

CUSTOMARY LAW MARRIAGES IN KENYA

CURRENT LEGAL STATUS AND EVALUATION OF VALUE SYSTEM ENTAILED

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OUTLINE

- What is Customary Law?
- Types of Customary Marriages
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 - Distinguishing Features of Customary Marriages
- Philosophy and Social Sciences on Goods of Marriage
 - Evaluating Customary Marriages
 - Conclusion
 - Possible Study Questions

WHAT IS CUSTOMARY LAW?

- Nature
- Distinguishing Features

TYPES OF CUSTOMARY MARRIAGES

- Monogamous
- **Polygamous**
 - Leviratic
- Sororate unions
- Widow inheritance
- Woman-to-woman marriages
 - Forcible marriages
 - Child marriages

MAJOR PHASES OF CUSTOMARY MARRIAGE IN KENYA OVER THE YEARS

- Pre-colonial period
 - Colonial period
- Independence and post-independence
 - 2010
 - 2014
 - 2017

CUSTOMARY LAW TRAJECTORY TO DATE (1)

- **Traditional Judiciary System**
- **General Act of the Berlin Conference (1885)**
- **Native Courts Regulations Ordinance (1897)**
 - **East Africa Order in Council (1897)**
 - Marriage Ordinance (1902)
- **Native Christian Marriage Ordinance (1904)**
 - Kenya Colony Order in Council (1920)
 - **Native Tribunal Ordinance (until 1950)**

CUSTOMARY LAW TRAJECTORY TO DATE (2)

- African Courts Ordinance (1951)
 - Magistrates Court Act (1967)
 - Judicature Act (1967)
 - Commission on Marriage & Divorce (1967)
- Law Reform Commission (permanent since 1982)
 - Kenya Constitution (2010)
 - Marriage Act (2014)
 - Marriage (Customary Marriage) Rules (2017)

OFFICIAL ATTITUDE TOWARDS CUSTOMARY LAW

- Separation / isolation due to dual system of courts.
- Lack of interest by colonial governments.
- Law panels set up in 1950.
- Pre-independence: tolerated but not accepted (regarded as inferior).
- Up to 1950: administrative officers in the legal system.
- Post-independence: part of law of Kenya (marriage, divorce, succession only from 1966; fmr legal and judicial system inherited, recognized and applied)
- Miller J.A.: Customary Law not extinguished
- 2010: Constitution is supreme law
- 2014: consolidation of existing marriage laws including Customary Law

NATIVE TRIBUNAL ORDINANCE (UNTIL 1950)

To administer the native law and custom prevailing in the area of jurisdiction of the tribunal so far as it is not repugnant to justice or morality or inconsistent with the provisions of any Order in Council or with any law in force in the Colony.

JUDICATURE ACT (1967, 2016)

- ACL could apply to a non-African (enough that one party be African).
- *The High Court, the Court of Appeal and all subordinate 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, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.*

PROVISO since 1897

These common law doctrines of equity and the statutes of general application shall be in force in the colony insofar as the circumstances of the colony and its inhabitants permit and subject to such qualifications as local circumstances render necessary.

CURRENT LEGAL STATUS: The Marriage Act (2014)

s. 6.

- (1) A marriage may be registered under this Act if it is celebrated –
 - (a) in accordance with the rites of a Christian denomination;
 - (b) as a civil marriage;
 - (c) in accordance with the customary rites relating to any of the communities in Kenya;**
 - (d) in accordance with the Hindu rites and ceremonies; and
 - (e) in accordance with Islamic law.
- (2) A Christian, Hindu or civil marriage is monogamous.
- (3) A marriage celebrated under customary law or Islamic law is presumed to be polygamous or potentially polygamous.**

CONVERSION OF MARRIAGES

Marriage Act (s. 8)

- (1) A marriage may be converted from being a potentially polygamous marriage to a monogamous marriage if each spouse voluntarily declares the intent to make such a conversion.

“PREDECESSORS” OF MARRIAGE ACT (2014)

- Marriage Act (Cap 150): “open to all”
- African Christian Marriage and Divorce Act: for Christian Africans
- Matrimonial Causes Act
- Separation and Maintenance Act
- Hindu Marriage and Divorce Act
- Mohammedan Marriage, Divorce and Succession Act
- Customary Laws (no system of registration until 2014; recognition through court rulings)

CONSTITUTION OF KENYA (2010)

s. 45 – on the Family

- (1) The family is the natural and fundamental unit of society and the necessary basis of social order and shall enjoy the recognition and protection of the State.
- (2) Every adult has the **right to marry a person of the opposite sex**, based on the **free consent** of the parties.
- (3) Parties to a marriage are entitled to **equal rights** at the time of the marriage, during the marriage and at the dissolution of the marriage.
- (4) **Parliament shall enact legislation that recognizes –**
 - (a) **marriages concluded under any tradition, or system of religious, personal or family law; and**
 - (b) **any system of personal and family law under any tradition, or adhered to by persons professing a particular religion, to the extent that any such marriages or systems of law are consistent with this Constitution.**

MARRIAGE UNDER CUSTOMARY LAW

Marriage Act (s. 43)

- (1) A marriage under this Part shall be celebrated **in accordance with the customs of the communities** of one or both of the parties to the intended marriage.
- (2) Where the payment of **dowry** is required to prove a marriage under customary law, the payment of **a token amount** of dowry shall be sufficient to prove a customary marriage.

NOTIFICATION OF CUSTOMARY MARRIAGE

Marriage Act (s. 44)

The parties to a customary marriage shall notify the Registrar of such marriage within three months of completion of the relevant ceremonies or steps required to confer the status of marriage to the parties in the community concerned.

CONTENT OF NOTIFICATION

Marriage Act (s. 45)

- (1) The notification under section 25 shall –
 - (a) *specify the customary law* applied in the marriage of such parties; and
 - (b) *contain a written declaration by the parties that the necessary customary requirements to prove the marriage have been undertaken.*
- (2) A declaration under subsection (1) shall contain the signatures or personal marks of two adult witnesses and each witness shall have played a key cultural role in the celebrating the marriage.

CONTENT OF NOTIFICATION (contd.)

(3) The notification under subsection (1) shall confirm –

(a) that the parties to the marriage were eighteen years of age at the time of the marriage;

(b) that the marriage is between persons who are not within a prohibited marriage relationship; and

(c) that the parties freely consent to the marriage.

APPOINTMENT OF REGISTRAR OF MARRIAGES AND MARRIAGE OFFICERS

Marriage Act (s. 50)

(1) There shall be a Registrar of Marriages who shall be appointed by the Cabinet Secretary.

(2) The Registrar shall –

- (a) perform civil marriages;*
- (b) register all marriages;*
- (c) issue marriage certificates for all registered marriages;*
- (d) issue certificates of no impediment to persons who intend to marry and who qualify for such a certificate;*
- (e) determine the rules governing customary marriages; and***
- (f) determine objections of notices to marry.*

REGISTRATION OF CUSTOMARY MARRIAGE

Marriage Act (s. 55)

- (1) Where the parties to a marriage under Part V have completed the necessary rituals for their union to be recognized as a marriage** under the customary law of any of the parties both shall apply to the Registrar within six months of their marriage for a certificate and both shall appear in person before the Registrar to be issued with the certificate of marriage.

- (2) Where the Registrar is satisfied that the parties to a marriage under Part V have complied with the provisions of this Act, and the parties have appeared before him in person, the Registrar shall register the marriage and issue the parties with a certificate of marriage.

DISSOLUTION OF A CUSTOMARY MARRIAGE

Marriage Act

s. 68: Mediation of disputes in Customary marriages.

s. 69.: Grounds for divorce of Customary marriage.

**PRESS STATEMENT FROM THE OFFICE OF THE ATTORNEY GENERAL
AND
DEPARTMENT OF JUSTICE ON THE REGISTRATION OF CUSTOMARY
MARRIAGES**

The requirements for registration of Customary marriages as per Gazette Notice 5345 are as follows:

- (a) Registration of Customary Marriages will start on **1st of August 2017**;
- (b) Parties who are already married under customary law shall only register the marriage and be furnished with a certificate.
- (c) Parties who wish to contract Customary Marriages after the commencement date of registration, shall within three (3) months of completion of the relevant customary rites, notify the Registrar, who shall thereafter issue a certificate.

SOME BENEFITS OF CODIFICATION

- S. 3.1, 3.3. Meaning of marriage; equal rights; legal status
- S. 4. Minimum age (18 years)
- S. 5 & 45.2 Need for two competent witnesses
- S. 10. Prohibited marriage relationships
- S.25. Notice of intention to marry
- S. 11. Void marriage – union not a marriage; consent not free
- S. 16 Duration/subsistence of marriage
- Part XII Maintenance of spouse
- Part XIII Offences and penalties

UNRESOLVED ISSUES

- Diversity of customs (MA 43.1; 45.1; 50e; 55)
 - Status of Polygyny (MA 6.3; 11.1c)
- *S.6(3)A marriage celebrated under customary law...is presumed to be polygamous or potentially polygamous.*
- *S.11(1c) A union is not a marriage if at the time of the making of the union either party is incompetent to marry by reason of a subsisting marriage;*
 - Polygamy vs constitutional value of *equality*
 - Dowry payments (MA 43.2)
 - Cousin Marriages (MA 10.4)
- Local circumstances that matter (ref. Proviso)

DISTINGUISHING FEATURES OF CUSTOMARY MARRIAGES

- **Tolerance of polygamy (more specifically, polygyny)**
- **Collective aspect of marriage transaction and relationship**
- **Emphasis on procreation**
- **Payment of dowry / bride price**
- Initiation
- Prohibited degrees
- Betrothal
- Consent (familial)
- Celebration of marriage
- Rights and duties

PHILOSOPHICAL AND SOCIAL SCIENCE PERSPECTIVES

- What is marriage for?
 - Good for the person: its importance for moral self-development.
- Good for the society: a stable society is built on stable marriages and families.
 - The unitive and procreative aspects of marriage.
- Marriage as either a “true good” or an “instrumental good”.
 - The relation between love and marriage.
 - Marriage as a religious sacrament.
- Brake, 2016: “contractual views” and “institutional views”

CONTRACTUAL VIEWS

- The modern ideal of marriage stresses on the voluntariness of the union.
- Brake, 2016: “spouses can choose marital obligations to suit their interests.”
- The arbitrariness of the various social understandings of marriage.
 - Calls into question marriage’s importance to society.
- The state therefore has no right to discriminate between marital practices.

INSTITUTIONAL VIEWS

- Brake, 2016: “the value of marriage consists precisely in the limitations it sets on individual choice in the service of a greater good”.
- Procreation is marriage’s *raison d’etre*; therefore, the presence of a child reifies a marriage.
- Marriage serves to reinforce consciousness of one’s duty to their community.

CLASH OF INSTITUTIONS

- *Hyde v Hyde* (1886)
- The distinctly Judeo-Christian nature of the Common Law view of marriage.
- *Genesis 2:24* – “Therefore a man shall leave his father and mother and be joined to his wife, and they shall become one flesh.” (NKJV)
 - Marriage as fundamentally monogamous and individualistic v. Marriage as potentially polygamous and communalistic.

INHERENT CONTRADICTIONS

- Polygamy and monogamy are divergent and irreconcilable.
- Marriage Act, S. 43(1): argument from tradition (inadmissible).
- The argument of consent (undesirable because it is a contractual view).
- Problematic favouring of polygyny over polyandry (argument from tradition).
- Inconsistent stance on cousin marriages: S. 10 of the Marriage Act (argument from tradition).

EVALUATING CUSTOMARY MARRIAGES

- Which view of marriage is more beneficial to individuals and society?
- Is there room for family consent in marriage?
- Should marriage be regarded as a *true good* in itself or as *instrumental* and therefore fluid in meaning?
- Which form of marriage better contributes to the good both of spouses and of society?
- Which form of marriage better safeguards the unitive and procreative (and educative) aspects of marriage?
- Is polygamy repugnant to justice (and morality)?
- Why shouldn't a second customary marriage be voidable under s. 11(1c)?

CONCLUSION

- Importance of registering and codifying customary marriage practices.
- Need for a consistent stance on what marriage should be.
- Either monogamy OR polygamy; not monogamy AND polygamy.
- Unhelpful to consider openness to polygamy as customary marriage's essential feature.

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SOME STUDY QUESTIONS

- Effects of Polygamy vis-à-vis Monogamy
- Impact of biological father presence/absence on wellbeing of family members and society
- Normative expectations associated with marriage: their need/purpose
- Should the law on polygamy change? If so, why?
- Existence (or lack thereof) of social supports for monogamy.
- Applicability of Marriage Act S. 43.1; 45.1; 50e; 55.