⁵⁹ [2006] eKLR.

⁶⁰ [1975] K.L.R. 307.

⁶¹ Cap. 300.

⁶² See for instance *Esiroyo v. Esiroyo* [1973] E.A. 388;

⁶³ [1991] K.L.R. (Env. & Land).

7. Challenges of protecting the equality rights of women in relation to customary law in Kenya.

There are a number of areas where customary law poses a challenge to the protection of equality rights of women. These relate mostly to personal law areas of marriage, divorce and inheritance (succession) as well as in property relations.

7.1 Conflict of Marriage Law Systems

Due to the pluralistic nature of Kenya's personal law regime, marriage and divorce are regulated under four different legal systems, namely customary,⁶⁴ statutory,⁶⁵ Islamic⁶⁶ and Hindu.⁶⁷ In addition, Kenyan law also recognizes cohabitation relationships through the judicial application of the common law presumption of marriage.⁶⁸

The problem of multiplicity of legal regimes comes not from the mere fact of multiplicity but because of the differential rights and duties arising under each legal regime. Each system has its own rules about various aspects of marriage such as age of consent, whether the marriage is monogamous or polygamous, and the rights and obligations of the parties. This means that a person's rights and obligations with respect to marriage and divorce can only be ascertained with reference to the system under which the marriage was established, thereby making it almost impossible to apply a uniform standard. In general, women in customary marriages are disadvantaged in the event of breakdown of marriage or death of spouse. It should also be noted that one aspect of personal law may impact on another aspect; for instance marriage, succession and property relations are inextricably linked.

⁶⁴ Customary marriage is governed by the customary laws of the various ethnic communities in Kenya. Though customary norms of marriage are not uniform among all Kenyan communities, there are some basic similarities. For instance, all customary marriages involve the union of not only the individual parties but of their families. Such marriages are potentially polygamous and usually require payment of bridewealth.

⁶⁵ Statutory marriages are governed by the Marriage Act which is the principal enactment dealing with marriage. Marriages under this Act are open to all persons irrespective of race or religion. The African Christian Marriage and Divorce Act (Cap. 151) provides a simple procedure for the celebration of marriage by Christian Africans and for the conversion of a customary marriage into a statutory monogamous marriage. Marriages under the statutory system are intended to be strictly monogamous and do not allow for bigamy or polygamy, both of which are prohibited and invalidated (see ss. 35 (1) and 37 of the Marriage and s. 5 of the African Christian Marriage and Divorce Act. The Matrimonial Causes Act⁶⁵ contains the law of divorce and matrimonial causes relating to persons married under the two above-mentioned Acts.

⁶⁶ Islamic marriages are celebrated under the Mohammedan Marriage, Divorce and Succession Act (Cap. 156) which applies the Islamic (sharia) law of marriage, divorce and succession to people of the Islamic faith. Islamic marriages are potentially polygamous up to a maximum of four wives at a time.

⁶⁷ Marriages between people of the Hindu religion are governed by the Hindu Marriage and Divorce Act (Cap. 157). Such marriages are monogamous. Divorce and related matters are subject to the Matrimonial Causes Act.

⁶⁸ This is by virtue of section 3 (1) of the Judicature Act (Cap. 8) which provides for the application of the common law of England in force as at 12 August 1897.

The multiplicity is compounded by the complex intersection between the systems, owing largely to the fact that people do not generally keep within one system of marriage but constantly traverse the boundaries. For instance, most Kenyan Africans who marry in church (under statute) at the same time go through some customary rites, such as negotiations for exchange of bridewealth. Hence the same parties contract a customary marriage and then follow it by a statutory marriage or vice versa. The question may then arise of which system of law governs the relationship, i.e. whether statutory law or customary law. This results in lack of clarity as to which system of marriage governs their relationship, and hence what rights and obligations obtain in the relationship.⁶⁹ Conflict also arises where a man marries a woman under customary law and then subsequently enters into a marriage with another woman under statute. Conversely, a man may marry a woman under statute and then go on to marry another woman (or women) under customary law. Both the Marriage Act⁷⁰ and the African Christian Marriage and Divorce cover these two situations and invalidate and criminalize such subsequent unions.⁷¹ However, the penal sanctions are breached with impunity and are hardly ever prosecuted.

Section 45 (4) of the new Constitution of 2010 retains the recognition of multiple marriage and family law systems but only to the extent that such marriages or systems of law are consistent with the Constitution. This would include the Bill of Rights and all the equality and non-discrimination provisions. Section 45 (3) provides that parties to a marriage are entitled to equal rights at the time of, during and at the dissolution of the marriage. Although the new Constitution does not explicitly address the question of how to resolve conflicts between different marriage systems, it at least points to itself as the standard. Any conflict would thus have to be resolved in light to constitutional principles, including equality and non-discrimination.

7.2 Age of Marriage

Early marriage is sanctioned by customary law which does not prescribe a minimum age of marriage of girls, provided they have reached puberty. It is common for girls, some as young as 12 years of age, to be married off, usually to much older men. This practice has a negative impact on young girls, as it adversely affects their health, education and general socio-economic

⁶⁹ E.g. in *Ayoob v. Ayoob* (Nbi Civil Appeal No. 34 of 1967 (unreported); *Mwangi & Others v. West* [1976] K.L.R. 203.

⁷⁰ Cap. 150.

⁷¹ See sections 35 and 37, Marriage Act (Cap. 150). See also section 5, African Christian Marriage and Divorce Act (Cap. 151).

position. Early marriage offends statutory provisions relating to age of marriage and capacity to marry. For instance, the Marriage Act and the African Christian Marriage and Divorce Act generally stipulate the age of marriage to be 18 years for marriages conducted under those statutes.⁷²

However, the most definitive provision on the age of marriage is in the Children Act, 2001.⁷³ Section 14 provides for protection of children from early marriage, female circumcision and other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development. Section 2 defines early marriage as marriage or cohabitation with a child. Under the same section a 'child' is defined as any human being under the age of 18 years. This effectively prohibits the marriage of persons under the age of 18 even where such a person is contracting a marriage under custom. There is thus a conflict between the provisions of the Children Act and the applicable customary rule and practice. One way of dealing with the above conflict would be to appeal to the provisions of section 3 (2) of the Judicature Act which provides that customary law is not applicable where it is inconsistent with written law. Hence customary law (unwritten law) could be held to be subject to the Children Act (written law).

The new Constitution of 2010 provides that every adult has the right to marry a person of the opposite sex, based on the free consent of the parties. The reference to "adult" means that only persons who have attained 18 years of age have the right to marry, effectively excluding marriage of minors. Such marriage is based on the free consent of the parties, this outlaws marriages where one of the parties is forced to marry, as happens in marriages involving young girls.

7.3 Maintenance

Under the Subordinate Courts (Separation and Maintenance) Act⁷⁴ a woman is entitled to maintenance for herself and her children upon separation from her husband. However, the Act expressly states that its provisions shall apply only to persons who have contracted monogamous relationships under the prevailing marriage statutes.⁷⁵ Customary marriages are therefore outside

⁷² However, it should be noted that both statutes nevertheless contemplate marriages of persons below 18 provided there is written consent from a parent or guardian, or in the alternative from a minister of religion, judge or registrar (see ss. 19 and 21, Cap. 150 and s. 8, Cap. 151).

⁷³ No. 8 of 2001.

⁷⁴ Cap. 153.

⁷⁵ See section 15, Cap. 153.

the scope of the Act. This provision bars women in customary marriages from applying for maintenance and effectively results in discrimination against such women.

It should be noted that under customary law generally, a woman is not entitled to maintenance from her husband upon separation or divorce, as she is expected to return to her natal family and obtain maintenance from there. Similarly, custody of children is under customary law expected to be exercised by the father; hence a women with actual custody of her children does not under customary law receive maintenance from the children's father.

7.4 Cohabitation

Cohabitation refers to the practice where a man and a woman live together in a conjugal union without formalizing the union under any of the four systems of marriage. Due to socio-economic changes, there has been growing informality in marital relationships and a rise in the number of cohabitation relationships. Often, parties engage in long periods of cohabitation and procreation before they have a wedding, if ever, and bridewealth is normally paid over a period of time. This is in keeping with the processual nature of African customary marriage, where marriage is not usually viewed as a single event but as consisting of different phases. Cohabitation is often the start of a process that may eventually culminate in a marriage proper, whether customary or statutory.

Variouly described as “living together”, “come we stay”, or “trial marriage”, cohabitation relationships traverse and defy conventional categorizations of family law systems. Kenyan statute law is silent on the issue of cohabitation. However, Kenyan courts have the power to make a legal “presumption of marriage” whereby the relationship is treated for all intents and purposes as a marriage, with all the attendant legal consequences.⁷⁶ In *Yawe v. Public Trustee*,⁷⁷ the court held that the presumption of marriage may be applied to customary marriages.

In Kenya, there is an intricate connection between cohabitation, customary marriage and presumption of marriage. As customary marriages are not registrable it is usually a question of fact, proved by oral evidence, whether parties who are cohabiting are married under custom or not. The question of how a relationship is defined is important as it has distributive consequences. For instance, the issue of whether a woman is entitled to maintenance and

⁷⁶ The common law presumption of marriage has been applied by virtue of section 3 (1) of the Judicature Act which provides for the common law of England as a source of law in Kenya. See *Yawe v. Public Trustee* (Civil Appeal No. 13 of 1976).

⁷⁷ Civil Appeal No. 13 of 1976 (unreported).

custody of children will depend on whether or not she is deemed to be married. Hence the presumption of marriage is usually invoked in cases where one party asserts the existence of a customary marriage, while the other party denies it. Usually the party denying the existence of a customary marriage argues that the requisite formalities or rituals were not performed, and that therefore the relationship has no legal status.⁷⁸

In the past the courts' approach has been to insist that all the requisite formalities for customary marriage must have been fulfilled before making a declaration of marriage. Courts often relied on Cotran's *Restatements of Marriage and Divorce*. A good example is *Case v. Ruguru*⁷⁹ where it was held that no marriage subsisted between the two people as *ngurario*, a ceremony involving the slaughtering of a ram under the applicable customary law, had not been performed in accordance with custom. The courts' stringent approach has been detrimental to women in cohabitation relationships as it has meant that such women could not avail themselves of the benefits of marriage, such as the right to inheritance of their husbands' estates, a share in the matrimonial property or maintenance from their husbands.

However, there has been a more recent trend, starting from 1976 in *Yawe v. Public Trustee*⁸⁰ where courts have been more willing to apply the presumption of marriage to cohabitation relationships even where the requirements for customary marriage have not been met. For instance, in *Adongo v. Adongo*⁸¹, the court applied the presumption of marriage in order to hold that a woman in a cohabitation relationship was married to the deceased and as such was a wife for purposes of the Act, thereby enabling the woman to have a share of the deceased's estate. However, while the courts' change in attitude is laudable, the absence of clear legal provisions regarding the application of the presumption means that women still have to rely on judicial discretion, which is changeable and hence unreliable.

There is need to establish a system for registration of customary marriage, so that women's status in customary marriage may be clear. There should also be statutory provisions for application of the presumption of marriage after a prescribed period, e.g. two years, in order to minimize the uncertainty as to whether a person is married or not. These reforms have been proposed in the current Marriage Bill of 2007.

⁷⁸ See for instance *Zepporah Wairimu v. Paul Muchemi* (Civil Case No. 1280 of 1970) [unreported]; reprinted in Eugene Cotran, *Casebook on Kenya Customary Law* (Nairobi: Professional Books Limited, 1987) 52 [*Casebook*].

⁷⁹ [1970] E.A. 55.

⁸⁰ Civil Appeal No. 13 of 1976 (unreported).

⁸¹ Cite. 2006

7.5 Divorce

Under customary law in most African communities, marriage was viewed as the union, not just of two individuals, but of two families and clans. The preservation of marriage was therefore of supreme importance, and divorce was discouraged and made difficult. Divorce was also not desirable as it meant that the wife's family had to return bridewealth to the husband's family. In customary law relating to divorce, women are disadvantaged relative to men. First, while there is a whole array of grounds upon which a man may divorce his wife, such as infidelity, insubordination, childlessness, or misbehavior, a woman can only cite cruelty and failure to maintain as grounds for divorce. Upon divorce, the woman is not entitled to custody of the children, who remain with the father's family. The woman is also not entitled to maintenance from her husband, as it is expected that she will return to her natal family, who are supposed to provide her with maintenance.

However, such assumptions are untenable in light of modern day realities as there is usually no land or resources available for the woman when she returns to her natal family. Divorced women are usually often left to fend for themselves. As separation and divorce usually occur in the context of domestic violence, where the woman and the children are often thrown out by an abusive husband, the woman usually has no choice but to take care of the children singlehandedly.

7.6 Matrimonial Property

The main problem in Kenya relating to women's rights to matrimonial property upon divorce is that the law on this subject is grossly inadequate. Parliament has not enacted comprehensive legislation to deal with the division or allocation of property between spouses at the dissolution of marriage. Due to this lacuna, the Kenyan judiciary has resorted to the use of an old English statute, the Married Women's Property Act, 1882 (MWPA). This Act is a procedural (rather than substantive) law that recognizes a married woman's capacity to hold property in her own right and transact in it.⁸² Section 17 of the MWPA provides that "in any question between husband and wife as to the title or possession of property, either of them may apply to the High court or a county court and the judge may make such order with respect to property in dispute ... as he thinks fit". Kenyan Courts have innovatively interpreted this section of the MWPA to develop rich jurisprudence in the division of matrimonial property between husband and wife.

⁸² This changed the common law position where a married woman's legal identity was subsumed into her husband, and hence she had no capacity to hold property in her own right.

The case of *I v. I*⁸³ was the first to establish that the MWPA was applicable to marriages solemnized in Kenya. The respondent had sought a declaration under S 17 of the MWPA claiming a half share in the proceeds of the sale of a house that the parties held in joint registration. The applicant husband objected to the application of the Act in determining the parties' respective interests in the proceeds. He relied on the proviso in section 3 (1) in the Judicature Act (reception clause) which states that English law shall apply only in so far as the circumstances in Kenya permitted. The court observed that the circumstances of Kenya and its inhabitants do not generally require that a woman should not be able to own property.

In *Karanja v. Karanja*⁸⁴ the High Court confirmed that the MWPA was a statute of general application which could apply to a marriage solemnized under customary law. The court was therefore prepared to impute a trust in favour of the wife in respect of matrimonial property whose acquisition which she had contributed to indirectly through payments for household and other goods.

However, the continued use of the MWPA, is unsatisfactory for various reasons. Quite apart from its antiquity, the Act is inadequate as it contains no substantive provisions relating to matrimonial property. For instance, there is no definition of matrimonial property, neither are there any clear guidelines about the rules or principles to be used in apportioning matrimonial property. Matters are left entirely to the judge's discretion. The question of the wife's contribution, direct or indirect, monetary or non-monetary, has usually been in issue.

In Kenya, the courts' interpretation of these issues has been inconsistent. For instance, in *Karanja v. Karanja*, the wife's indirect contribution through purchase of household items with her salary was taken as giving rise to an imputation of a trust in her favour. As already mentioned, this case is also important as it applied the MWPA to a customary marriage. In *Kivuitu v. Kivuitu*⁸⁵ (decided in 1991) the court went even further to hold that a woman's indirect contribution, both monetary and non-monetary (through wifely duties) were sufficient to entitle her to a share of family property. The encouraging trend was continued in *Nderitu v. Nderitu*⁸⁶ where the Court awarded 50% share of the matrimonial property to the wife.

⁸³ [1971] E.A. 278.

⁸⁴ [1976] K.L.R. 307.

⁸⁵ [1985] L.L.R. 1411 (Court of Appeal).

⁸⁶ [1997] L.L.R. 606 (Court of Appeal).

However, the gains made in these cases were reversed in *Kimani Vs. Kimani Njoroge*⁸⁷ which held that there must be strict proof of monetary contribution and that no presumption of a trust should be made. The reversal of gains continued in *Echarya v. Echarya* (2007) where the court disregarded unpaid contribution to a marital household, such as childbirth, childcare, cleaning, and agricultural labor, in dividing matrimonial property at divorce. The court's insistence on proof of monetary contribution is onerous for women, particularly those in rural areas who are not in salaried employment but whose work in tilling land and rearing livestock, though difficult to quantify in monetary terms, is nevertheless significant.

A further problem for women in customary marriages is that in order to bring themselves within the ambit of the MWPA, they have to prove that they are married. In the absence of a marriage certificate, as their marriages are not registered, this is a difficult task and unduly puts them at a disadvantage in comparison with women married under statutory law. There is also the cultural assumption in customary law that women cannot own property, particularly land.

All of this points to the need for clear legislation on these matters. The proposed Matrimonial Property Bill, 2007 seeks to introduce substantive law and clear guidelines on apportionment and distribution of matrimonial property. Article 45 (3) of the Constitution of 2010 that recognizes equal rights of the parties to a marriage at all stages, including dissolution, will hopefully give impetus to legislative reform in this area.

7.7 Succession

Kenya's law of succession is characterized by plurality. Currently, there are three regimes of succession law that apply in Kenya, namely statutory law, customary law, and Islamic law.⁸⁸ The main challenges relating to women's rights arise from the conflict of such laws and the divergent applications of customary law in succession matters. It should be noted that the law of succession is intricately connected to the law of marriage and divorce and property law in general. Hence, conflict in these areas are likely to affect the application of the law of succession.

In colonial times, there were separate regimes of succession depending on the race and religion of the individual concerned. Generally speaking, Africans were subject to customary law (even where they

⁸⁷ 1997] L.L.R. 553 (Court of Appeal). The Appeal Court remitted the case for fresh hearing by the High Court as the trial judge had exhibited manifest bias against women.

⁸⁸ Islamic law of succession is applied by virtue of the Mohammed Marriage, Divorce and Inheritance Act (Cap. 156). Under this Act, the Kadhis' courts have jurisdiction to deal with any disputes between Muslims relating matters of inheritance, among other personal law matters. Islamic law of succession is beyond the scope of this paper.

had converted to Christianity and married under statute), Europeans were subject to statutory law, while Muslims and Hindus were governed by their respective religious laws. Under customary law in Kenya, succession of property is patrilineal, that is through the male line.⁸⁹ The main features of customary law of inheritance include communal holding of land and property, supremacy of males (particularly the eldest son), and general exclusion of women from inheriting, particularly land. Customary law is characterized by patriarchal relations which, when interconnected with capitalism (for instance the individualization of title to land), has resulted in the general exclusion of women from inheritance, particularly that of land.

Traditionally men owned land and livestock while women could only own movable assets, such as cooking utensils and farming implements. The general rule is that a man's property is distributed equally among his sons. Daughters do not inherit any property from their father, as it is expected that they will get married and enjoy the property of their husband. Unmarried daughters may obtain cultivation rights over a portion of land, but on their marriage or death, such land would be taken over by their brothers. Where a man has only daughters and no sons, his property is divided up amongst his brothers. Widows have a right to be maintained and to use part of the deceased's land for their own needs during their lifetime, but they do not have absolute rights to the property and such rights cease upon their remarriage. There is also the idea that women are themselves property to be owned, rather than legal subjects who can own property in their own right.⁹⁰ In many Kenyan communities, there is the practice of levirate marriage where, upon a husband's death, the widow gets married to the deceased's brother. This is done in order to perpetuate the deceased's line and to provide for maintenance of the widow and the deceased's children.

However, there is some indication of changes in customary norms and practices over time to accommodate new realities. There are therefore examples of changes in customary practices that allow women to inherit land, for instance in Murang'a District in central Kenya.⁹¹ Research also shows a growing acceptance that an unmarried woman may in some cases inherit from her father, particularly where a daughter have been taking care of her father in his old age⁹².

⁸⁹ Most of the ethnic communities of Kenya are patrilineal, with a few exceptions such as the Digo and Duruma. However, even these have shifted towards patrilineage as a result of contact with Islam.

⁹⁰ Patricia Kameri-Mbote, "Gender Dimension of Law, Colonialism and Inheritance in East Africa: Kenyan Women's Experiences", IELRC Working Paper 2001 <<http://www.ielrc.org/content/w0101.pdf>> (last accessed on 30th December 2010).

⁹¹ McKenzie, *supra* note 22..

⁹² Nyamu, Property Relations, *supra* note 21.

In 1968, the Commission on the Law of Succession recommended that there should be a uniform law of succession. Pursuant to the Commission's recommendations, a Law of Succession Act⁹³ was passed in 1978 which came into operation in 1981. This law sought to unify the different systems of succession, and was intended to apply to all people in Kenya irrespective of race or religion. Another goal of the Act was to promote the equal status of women in Kenyan society.

The Act is based on English principles of succession and deals with both testate and intestate succession. It proceeds on the assumption of individual ownership of property, the right of a spouse to succeed to the deceased's estate, and equality of male and female children on succession irrespective of their marital status. Thus the Act does not make a distinction between the rights of sons and daughters to inherit their parents' estates, whether comprising movable or immovable property. This goes counter to the assumption in customary law that women do not generally own or inherit land and that daughters (particularly married ones) do not inherit their father's estate. The Act therefore seeks to be gender-neutral in its application.⁹⁴

Section 2 (1) of the Act categorically states that, except as otherwise expressly provided in the Act, the provisions of the Act shall have universal application to all cases of testate and intestate succession to the estates of persons dying after the commencement of the Act.⁹⁵ However, though the Act was intended to provide for a uniform system of succession, in reality this did not happen. In 1991 Muslims were exempted from the application of the Act⁹⁶ on the argument that the Act embodied secular principles which were contrary to Islamic teachings contained in the Koran and, further, that succession for Muslims was already adequately regulated under the Koran.⁹⁷ Further, certain geographical regions are exempted from the application of the Act in relation to intestate succession of agricultural land and livestock; customary law is the applicable law for those regions.⁹⁸ The Act also provides that a person when making a will is at liberty to indicate that his or her estate will be governed by customary

⁹³ Cap. 160.

⁹⁴ However, there is differential treatment of widows and widowers in section 35 of the Act. While widows acquire only a life interest in the property of their deceased husbands, widowers acquire an absolute interest, which they can transfer and also pass on through inheritance. In addition, a widow loses her life interest in the property if she remarries. A widower continues to enjoy the inheritance regardless of his marital status.

⁹⁵ The substantive provisions of the Act do not apply to persons who died before the coming into operation of Act.

⁹⁶ *Vide* L.N. 21 of 1990.

⁹⁷ This source of law is based on the teachings of the Quran. Under the Mohammedan Marriage, Divorce and Inheritance Act (Chapter 156), the Kadhi's courts have jurisdiction to deal with any disputes between Muslims relating matters of inheritance, among other personal law matters.

⁹⁸ *Vide* s. 32. These areas include Wajir, West Pokot, Turkana, Tana River, Kajiado, Garissa, Marsabit, Isiolo, Mandera and Lamu. In general, the people living in these gazetted areas adhere to their traditional way of life to a large extent.

or religious law. Thus the Act reserves the application of customary law in certain situations. The Act also gives recognition to certain aspects of African culture, for instance by making provision for inheritance by members of the extended family with a much expanded list of consanguinity relationships beyond the nuclear family.⁹⁹ Provision is also made for administration of estates of polygamous families, which usually arise under customary marriages.

A number of problems have arisen in the operation and interpretation of the Law of Succession Act which have a bearing on customary law. As already mentioned, the Act by section 32 excludes certain gazetted geographical areas from the application of the Act and provides for application of customary law (i.e. the law or custom applicable to the deceased's community or tribe) in those areas. Under the former Constitution, the exemption of customary personal law in section 82 (4) from non-discrimination protections meant that a woman who felt unfairly treated in a succession matter where customary law was applied had no opportunity for redress under the Constitution. Now the new Constitution such a woman would be able to rely on the recognition of equal rights in marriage (Article 45 (2) and the subordination of customary law to the Constitution (Article 2 (4) in order to apply for redress.

Another problem with the exemption in section 32 of the Law of Succession Act is that the Kenyan courts have interpreted this section in divergent ways. The section specifies that the exemption applies to geographical areas gazette by the Minister. This means that only areas so gazetted are affected by section 32. However, some courts have taken it for granted that customary law is the applicable law in relation to agricultural law, without first finding out whether the land in question has been gazetted.

A further issue arises due to conflict of marriage laws owing to the interaction of different marriage systems. As previously discussed, people are constantly traversing the boundaries between the various marriage systems. In 1981, the Law of Succession Act was amended to allow a wife married under customary law but whose husband had contracted a previous monogamous marriage (contrary to marriage laws) to be considered a wife for purposes of the Act. This was done by section 3 (5), which provides as follows:

“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 subsequent or previous marriage to another woman, nevertheless a wife for the

⁹⁹ The list includes step-brothers and step-sisters, half-brothers and half-sisters, grandparents and step-grandparents, among others.

purpose of this Act... and her children are accordingly children within the meaning of this Act.”¹⁰⁰

The above provision is in direct contravention of both the Marriage Act and the African Christian Marriage and Divorce Act, which invalidate any customary marriage contracted subsequent to a statutory marriage. Section 3 (5) amounts to a sanctioning of a situation after the man’s death that would have been unlawful during his lifetime. Although the provision may be seen as an attempt to recognize the reality on the ground, where many men marry their first wives under statute and then proceed to marry other women under customary law (or vice versa), it has proved to be unjust to the first wife, who is forced to share her husbands’ with women who have come into the relationship subsequently, and whose existence is often not discovered until after the man’s death. The subsection also assumes that all the family property belongs to the man for distribution to his wives and fails to give recognition to the contribution that the first wife may have made to the acquisition of the property.

The courts have taken different approaches to the issue of applicability of customary law, with some judges taking the stance that the Law of Succession Act is the exclusive law relating to succession matters.¹⁰¹ Other judges have been of the view that customary law is generally applicable to succession matters, except where such customary law is repugnant to justice and morality.¹⁰²

8. Opportunities for advancing women’s rights in relation to customary law in Kenya.

Up till now, the discussion has focused on the challenges that customary law poses to the attainment of women’s human rights in Kenya. This section now explores opportunities or possibilities that customary law may present for the advancement of women’s human rights.

One useful way of approaching customary law is to recognize the cultural roots of customary law and the traditional values imbued within it. One of the values emphasized in African traditional societies was the inherent dignity of the individual within the group. Such dignity called for respect in all dealings with the community. In this regard, women were held in special esteem because of their roles as mothers and nurturers of life. In some societies, some women were highly honoured as queen mothers and advisers who wielded great influence and whose opinions were highly regarded. These notions of dignity and respect for women can be

¹⁰⁰ This sub-section was inserted by Act No. 10 of 1981.

¹⁰¹ See e.g. *Rono v. Rono* [2005] E.A. 363.

¹⁰² See e.g. *Wambugi w/o Gatimu v. Stephen Nyaga Kimani* [1992] K.A.R. 292.

drawn upon and applied in the modern context in the quest for gender equality and protection of women's rights. For instance, these values may be used to challenge practices that are oppressive to women.

Similarly, the traditional African philosophy of Ubuntu¹⁰³ emphasizes the interdependence of everyone in society and the need for mutual respect and consideration. The Ubuntu philosophy offers us an understanding of human beings in relation with the world.¹⁰⁴ According to Ubuntu, there exists a common bond between us all and it is through this bond, through our interaction with our fellow human beings, that we discover our own human qualities. Ubuntu can be applied to women's rights in a positive way to reinforce the idea that women's well-being is for the good of society and that therefore women's interests should be advanced.

It should also be recognized that customary law in some cases gave more entitlements to women than contemporary formal law. For example, under customary law, a woman was entitled to user and occupation rights in the family property. Further, certain food crops growing on land, such as beans and potatoes, belonged to the woman. These traditional entitlements have been adversely affected with the introduction of formal laws providing for individual land tenure as land titles are in the vast majority of cases vested in the man as the head of the household.

An attribute of customary law that presents opportunities for women's rights is the fact that it is dynamic and flexible and thus adaptable to changing circumstances. There is need to empower women to leverage this dynamism and flexibility to their advantage, and to influence the development of customary law in a way that is more responsive to women. Women can utilize their particular roles or areas of authority to help shape customary law. For instance, in some Kenyan communities, ailing men whose daughters have taken care of them have given those daughters a share in their property, despite the prevailing customary norm that daughters are not entitled to inherit their fathers' property.¹⁰⁵ In some parts of the country, widows have been able to use their customary law position as *muramati* (trustees) to make decisions regarding apportionment of their husbands' estates.¹⁰⁶

9. The Constitution and Customary Law and Women's Rights

¹⁰³ Ubuntu is a Zulu term that may be restated as "Umuntu Ngumuntu Ngabantu", which means that a person is a person through other persons.

¹⁰⁴ The word 'Ubuntu' and its derivatives originate from the Bantu languages of Africa.

¹⁰⁵ See Nyamu, Property Relations, *supra* note 21.

¹⁰⁶ See McKenzie, *supra* note 22.

Before the adoption of a new Constitution in August 2010, the constitutional position in Kenya with regard to customary law was inconsistent and there was no commitment to gender equality. The former Constitution contained a Bill of Rights (Chapter V) which provided protection for the fundamental rights of every person in Kenya irrespective of race, tribe, creed or sex, among other grounds. Sex was only added as a ground of discrimination in 1997. There was also a prohibition, contained in section 82 (1), against any law that was discriminatory either of itself or in its effect. However, these protections were watered down by the provisos to section 82 (4), which made the following exceptions as follows: (*inter alia*):

“Sub-section (1) [of section 82] shall not apply to any law so far as that law makes provision:

(b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.

(c) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons.

Thus sub-sections (4) (b) and (c) expressly excluded the non-discrimination provisions of the Constitution in matters of personal law and also allowed for exclusionary application of customary law even where it was discriminatory. This provision had important implications for the human rights of women as the listed areas of personal law are the very areas where customary norms and values play a significant role and where women need protection from discriminatory cultural practices. The implication was that sex discrimination in these areas was permissible and that a law that discriminated on that basis would not be deemed unconstitutional. In *Mukindia Kimuru v. Margaret Kanario*¹⁰⁷ the Court of Appeal (the highest court in Kenya) affirmed that section 82 of the Constitution sanctions exclusion of daughters from inheritance of their fathers' estate.

By contrast, the Constitution of 2010 represents major victories for women's human rights. This is seen both in its general orientation and in its specific provisions. To start with, the national values and principles of governance under the Constitution include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized. Secondly, the Constitution explicitly provides for gender equality and non-discrimination. Under Article 27 (1), every person is equal before the law and has the right to equal protection and equal benefit of the law. Equality includes the full and equal enjoyment of

¹⁰⁷Nyeri Court of Appeal Civil Appeal No. 19 of 1999 (unreported).

all rights and fundamental freedoms.¹⁰⁸ Article 27 (3) provides that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. Under Article 27 (4) and (5), neither the State nor any person is allowed to discriminate, whether directly or indirectly against any person on any ground, including sex, pregnancy, marital status or dress, among others.¹⁰⁹ For the first time, anti-discrimination provisions target not just the State but also non-State persons. This enables women to obtain redress from individuals, groups and corporate bodies in relation to discriminatory action.

The Constitution also recognizes the principle of affirmative action. In order to give full effect to the realization of the rights guaranteed under Article 27, the State is obliged to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.¹¹⁰ It should be noted that women have been recognized as a category of vulnerable or marginalized groups and an obligation is imposed on all state organs and public officers to address the needs of such vulnerable groups.¹¹¹

Another important provision is the principle articulated in Article 27 (8) that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender. The State is enjoined to take legislative and other measures to implement this principle. This principle is significant for women as it ensures that they are guaranteed at least one-third representation in elective or appointive bodies in the public sector. This would result in enhanced opportunities for participation and decision-making in a manner that ensures that women's interests are articulated and taken into account.

Article 2 (1) of the Constitution declares the supremacy of the Constitution and states that the Constitution is binding on all persons and all State organs at both levels of government. Under Article 2 (4) any law, including customary law, that is inconsistent with the Constitution, is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid. This provision clearly subordinates customary law to the Constitution and enables any conflicts between customary law and the Constitution to be resolved in favour of the Constitution, including the Bill of Rights and the principles of non-discrimination and

¹⁰⁸ Article 27 (2).

¹⁰⁹ The other grounds are race, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, language or birth.

¹¹⁰ Article 27 (6).

¹¹¹ Article 21 (3) as read together with Article 260 which defines "marginalised group" to mean a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4). Some of the grounds of discrimination in that clause relevant to women include sex, pregnancy, marital status and dress.

equality. This is a welcome departure from the previous position where such conflicts could not easily be resolved through the Constitution. However, the new Constitution is silent on the question of conflict between customary law and other laws. In such cases, in my view it would seem that Section 3 (2) of the Judicature Act (which subordinates customary law to written law) would continue to apply, with the added safeguard that all such law has to be interpreted through the prism of constitutional principles of non-discrimination, equality and others.

For the first time there is constitutional recognition of alternative forms of dispute resolution. Art. 159 provides for the promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. Traditional dispute resolution mechanisms usually utilize localized norms drawn from customary law and customary practices. The recognition of these mechanisms is significant as they are usually the most accessible form of dispute resolution for most women, particularly in rural areas. This is because the formal courts are for the most part outside the reach of the majority due to the high financial costs, geographical distance, complex procedures, unfamiliar language, among other hurdles. This recognition can provide a basis for formulation and implementation of (policy and legislation to regulate the operations of these forums.

It should be noted that use of traditional dispute resolution mechanisms is subject to some important limitations. Article 159 (3) provides that traditional dispute resolution mechanisms shall not be used in a way that contravenes the Bill of Rights, is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality, or is inconsistent with the Constitution or any written law.¹¹² These limitations on the use of traditional dispute resolution mechanisms are important for women, as women often face discrimination and marginalization in these forums. Subjecting the operations of these mechanisms to the Bill of Rights is especially important as it means that these mechanisms cannot be used in a discriminatory manner or in a manner that offends the principles of gender equality and equity.

The new Constitution attempts to strike a balance between protection of individual rights and freedoms and recognition of group rights, including the right to culture. In Article 11 (1) there is a stated recognition of culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. The State shall promote all forms of national and cultural expression through literature, the arts, and traditional celebrations, among others.¹¹³

¹¹² Article 159 (3) replicates the wording in Article 3 (2) of the Judicature Act relating to limitations in the application of customary law.

¹¹³ Article 11 (2) (a).

Article 44 (1) protects the exercise of language and culture. Hence every person has the right to use the language, and to participate in the cultural life of their choice. Further, a person belonging to a cultural or linguistic community has the right, with other members of that community to enjoy the person's culture and use their language, to form, join and maintain cultural and linguistic associations and other organs of civil society.¹¹⁴ However, no person shall compel another person to perform, observe or undergo any cultural practice or rite.¹¹⁵ This is an important limitation for women as it means that women can now more easily challenge practices that are forced upon them in the name of culture, such as widow inheritance, widow cleansing and female genital surgeries.

The new Constitution retains the pluralistic base of family law by providing for enactment by Parliament of legislation that recognizes marriages concluded under any tradition, or system of religious, personal or family law, as well as any system of personal and family law under any tradition, or adhered to by persons professing a particular religion. This is a recognition of the validity of customary and religious systems of customary law. However, such recognition is only to the extent that any such marriages or systems of law are consistent with the Constitution.¹¹⁶

The above constitutional provisions provide an ample foundation for reform of law and policy on women's rights in relation to customary law. This would include reform in the areas highlighted in this paper including marriage and divorce, succession and property rights.

10. Challenges of cultural relativism and legal pluralism relating to women's rights

One of the key challenges facing efforts to realize women's human rights is cultural relativism. While human rights, including women's rights, are usually justified on the basis that they are universal, inherent and predate all legal systems, there is the counter-argument by cultural relativists to the effect that ethical and social standards reflect the cultural context from which they are derived and that each group should look to their own culture to devise and implement their own notion of rights. Cultural relativists claim that notions of universality are an attempt by Western societies to impose their own cultural standards and values on non-Western societies. Hence, cultural relativists have justified some cultural practices which are generally considered harmful to women and girls, such as FGM, child marriages and widow cleansing, through an appeal to cultural sentiments.

¹¹⁴ Article 44 (2).

¹¹⁵ Article 44 (3).

¹¹⁶ Article 45 (4).

In Kenya cultural relativist ideas have been demonstrated during Parliamentary debates on the Marriage Bill where members of Parliament have on various occasions rejected the bill on the claims that the legislation is un-African and an imposition of western values etc.¹¹⁷ Similarly, during debates prior to the passing of the Sexual Offences Act, 2006, provisions proposing the criminalization of marital rape were rejected on the basis that they went against African culture.

Attempts to criminalize practices that offend human rights standards often result in backlash against the very people sought to be protected or merely drives the practice underground. Therefore although it is important to penalize such practices in order to convey a normative message, there is need to be careful not to take an abolitionist stance without appropriate sensitization and awareness raising. The challenges posed by cultural relativism mean that efforts at reform of formal law must take into consideration the specific cultural context and should avoid approaches that result in polarization between rights activists and traditionalists. There is need for consensus building before attempting to change law. This involves recognition by reformers of the value of customary norms in women's lives and the realization that custom is a source of identity for most people and can be a source of entitlement.¹¹⁸ However, it should at the same time be remembered that culture is not a fixed entity but is constantly evolving and is subject to negotiation and compromise. Some important questions include: who has power to define culture; whose voices are being heard in a culture; who benefits from definitions of culture?

A related challenge for the advancement of women's human rights is that posed by legal pluralism. In a legally plural context, there is co-existence and interaction between multiple legal orders. This means that there are multiple and often overlapping bases for claims. This fosters what Meinzen-Dick and Pradhan call "knowledge uncertainty", meaning that no one in a given situation knows all the applicable legal frameworks and their provisions, thus resulting in partial and fragmented knowledge.¹¹⁹ Thus a woman in a matrimonial dispute may only be aware of customary law as being of relevance, while the lawyer and the court may instead only be cognizant of statutory law. Parties are also often uncertain of which legal framework is

¹¹⁷ Phoebe Asiyo, "Gender Issues and the Legislative Process in Kenya" in Mary Adhiambo Mbeo, & Oki Ooko-Ombaka, eds. *Women and Law in Kenya* (Nairobi: Public Law Institute, 1989) 41.

¹¹⁸ Winifred Kamau, "Law, Pluralism and the Family in Kenya: Beyond Bifurcation of Formal Law and Custom" (2009) 23 *International Journal of Law, Policy and the Family* 133.

¹¹⁹ Ruth S. Meinzein-Dick & Rajendra Pradhan, "Legal Pluralism and Dynamic Property Rights", CAPRI Working Paper, No. 22 (2002) at 13.

applicable in a given situation. Another form of knowledge uncertainty arising from multiple and overlapping legal frameworks is the inability to know or predict how other people or institutions will act.¹²⁰ This is exacerbated by the fact that customary law itself is constantly evolving, thus making it difficult to ascertain its content at any moment, and making such content the subject of contestation and negotiation. Thus the legal terrain is constantly shifting. A major implication for advocates of women's rights is that one cannot reliably depend on formal law (e.g. statutes) and formal institutions (e.g. courts) to secure women's entitlements and must always take into account the other competing and overlapping legal frameworks.

Despite its challenges, legal pluralism, with its inherent flexibility and dynamism, provides women with some valuable opportunities. Where rules and laws are subject to negotiation and re-interpretation and change, there is room for the law to be adaptive in response to changing circumstances. For example, the fluidity of customary law can allow for accounts of customary law that differ from the dominant version. Legal pluralism also offers the possibility of "forum shopping", in which disputants use different normative repertoires in different contexts or forums depending on which law or interpretation of law they believe is most likely to support their claims.¹²¹ The ambiguity and plurality allows for choice and human agency.

Nyamu advocates an approach which she terms 'critical pragmatism' that focuses on context and consequences, and enables women to utilize and develop the opportunities presented by plural normative orders while challenging oppressive ones. This entails taking advantage of positive aspects of both statutory and customary law, while resisting those aspects which are unfair or repressive to women.¹²² However, it should be realized that women are not always in a position to make effective or strategic choices. The process of negotiating the plural legal terrain is hinged on existing power relations, and women are usually disadvantaged as they often lack the knowledge, resources and bargaining power needed to actualize their rights. There is need for establishing effective platforms for negotiation as well as providing external intervention to level the playing field for women.¹²³

A multi-pronged approach is required in efforts to realize women's rights in the context of legal pluralism as no one approach will work on its own. Nhlapo suggests three main strategies that can be used in this struggle, namely conscious law reform, judicial intervention

¹²⁰ Ibid. at 14.

¹²¹ Ibid at 5; Keebit von Benda-Beckman, *The Broken Staircase to Consensus: Village Justice and State Courts in Manangkabau* (Dordrecht, The Netherlands: Foris, 1984).

¹²² Celestine I. Nyamu, "How Should Human Rights & Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?" (2000) 41 *Harvard International Law Journal* 381 ["Human Rights"].

¹²³ Meinzen-Dick & Pradhan, *supra* note 121 at 19.

and internal adjustment and.¹²⁴ Conscious law reform entails taking steps to deliberately change laws to eliminate discriminatory practices in cultural practices, while being sensitive to the complexities of culture and customary norms.¹²⁵ Women's rights groups, civil society NGOs and community based organizations have a crucial role to play in the processes of lobbying for law reform, raising public awareness of issues, and dissemination and public education of the laws once passed.

Judicial intervention involves the formal courts playing a key role in spearheading changes. Judges and magistrates can use a wide range of interpretive tools to do so. For instance, they can appeal to constitutional principles, particularly where a country's constitution has incorporated principles of gender equality, non-discrimination and affirmative action.¹²⁶ Reference may also be made to international human rights standards, such as those in CEDAW or the African Women's Rights Protocol. The repugnancy clause may be used to declare customary laws or practices repugnant to justice or morality, while positive values in customary law, such as dignity and respect for women (as daughters and mothers) may be applied. Even in the absence of enabling constitutional or legislative provisions judges can still be creative and innovative. For example, they can choose to rely on empirical evidence of changing customary practices that reflect the living law, rather than on written accounts of customary law which portray a static customary law. In order to enable judicial officers to play this role effectively, there is need for focused training of judicial officers. Some laudable efforts have already been made in Kenya through the Jurisprudence of Equality Programme (JEP) spearheaded by the Kenya Women Judges Association (KWJA), where a number of Kenyan judges and magistrates have received gender training. It should be noted that under the Constitution of 2010, the Judicial Service Commission is mandated to, among others, prepare and implement programmes for the continuing education and training of judges and judicial officers. One of the principles to guide the Commission in the performance of its functions is the promotion of gender equality.¹²⁷ These provisions provide ample scope for courts to be equipped with knowledge on gender issues, which can potentially be used to make decisions which are more in line with women's human rights. Researchers on gender issues can provide support to courts by undertaking research on living customary law to provide credible empirical evidence of changing customary

¹²⁴ "Culture, Custom and Women's Human Rights"

<http://hrlibrary.ngo.ru/iwraw/culture_custom_womensHR1999.html> (last accessed on 30th December 2010).

¹²⁵ *Ibid.*

¹²⁶ See for example Article 27, Constitution of Kenya 2010.

¹²⁷ See Article 172 (1) (d) and Article (2) (b) of the Constitution.

practices. Once such research is published it may then be deployed as evidence in court, for instance by lawyers and women's rights groups engaging in strategic litigation, including test cases and constitutional challenges of customary practices.

The third strategy, internal adjustment, entails the modification of customs and practices within a particular community.¹²⁸ In this regard, existing cultural structures may be used to effect change in customary law in order to modify discriminatory cultural practice. While this may be a slow process, it is more sustainable in the long run as the change will come from the people themselves. The scope for internal adjustment arises from the dynamic and flexible nature of custom. For example, in Kenya some communities have, with the assistance of local NGOs, adopted an alternative rite of passage for women that incorporates all the valuable cultural teachings and practices but excludes the "cut" characteristic in FGM.¹²⁹ There is therefore need for critical engagement with customary institutions and practices which act as gatekeepers of tradition, such as councils of elders, on issues that impinge on women's rights, such as child marriages, widow inheritance and widow cleansing. In this regard, creation of public awareness on gender issues is critical, using local teachings and interpretations.

It is also important to engage with traditional justice structures which operate alongside the formal justice system. These forums, though not officially sanctioned, are involved in resolution of disputes at the local level, particularly in rural areas, and take up the bulk of cases in the country. Due to difficulties that women face in accessing the formal justice system, which include cost, geographical distance, lack of legal representation and technicalities of procedure, these informal justice structures are often the only accessible and relevant justice system for the majority of women. The advantages of these forums are that they are cheap, geographically accessible, flexible, use non-technical language and procedure, and apply familiar local norms. However, they also suffer from some major shortcomings such as biased and negative attitudes towards women, exclusion of women from decision-making positions and processes, use of inhumane punishments and ignorance of human rights principles. It therefore becomes necessary for women to be able to address the content of customary law in that context, for instance by drawing on customary principles that are supportive of women and giving alternative accounts of custom. Addressing the content of customary law would at the same time feed into the interpretation of customary law in the formal judicial system.

¹²⁸ Supra, note 126.

¹²⁹ See postings at <http://fgmnetwork.org/gonews> <last accessed on January 13, 2011.

There is also need to democratize informal justice systems by increasing women's representation in these forums. The agents of dispute resolution also need gender sensitization and education on human rights principles. In the Turkana region in Kenya, some inroads have been made by women who, after receiving paralegal training from a local NGO,¹³⁰ have gained credibility in their communities and succeeded in sitting on local councils convened by administrative chiefs. The input of these women is sought during resolution of disputes involving other women, which has resulted in some gains for women's rights.

CONCLUSION

In a context of legal pluralism, customary law continues to be a significant aspect of legal and social regulation in Kenya. The interaction of customary law with state law often engenders conflict and competition, which has important implications for the realization of women's human rights. Due to the importance of customary law in the lives of women, efforts to realize women's rights in Kenya cannot be effective unless such efforts take into account customary law and its related institutions. There is need to find ways of resolving conflicts between customary law and statutory law. This requires a multi-pronged approach as no one approach will work on its own. Despite the numerous challenges that legal pluralism poses, it at the same time offers opportunities for women's agency, such as forum shopping, that can be utilized towards realization of women's rights. In this regard, the dynamic and flexible nature of customary law allows room for the development of a customary law that is sensitive to the needs and entitlements of women. The content of such customary law needs to be shaped by the perspectives and interventions of women, drawing from positive African cultural values and informed by socio-economic changes in the modern Kenyan context. Kenya is fortunate to have a new Constitution which unequivocally espouses the principles of gender equality, non-discrimination and affirmative action. These principles can act as a springboard from which legal and institutional reforms can be spearheaded. The judiciary has a special role in the interpretation of laws (customary and statutory) through the prism of gender equity principles. Other state and non-state actors, including women, can play a key role in shaping perceptions of gender relations and ensuring women's equitable representation in decision-making, dispute resolution and norm-formulating forums.

¹³⁰ The NGO is called the Turkana Women Conference Centre. See <http://www.awid.org/eng/Issues-and-Analysis/Library/When-culture-overrides-the-law-Does-rights-talk-always-get-results2> (last accessed on 30th December 2010).

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