Legal Transplantation and Its Effects of Customary Law in Kenya: The Case of Marriage

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By

STAUSSI, JAMIE ERIC

095813

Prepared under the supervision of

DR. ANTOINETTE KANKINDI

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Declaration

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

Signed

Date: **08/01/2021**

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

Signed.....

DR. Antoinette Kankindi

Abstract

At the time where Kenya was part of the United Kingdom's colonial empire, the United Kingdom with the aim of easier administration of the Kenyan population introduced its own legal system, the common law, and in doing so engaging in the process called Legal Transplantation.

Legal Transplantation refers to the borrowing or movement of one legal system from one country to another[1]. By this process, the United Kingdom relegated the rules and norms that guided indigenous institutions in general, and marriage in particular below State law. This implementation of a foreign legal system negatively affected the institution of marriage which will be the focus of the research. It changed for instance the very definition of marriage, caused the breakup of families, and confused or blurred the process of succession. The negative effect introduced a challenge that the legislator needed to solve. That is why in 1967 the legislator set a commission to harmonize legal provisions on marriage as much as possible. In 2010 The new Constitution of Kenya sought to increase the protection of marriage and, in response to the constitutional provision, in 2014 parliament passed the current **Marriage Act**[2].

This research will analyse and compare the effects of the introduction of common law on the institution of marriage, the subsequent relegation of customary law as well as the post-colonial attempts by the Kenyan legislator to create greater space for customary law in order to protect this institution.

The study will use the qualitative analysis of the problem through case law, and secondary sources to assess the impact of the transplanted legal system and the corrective customary law on the institution of marriage.

[1] A Watson, *Legal Transplants: An Approach to Comparative Law*, Second Edition, Scottish Academic Press, Edinburgh, 1974.

[2] *Marriage Act* (Act No. 4 of 2014).

List of Cases

1. *R v. Amkeyo* (1952) 19 East African Court of Appeal
2. *R v Mwakio Asani s/o. Mwanguku* (1930) 14 KLR 133
3. *Monica Jesang Katam v Jackson Chepkwony & Another* (2011) *Eklr*
4. *Hyde v Hyde* (1886), English Court of Probate and Divorce
5. *J F B v M O O & another* (2018) eKLR.

List of Legal Instruments

1. Constitution of Kenya 2010
2. *Marriage Act* (Act No. 4 of 2014)
3. *Matrimonial Causes Act*, 1962.
4. *Judicature Act* (2018)
5. *Marriage (Customary Marriage) Rules* (2017).

Chapter 1: Introduction

Background of the Problem

Prior to colonial rule, customary law existed to create order and guide the life of communities. These customary laws were diverse as to meet the number of different indigenous groups that existed[3]. These laws were integrated with the way of life of the communities that followed them. It espoused what Friedrich Von Savigny argued for, as Customary Law was the "spirit of the people[4]." There were similar features on the laws of marriage common to multiple communities including: Arranged Marriages, union of two families, exchange of gifts, payment of bride wealth, polygamous unions etc[5]. In the African context, there was an added importance to building a strong family unit in order to continue the line of the clan. This order that existed before the colonial period was to be disrupted by the introduction of English law imposed on local communities.

The issue with this is that some communities had more developed systems of law than others, making it harder for the English to deal with them. Therefore, for easier administration they implemented a dual legal system. The first was the traditional native tribunals supervised by the administrative orders for the natives and English Common law for the Europeans[6]. The institution of marriage was more complicated as they applied 4 systems: English law, African customary, Islamic and Hindu law which applied to the respective communities of the society[7]. While all existed, the English inspired State Law was clearly held as the predominant law. It supplanted customary law where it ran counter to the demands of colonial administration. Under the Common Law Doctrine, Marriage was described through the case of *Hyde v Hyde* which defined Marriage as "the voluntary union for life of one man and one woman to the exclusion of all other"[8]. This essentially meant that other forms of customary marriage were

[3]Allot A. N, 'Customary Law in East Africa', *Africa Spectrum*, 1969-<https://www.jstor.org/stable/40173502> on July 2020.

[4] Rai N, Basic Concept of Savigny's Volksgeist, March 2011-<https://ssrn.com/abstract=1788347 or http://dx.doi.org/10.2139/ssrn.1788347> on June 2020.

[5] Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, LawAfrica Publishing (K) Ltd, Nairobi, 2014.

[6] Allot A. N, 'Customary Law in East Africa', *Africa Spectrum*, 1969-<https://www.jstor.org/stable/40173502> on July 2020.

[7] Cotran E, 'The Development and Reform of the Law in Kenya' 27, *Journal of African Law*, 1983.

[8] *Hyde v Hyde* (1886), English Court of Probate and Divorce.

not recognised under state law. In doing so, the British colonial rule destabilised the African social order[9].

Multiple legislative statutes were enacted during the colonial period. In doing so, they created confusion and fractured the customary marriage system. The post-colonial governments of Kenya attempted to reform and harmonize the marriage legislations. The first attempt coming in 1967 through the creation of the **Commission on the Law of Marriage and Divorce**[10], and the latest being the **Marriage Act of 2014**[11].

The Commission was of the opinion that the Marriage system was flawed as "*Much of the existing statute law has its roots in English Law…The result is that although the law recognises polygamous marriages, both Islamic and Customary, they have tended to be treated as inferior to monogamous marriages*[12]." It further pointed out that **Mohammedan Marriage, Divorce and Succession Act** seemed to allow conversion of customary into Islamic while **the African Christian Marriage and Divorce Act** provided for the conversion of customary marriage into statutory. Further they found that the **Marriage Act** of time allowed for the conversion of Customary and Islamic into statutory marriage as per that act. It was clear to them that this was unsatisfactory as "*all forms of marriage allowed by law should be equally effective*[13]."

The Commission's report[14] also noted that there were issues when it came to the change of personal law when religions were changed, or when there was intermarriage between tribes. There were doubts as to what the core essentials of customary marriage needed to exist for it to be considered valid. It took specific note of the role of women in customary marriage, arguing that there "*were some aspects of the law which were derogating from the dignity and status to which women are entitled*." [15]

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[9] Kang'ara S, 'Beyond Bed and Bread: Making the African State through Marriage Law Reform - Constitutive and Transformative Influences of Anglo-American Legal Thought', 9 (3) *Hastings Race & Poverty L.J*, 2012.

[10] Cotran E, 'Marriage Divorce and Succession Laws in Kenya: Is Integration or Unification Possible?' 40, *Journal of African Law*, 1996.

[11] *Marriage Act* (Act No. 4 of 2014).

[12] Cotran E, 'Marriage Divorce and Succession Laws in Kenya: Is Integration or Unification Possible?' 40, *Journal of African Law*, 1996.

[13] The Commissions of inquiry, *Report of the Commission on the Law of Marriage and Divorce*, 1968, 14.

[14] *Report of the Commission on the Law of Marriage and Divorce*, 1968, 14.

[15] *Report of the Commission on the Law of Marriage and Divorce*, 1968, 14.

The Commission report provided recommendations[16]. For purpose of this research some are more relevant than others. For instance Recommendation 2 suggested that the law prescribe a minimum age for marriage that would be applied to all communities and their system of marriage; Recommendation 3 provided a caveat however as the courts could allow marriages where a party was below the minimum age but only where neither party was below age 14; Recommendation 4 proposed that if a ceremony took place where a party was below the minimum age without the permission of the court, that ceremony was not to be considered a valid marriage; Recommendation 11 encouraged parties contracting a marriage to specify what type of marriage they intended to contract.

Eugene Contran[17] summarizes the attempts that were made to implement the Commission's recommendations. The last of these attempts, a Bill in 1979, failed as it was considered too Western and gave too many rights to women. He continues to say that only in 1982, when the Kenyan Government created a permanent Law Reform Commission with the aim to ensure its "*systematic development and reform*," were the recommendations discussed. No real progress was made until 1993 when a Task Force was created to review Laws Relating to Women in Kenya[18].

The report it published in 1999 recommended among other things that specific legislation be enacted to govern marriage law, matrimonial property law and domestic violence law. Bills related to this recommendation were put to parliament but never passed[19].

The Marriage Act of 2014 on the face of it adopted most of the recommendations of the 1968 Commission, the most important one being the codification of Marriage Laws into one main legislation.

This description of the development of the marriage legislation is important in two ways. First provides an overview of the fragmentation of legislations that occurred with the introduction of English Common Law and secondly it discusses some the attempts made to formalize these laws into one main legislation. Despite the progress brought about by **the Marriage Act 2014**,

[16] The Commissions of Inquiry, *Report of the Commission on the Law of Marriage and Divorce*, 1968, 24

[17] Cotran E, 'Marriage Divorce and Succession Laws in Kenya: Is Integration or Unification Possible?' 40, *Journal of African Law*, 1996.

[18] The Commissions of Inquiry, *Report of the Commission on the Law of Marriage and Divorce*, 1968.

[19] Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, LawAfrica Publishing (K) Ltd, Nairobi, 2014, 24.

some problems caused by such fragmentation for example the legalization of divorce, remain. It is the persistence of such problems that the need for this research to be undertaken.

Customary law focuses on the importance of family and society. It is communal and shared by everyone in that community, unlike State Law which is more adversarial and individualistic[20]. This shift in focus has destabilized the family core, and therefore, the community in general. A Survey undertaken in 2017 showed that 74.4% of the respondents believed that people today do not take marriage as seriously as they should[21] . Similarly, divorce rates in Kenya have risen over the course of the last 20 years from 3.4% in 1998 to 6% as of 2014[22]. This is in stark contrast to the years between 1962 and 1979 where on average 95% of the population over the age of 50 was married[23]. This may be caused by multiple reasons, however the main reason I see for this is the fact that the Marriage Act and other prior legislations made it easier to get a divorce.

Prior to this act, divorce was guided by the Matrimonial Causes Act which provided divorce in a civil/Christian marriage. It stated that there must have been: (a) adultery, (b) desertion of at least 3 years, (c) cruelty and (d) unsoundness of mind[24]. It did not directly mention divorce in a customary marriage. The 2014 Act provides for the same grounds but adds a new ground: Irretrievable breakdown of the marriage[25]. This is not defined in the act and therefore easy to exploit, which may explain this rise.

Statement of the Problem

The main issues that the research will attempt to identify and discuss are the direct and indirect effects of the implementation of English Common Law on the institution of marriage in Kenya.

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[20] Kang'ara S, 'Beyond Bed and Bread: Making the African State through Marriage Law Reform - Constitutive and Transformative Influences of Anglo-American Legal Thought', 9 (3) *Hastings Race & Poverty L.J*, 2012, 7.

[21] Mungai C, 'Soaring Divorce Cases and the Politics of Marriage' The Standard, 27 May 2017 - <https://www.standardmedia.co.ke/lifestyle/article/2001241240/divorce-rate-goes-up-among-young-couples> on 6 August 2020.

[22] Mungai C, 'Soaring Divorce Cases and the Politics of Marriage' The Standard, 27 May 2017 - <https://www.standardmedia.co.ke/lifestyle/article/2001241240/divorce-rate-goes-up-among-young-couples> on 6 August 2020.

[23] Hudson R D, Meekers D, 'The Universality of African Marriage Reconsidered: Evidence from Turkana Males' 35(4) *Ethnology*, 1996.

[24] Section 8, *Matrimonial Causes Act*, 1962.

[25] Section 65(e), Section 66(2)(e), Section 69(1)(e), Section 70(a), *Marriage Act* (Act No. 4 of 2014).

It will further explore the subordination of customary law to state law onto marriage, from the colonial to the post-colonial period. Finally, the research will critique the attempts by the post-colonial governments to create greater space for customary law to protect and promote the institution of marriage.

Justification of the Problem

In Africa, it is a commonly held belief that the stability and functionality of a community depend upon the stability of marriage and family. The impact of the transplantation of the foreign English Common Law in regulating marriage has brought about challenges to the institution. It is some of those challenges that justify that a research is undertaken, to identify them, expound on their cause and how they affected society; discuss how the Governments of Kenya attempted to solve them, and finally, provide possible workable solutions to the challenges that remain.

Significance of the Study

The importance of this paper is founded upon is contribution to knowledge and policy improvement. In relation to the contribution of knowledge it will; explain the method by which the English implemented their legal system as well as how they used it to create legislation specifically for the citizens of Kenya, it will also explain how customary law was affected by such an implementation. In relation to policy, the hope is that the recommendations provided could be considered in hopes of developing and enhancing the institution of marriage by correcting the wrongs and divisions of the family caused by the introduction of English Common Law.

Aims an Objectives of the Study

The main aim of the research is to study the promotion and protection of the institution of marriage using customary law. To achieve this, the study will:

1. Examine the legal transplantation of Common Law and the legal framework it created to regulate marriage in Kenya.
2. From the point of view of marriage case law, investigate the impact of the introduction of a Common Law inspired State Law on Customary Law.
3. Suggest possible recommendations to enhance the protection of the institution of Marriage in our modern society.

Hypothesis

It is assumed that the adoption of the English Common law and the institution of marriage based upon it, negatively affected the stability of the family unit and therefore the community.

Research Questions

The following research questions must be answered:

1. What is the meaning and scope of marriage inspired by English Common Law in Kenya?

2. What evidence exists to show preferential use of common law in detriment of customary law in marriage cases?

Research Methodology

The study will be doctrinal in nature. It will involve the use of statutes, cases and secondary sources from existing literature to evaluate the effect of the transplantation of common law on customary law, in relation to the institution of marriage.

Scope of the Study

The research will attempt to cover the Customary Institution of Marriage and the impact of Common Law Transplantation has had on it. In doing so it will analyse the Post-Colonial governments attempts at rectifying the possible negative effects of such transplantation.

Limitation of the Study

The main limitation of this paper is that it is heavily reliant on research that has already been carried out, as well as the decision of the courts that are available online. This paper would have benefited greatly if provided with ample time to carry out interviews in communities still relying on customary practices to truly understand the effects of State Marriage Law over that of Customary Law.

Literature Review

The role of law in the development of a state is a topic that has been researched and spoken upon quite substantially[26]. There have however, been arguments made on how the law should develop to best aide the society in which it aims to serve. According to the German jurist Savigny, the law was an expression of the will people; it was influenced by the history, culture,

[26] Daniels R J, Trebilcock M J, Carson L D, The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies, 59 *The American Journal of Comparative Law,* 2011, 121.

and traditions of its people[27]. Pierre Legrand had similar views as he thought that each law is culturally determined and thus any transplanted law would have a negative impact on society[28]. This idea was further articulated by Otto Kahn-Freund, who argued that while very possible, it would lead to public rejection[29]. One can make the argument that the law they spoke about was Customary Law because it developed within a certain cultural community and without any outside influence.

Nowhere in Kenyan legislation is customary law defined, but it is mentioned in Article 2(4) of the 2010 Constitution of Kenya[30] which provides that "*Any law, including customary law, that is inconsistent with this constitution is void to the extent of the inconsistency and any act or omission in contravention of this Constitution is void*." For this reason, the definition that will be used in this research was posited by Ambani and Ahaya who define it as the "*rules of custom, morality, and religion that the indigenous people…view as enforceable*[31]" They further state that before the colonization of Africa, Africans had their own governance system[32], which on the face of it links directly to the development of law posited by Savigny.

The second view of legal development is Legal Transplantation. The term was coined by Alan Watson although the process has existed since the time of Ancient Rome. Legal Transplantation as he defined it was the borrowing or movement of one legal system from one country to another[33]. In the late 1700s to early 1800s there was a call for the states of Germany to have a set of codified laws. German Jurist Thibault called for such codification to be based

[27] Rai N, Basic Concept of Savigny's Volksgeist, March 2011-<https://ssrn.com/abstract=1788347 or http://dx.doi.org/10.2139/ssrn.1788347> on June 2020.

[28] Legrand P, 'The Impossibility of 'Legal Transplants', *Maastricht Journal of European and Comparative Law*, 1997.

[29] Mitra S, 'A Contemporary Review of Otto Kahn- Freund's "The Uses and Misuses of Comparative Law", University of Birmingham, 2018.

[30] Article 2(4), *Constitution of Kenya* (2010).

[31] Ambani J and Ahaya O, 'The Wretched African Traditionalists in Kenya: The Challenges and Prospects of Customary Law in the New Constitutional Era' 1 *Strathmore Law Journal 1*, 2015, 43.

[32] Ambani J and Ahaya O, 'The Wretched African Traditionalists in Kenya: The Challenges and Prospects of Customary Law in the New Constitutional Era' 1 *Strathmore Law Journal 1*, 2015, 43.

[33] A Watson, *Legal Transplants: An Approach to Comparative Law*, Second Edition, Scottish Academic Press, Edinburgh, 1974.

on the existing French Civil Code.[34] This would be an example of the concept of Legal Transplantation.

Legal Transplantation is the process by which the British attempted to assert control throughout their colonial empire. They erroneously believed that customary law was simply one large body of law when in reality it was a large and diverse body of customs and practices that met the needs of various independent communities[35]. There were, however, overarching similarities found in the differing cultures such as the role the community played in the institution of marriage and family[36]. Marriage played a vital part because it involved all members of the community, including the dead and yet to be born as well as being a rite of passage[37]. The introduction of Common Law view of marriage was in direct opposition. This could be seen, among other things, in the definition of marriage in the case of *Hyde v Hyde*, which defined marriage as the "*consensual union of one man and one woman to the exclusion of all others*[38]". This definition shows the individualism of the common law view of marriage as compared to that of customary law. This led to the destabilization of the family unit as discussed by Sylvia Kang'ara[39]. She argues that by defining what marriage was, the British were able to disrupt the social system[40].

The situation was made worse due to the conditions set for the application of customary law[41] the first being that they were not repugnant to justice, equity or good morality and second that it was not in conflict with any written law. This can still be seen in the Judicature Act's

[34] Codification and the Rise of Modern Civil Law, University of Auckland, New Zealand, January 2016 -< https://lawexplores.com/codification-and-the-rise-of-modern-civil-law/#Fn10> on 28 August 2020.

[35] Allot A. N, 'Customary Law in East Africa', *Africa Spectrum*, 1969-<https://www.jstor.org/stable/40173502>.

[36] Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, LawAfrica Publishing (K) Ltd, Nairobi, 2014, 24.

[37]Okiya D O, 'The centrality of marriage in African Religio-culture with reference to the Maasai of Kajiado County Kenya, Kenyatta University, Nairobi, 2016, 6.

[38] *Hyde v Hyde* (1886), English Court of Probate and Divorce.

[39] Kang'ara S, 'Beyond Bed and Bread: Making the African State through Marriage Law Reform - Constitutive and Transformative Influences of Anglo-American Legal Thought', 9 (3) *Hastings Race & Poverty L.J*, 2012, 7.

[40] Kang'ara S, 'Beyond Bed and Bread: Making the African State through Marriage Law Reform - Constitutive and Transformative Influences of Anglo-American Legal Thought', 9 (3) *Hastings Race & Poverty L.J*, 2012, 7.

[41] Ndulo M, 'African Customary Law, Customs and Women's Rights', Volume 18 (Issue 1), Idinana Journal of Global Legal Studies, 2011, 10.

repugnancy clause[42]. It shows that Common Law was held to be and still is superior to African customary law.

Customary practices as stated previously vary and are different depending on the customs that one subscribes themselves to[43]. One of the more important customary practices is the celebration of marriage within the community. The legislation of Kenya recognises this under the 2014 Marriage Act, defining it as "*a marriage celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage*[44]."

While differences between the practices of communities exist, there are similarities as well. In terms of similarities there is an added importance on the role of the community and kin in the celebration of marriage. This similarity will be discussed in the contexts of the Kikuyu and Luo communities, respectively. The choice of these two communities is based off the larger pool of available literature as compared to other Kenyan communities.

The Kikuyu community viewed marriage as a central institution on which other institutions were built upon[45]. The importance of marriage in community building necessitated multiple steps, described below, before the marriage was considered valid[46].

The first step was the search for a companion within the community, where individuals were left to choose their prospective partner, after which the man would investigate the history of his potential wife's clan[47]. The man would then visit the '*Mundu Mugo*' or Medicine Man to see if his wife would bring luck or disaster to the family. Upon satisfaction from the medicine man's information, the father would begin teaching and advising his son on the values that would need to exist between man and wife[48]. Once all these steps are positively concluded

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[42] Section 3(2) *Judicature Act* (2018).

[43] Clark, S, Kabiru C, Mathur R, Johnson D, 'Relationship Transitions Among Youth in Urban Kenya, Journal of Marriage and Family', 72, 2010, 75.

[44] Section 43(1), *Marriage Act* (2014).

[45] Karanja J, 'An Assessment of the Interaction Between Kikuyu Customary Marriage and Roman Catholic Church Marriage: The Case of Tuthu Parish in Muranga'a Distric', University of Nairobi, Nairobi, 1998, 70.

[46] Karanja J, 'An Assessment of the Interaction Between Kikuyuy Customary Marriage and Roman Catholic Church Marriage: The Case of Tuthu Parish in Muranga'a District', 74.

[47] Karanja J, 'An Assessment of the Interaction Between Kikuyuy Customary Marriage and Roman Catholic Church Marriage: The Case of Tuthu Parish in Muranga'a District', 74.

[48] Karanja J, 'An Assessment of the Interaction Between Kikuyuy Customary Marriage and Roman Catholic Church Marriage: The Case of Tuthu Parish in Muranga'a District', 75.

then the father of the husband-to-be, would brew a beer and invite his counterpart and his family to a party where they would drink together, this was called the '*Njoohi ya Njurio*' or Proposal Beer[49].

The '*Ngurario'* or 'Pouring of the Blood of Unity' was the actual engagement. It allowed the relatives of both sides to meet and know one another. The feasting and dancing from both families signified that the girl was blessed and given away in good heart, the sacrificing of the animal bound the two families together, making them responsible for the marriage they had witnessed[50].

In the community, bride-wealth from the husband-to-be was viewed as a public acknowledgement of a genuine union[51] meant to strengthen the families' bond and demonstrate their commitment to the success of marriage.

For the Luo community, marriage is also seen as a communal process[52]. When a man wished to marry, he would ask a '*jagam'* or go between, usually a person outside the community of the groom but with a relationship with the family of a potential wife[53]. Without the *jagam,* parties could not carry out the marriage, as the role of go between was to make sure that there was not any illegitimate relationships[54].

The "*Meko*" or the recognized bride abduction, was considered the correct form of marriage[55]. Within it there are two phases: the consultation with the girl's family to allow her to give

[49] Karanja J, 'An Assessment of the Interaction Between Kikuyuy Customary Marriage and Roman Catholic Church Marriage: The Case of Tuthu Parish in Muranga'a District', 75.

[50]Karanja J, 'An Assessment of the Interaction Between Kikuyuy Customary Marriage and Roman Catholic Church Marriage: The Case of Tuthu Parish in Muranga'a District', 77.

[51] Karanja J, 'An Assessment of the Interaction Between Kikuyuy Customary Marriage and Roman Catholic Church Marriage: The Case of Tuthu Parish in Muranga'a District',78.

[52] 'Marriage in The Culture of the Luo Population, Exploring Africa', -< https://www.exploring-africa.com/en/kenya/luo-population/marriage-culture-luo-population> on 12 September 2020.

[53] Owiti GO, 'The Luo Co-Wives of Kenya: Using Resistance Resources to Achieve an Empowered Quality of Life', University of Bergen, Bergen, 2012, 9.

[54] Owiti GO, 'The Luo Co-Wives of Kenya: Using Resistance Resources to Achieve an Empowered Quality of Life', University of Bergen, Bergen, 2012, 9.

[55] Pritchard EE, 'Marriage Customs of the Luo of Kenya', 20, *Africa: Journal of the International African Institute*, Cambridge University, 1950, 3.

consent [56];and the "abduction" of the bride from her home[57]. She is taken by her husband-to-be to her future home and is followed by her community who sing and dance[58]. The "*Diero*" or large party occurs after the *meko* where the young men and women of the wife's original homestead travel to her new home.[59]. The point of this ceremony is to ascertain whether the woman is happy to stay with her husband[60]. The "*Duoko*" is another ceremony where the husband's community come together to visit the new in-laws and pay respect to the wife's mother[61].

The importance of kin and clan is shown in the two examples above. The multiple ceremonies allowed the clans to come together and familiarize with one another. This familiarization allowed for a stable marriage as the community could provide marital counselling in case of any breakdown[62]. Due to the role the community played in the marriage ceremonies, societal bonds contributed to the preservation of marriage, which resulted in stable unions[63].The whole institution as described thus far, contrasts sharply with the Common Law view of marriage which is inherently individualistic.

The Common Law marriage substantially changed societal view of marriage over the years particularly due the urban youth are increasingly accepting western practices. This is seen for instance in self-selection of partners and greater independence from kin prior to marriage, which reduces the chances of the extended family providing marital advice[64].

[56] Pritchard EE, 'Marriage Customs of the Luo of Kenya',3.

[57] Pritchard EE, 'Marriage Customs of the Luo of Kenya', 4.

[58] Pritchard EE, 'Marriage Customs of the Luo of Kenya', 4.

[59] Pritchard EE, 'Marriage Customs of the Luo of Kenya', 4.

[60] Pritchard EE, 'Marriage Customs of the Luo of Kenya', 4.

[61] Pritchard EE, 'Marriage Customs of the Luo of Kenya', 6.

[62] Karanja J, 'An Assessment of the Interaction Between Kikuyuy Customary Marriage and Roman Catholic Church Marriage: The Case of Tuthu Parish in Muranga'a District', 78.

[63]Potash B, 'Some Aspects of Marital Stability in a Rural Luo Community', 48(4), *Africa: Journal of the International African Institute*, 1978, 386.

[64]Clark, S, Kabiru C, Mathur R, Johnson D, 'Relationship Transitions Among Youth in Urban Kenya', 72, *Journal of Marriage and Family*,, 2010, 75.

Duration

The paper shall be completed and submitted to the Board at the beginning of the Second Semester of the Fourth Year, specifically at the end of November 2020. Considering that supervisors were assigned at the beginning of May 2020; it will take about 5-6 months.

Chapter Breakdown

The research paper will have 5 chapters.

Chapter One, provides the reader an overview of the paper, the background of the study, the aims, and objectives, as well as a brief overview of the literature review,

Chapter Two provides the theoretical framework of the research.

Chapter Three will discuss the way in which Common Law was introduced into Kenya, the multiple different legislations that were introduced and how it affected the creation of the **2014 Marriage Act**. – *Analysis of the effect of legal transplantation on the institution of marriage from the viewpoint of the legal framework.*

Chapter Four will analyse the impact that the introduction of State Law affected Customary Law whether positively or negatively. The research will attempt to do this using the existing available case law. – *examination of the same from the viewpoint of case law*

Chapter Five will act as the concluding chapter of this research paper. It will concisely present the findings of the discussion in relation to Legal Transplantation and its effect on Customary Marriage and the society. It will then attempt to provide possible recommendations to further strengthen the institution of marriage in Kenya.

Chapter 2: Theoretical Framework

Introduction

There are two main theories that are used in order to achieve the aims of this research paper and answer the questions that originate from those aims. The first is legal transplantation which is a theory of legal development and second is legal pluralism which is as a direct result of the first. Legal Transplantation refers to the borrowing or movement of one legal system from one country to another[65]. Legal Pluralism refers to existence of multiple legal systems within a nation[66].

Legal transplantation is both a process and a theory of legal development. It is the overarching concept of this paper, with its effects on the institution of marriage being discussed. Legal Pluralism is used to show how Common Law and Customary Law interacted with one another in the Kenyan courts. This is important as it is one of the reasons why customary law was relegated in status to subsidiary legislation.

These two theories are discussed further in the following sections. Section 1 discusses Legal Transplantation and Section 2 discusses Legal Pluralism.

Legal Transplantation

There is a belief that the implementation and borrowing of foreign laws and institutions is one way of upgrading and developing a legal system[67]. This theory explains that the borrowing of foreign laws and institutions does not happen in an empty space, as it usually comes into contact with existing systems of rules.

Legal transplantation has 4 typologies[68]: the cost saving transplant which saves time and money[69]; the externally dictated transplant where a dominant state imposes that the subservient

[65] A Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd ed,, Scottish Academic Press, Edinburgh, 1974.

[66] Davis M, The Oxford Handbook of Empirical Legal Research, Oxford University

[67] Husa J, 'Developing Legal System, Legal Transplants and Path Dependence: Reflections on the Rule of Law', 6(2), *Chinese Journal of Comparative Law*, 130.

[68] Miller J, 'Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process',51(4), *The American Journal of Comparative Law*, 483.

[69] Miller J, Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process', 485.

state implements its laws[70]; the entrepreneurial transplant which focuses on individuals and groups who benefit from the adoption of foreign laws[71]; and the legitimacy generating transplant which provides legitimacy based on the prestige of the foreign model[72]. In the Kenyan context the second typology was used, as Kenya was a colony of the United Kingdom. In this case, the common law system was adopted as a means of direct control by the colonial government over the colonized country.

The transplantation theory is used to analyse the introduction and adoption of English Common law into the legal system in Kenya to the detriment of the already existing customary practices. The continued use of Common Law influenced statutory law alongside a reference to customary law, mostly after independence, led to the need for a second theory, mainly Legal Pluralism.

Legal Pluralism

Legal Pluralism refers to existence of multiple legal systems within a nation[73]. In Kenya, the existence of multiple customary systems is based on the ethnic diversity within the country[74]. What we today call customary law is derived from these customary systems. Kenya's colonial history led to the state adopted English common law and due to the reception clause, there was an introduction of a dual legal system where both English and customary law were applied[75] although not equally. Kenya's legal system therefore includes common law inspired statutory law, Hindu and Islamic religious law and customary law[76].

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[70] Miller J, Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process, 487.

[71] Miller J, Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process, 850.

[72] Miller J, Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process, 853.

[73] Davis M, 'The Oxford Handbook of Empirical Legal Research, Oxford University.

[74] Midamaba B H, 'Legal Pluralism and Attendant Internal Conflicts in Marital and Inheritance Laws in Kenya', 49(3), *Africa: Revisita trimestrale di studi e documentazione dell'istituto italiano per L'Africa e l'Oriente*, 1994, 375.

[75] Bakari A H, 'Africa's Paradoxes of Legal Pluralism in Personal Laws: A Comparative Case Study of Tanzania and Kenya', Volume 3 (Issue 3), *African Journal of International and Comparative Law*, 1991, 545.

[76] Midamaba B H, 'Legal Pluralism and Attendant Internal Conflicts in Marital and Inheritance Laws in Kenya', 49(3), *Africa: Revisita trimestrale di studi e documentazione dell'istituto italiano per L'Africa e l'Oriente* 1994, 375.

Kenya is therefore considered a pluralistic state due to its diverse system of laws applied in the courts today. However, the interaction between customary and statutory law caused issues within society, which S.C. Wanjala attributed to the multiplicity of family laws[77]. Legal Pluralism then appear as an adequate theory for the analysis of courts' interpretation of the diversity of laws in the Kenyan legal system.

Conclusion

The theoretical framework presented above shows the importance of the two theories in the examination of the effects of legal transplantation on customary marriage in Kenya. The institution of marriage is sometimes made complex due to the diversity of the people involved in it. The two theories will aid in the examination of the process of implementing the common law and its effects on the institution, since any one marriage could fall within multiple different customary practices, religious practices, or statutory provisions.

[77] Midamaba B H, 'Legal Pluralism and Attendant Internal Conflicts in Marital and Inheritance Laws in Kenya', 1994, 376.

Chapter 3: Analysis of The Effect of Legal Transplantation on The Institution of Marriage from The Viewpoint of The Legal Framework.

Introduction

The legal framework of Kenya's marriage institution is one that has been changed considerably from the pre-colonial times to modern day. Multiple legislations were implemented during Kenya's colonial period, and further development to the institution occurred as a result of the harmonization attempts by the government. This chapter discusses the effects of legal transplantation on the understanding of what marriage is and the institution in general, doing so in 2 sections: Colonial period, Post-2010 Constitution.

Colonial Period

This period was the beginning of Legal Transplantation as the British introduced Common Law in Kenya[78]. This era beginning in the latter half of the 19th Century[79] until Independence led to the relegation of customary law, when it ran contrary to the needs of the colonial government or was believed to be contrary to European ideas[80].

The **Marriage Ordinance of 1902,** an important legislation of the time, was an ordinance that was enacted specifically for the Christian form of marriage, the provisions of which matched closely to English Law[81]. It was a way for Africans who had converted to Christianity to contract a Christian marriage[82]. The interpretation of this legislation led to the definition of marriage as a strictly monogamous union[83]. It did not cater in any way for customary law. The Marriage Ordinance was a tool by which the colonial administration of justice promoted European-type marriages, considering it formal, legalistic, and therefore valid, as opposed to

[78] Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, LawAfrica Publishing (K) Ltd, Nairobi, 2014, 18.

[79] Kang'ara S, 'Beyond Bed and Bread: Making the African State through Marriage Law Reform - Constitutive and Transformative Influences of Anglo-American Legal Thought', 9 (3) *Hastings Race & Poverty L.J*, 2012, 4.

[80]Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, LawAfrica Publishing (K) Ltd, Nairobi, 2014, 18.

[81] Phillips A, 'Marriage and Divorce Laws in East Africa', 3(2), *Journal of African Law*, 1959, 93.

[82] Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, LawAfrica Publishing (K) Ltd, Nairobi, 2014, 19.

[83] Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, LawAfrica Publishing (K) Ltd, Nairobi, 2014, 20.

Customary marriage. They viewed Customary Marriage as informal, that it lacked legal precedent and therefore was not a valid form of marriage[84].

The Marriage Ordinance was enhanced by the **Native Christian Marriage Ordinance of 1904**. This ordinance had one major effect, it made it possible for Africans who had contracted a customary marriage to convert to a Civil/Christian form[85]. This meant that a man who originally contracted a polygamous marriage had to choose who he would contract a monogamous marriage with, essentially abandoning all other wives[86]. One reason that most polygamous unions decided to convert was that by doing so, they had "equal status to Europeans in family law"[87] and further, the ability to enhance their financial standing usually accompanied such conversion.

Other statutes implemented during the colonial period that directly relate to Marriage and Divorce included **The Mohammedan Marriage and Divorce Registration Ordinance** and **Hindu Marriage, Divorce and Succession Ordinance** which dealt with those of Islamic and Hindu faith respectively[88]. Though their analysis could be important for the study of marriage legislation in Kenya, they are not directly relevant to the topic of this research paper.

The Ordinances of the colonial period attempted to frame the family law regime in westernized terms in order to shape the colonial regime and social structure to suit their needs,[89] for instance by destabilizing and therefore controlling communal land holdings[90].

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[84] Kang'ara S, 'Beyond Bed and Bread: Making the African State through Marriage Law Reform - Constitutive and Transformative Influences of Anglo-American Legal Thought', 9 (3) *Hastings Race & Poverty L.J,* 2012, 6.

[85] Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, LawAfrica Publishing (K) Ltd, Nairobi, 2014, 20.

[86] Kang'ara S, 'Beyond Bed and Bread: Making the African State through Marriage Law Reform - Constitutive and Transformative Influences of Anglo-American Legal Thought',9(3) *Hastings Race &Poverty L.J,* 16.

[87] Kang'ara S, 'Beyond Bed and Bread: Making the African State through Marriage Law Reform - Constitutive and Transformative Influences of Anglo-American Legal Thought', 10.

[88] Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, LawAfrica Publishing (K) Ltd, Nairobi, 2014, 21.

[89] Kiage P, *Family Law in Kenya: Marriage, Divorce and Children*, LawAfrica Publishing (K) Ltd, Nairobi, 2014, 21.

[90] Kang'ara S, 'Beyond Bed and Bread: Making the African State through Marriage Law Reform - Constitutive and Transformative Influences of Anglo-American Legal Thought',9 (3) *Hastings Race & Poverty L.J,* 2012, 15.

Post-2010 Constitution Period

The 2010 Constitution of Kenya provides that "*parliament shall enact legislation that recognises a) marriages concluded under any tradition, or system of religious, personal or family law.*[91]" This necessitated the need for change when it came to the Marriage Act that was in effect at the time.

The **Marriage Act of 2014**, met this constitutional mandate by providing a new definition of marriage, considering it to be "*a voluntary union of man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act*[92]. This means that so long as the marriage is registered and certified under the Act, customary marriages would have the same status as Civil and Christian marriages. This is the first time in Kenya's legislative history that customary marriages were directly referenced by legislation.

In 2017, **The Marriage (Customary Marriage) Rules, 2017** was enacted. It further defines customary marriage as "*a marriage contracted in accordance with the customs of the communities of one or both of the parties to the marriage*[93]." It specifically provides for the certification and registration of Customary Marriages.

Conclusion: Effect of English Common Law

The implementation of Common Law by the colonial government is a clear example of legal transplantation, specifically the externally dictated transplant in relation to the institution of marriage in Kenya. During the colonial period, it came into direct contact with customary practices and rules in relation to marriage and thusly, it was negatively affected as the colonial governments attempted to shape the society as they saw fit.

The acceptance and implementation of the western conception of marriage continued until 2014, with the implementation of **the 2014 Marriage Act** and further the **2017 Customary Marriage Rules**, which for the first time dealt directly with the customary marriages. It can be noted however, that the western ideal of formalization still rings true as customary marriage now has been provided with rules and regulations that did not exist previously. Similarly, while the Constitution provides that all marriages are equal under the law, the lack of provisions to

[91] Article 45(4)(a), *Constitution of Kenya* (2010).

[92] Section 3, *Marriage Act* (2014)

[93] Section 2, *Marriage (Customary Marriage) Rules* (2017).

convert from a Christian or Civil Marriage into a customary one while the vis-versa exists may be seen as prejudiced.

It appears that the development of marriage legislation has attempted to reverse the common law transplant effects on the institution of marriage. In order to truly see whether this is the case, an analysis of the court's interpretation of the legislation is required.

Chapter 4: Analysis of The Effect of Legal Transplantation on The Institution of Marriage from The Viewpoint of Case Law

Introduction

While the legislative framework is important to the institution of Marriage, its position is only strong if the courts correctly apply the rules and regulations that it sets out. To truly understand the effects of the transplantation of common law into Kenya, one must examine the courts decisions when it comes to marriage. As with the previous chapter, the examination is presented in two sections: The Colonial Period and Post-2010 Constitution. It is important to look at court decisions in both periods as it would highlight whether or not the courts views have changed.

Colonial Period

With the transplantation of English Common Law, so arrived the English interpretation of these laws. It is the case with the definition of marriage, as seen in *Hyde v Hyde*[94]. Even though this case was not presided in Kenyan Courts, it is of particular importance as it set the precedent of the elements of what the courts would need consider for a valid marriage to exist.

John Hyde was an Englishman by birth and Mormon by faith. He married is wife as per the rights and ceremonies of the Mormon religion, which allowed for potentially polygamous marriages. They then lived together and had children. A few years later, he renounced his faith and was excommunicated by his church, which as a result declared that his wife could remarry. His wife remarried, which led him to institute a divorce case against her on the basis of adultery.

The decision of this case, based on *Wanderer v Wanderer*, was that the Mormon marriage, being a foreign institution in England, could not be considered valid as it did not resemble the English institution of marriage. The courts defined Marriage as, "*the voluntary union for life of one man and one woman, to the exclusion of all others*." This definition was based on the ideals set about by Christianity of which the judge continued to reference throughout. The court further held that cultural traditions that the court did not know of, nor understand could not become the basis of a court's decision[95]. This case was applied in Kenya as precedent based on the reception clause. The reception clause, a statutory law, was introduced into Kenya as early

[94] *Hyde v Hyde* (1886), English Court of Probate and Divorce.

[95] *Hyde v Hyde* (1886), English Court of Probate and Divorce.

as 1897, provided that Kenya would receive English Common law prior to independence[96], including this case.

The court, in *R v Amkeyo,* presided over a criminal case where the accused was convicted of possession of stolen property, based on the testimony of the chief witness, who happened to be a woman who he had contracted a customary marriage. On appeal, it was argued that since the accused and chief witness were married, they held spousal privilege and that her evidence should not have been admitted. The court rejected this on the basis that a bride-price was paid, arguing, '*that the wife not a free contracting agent, but was to be regarded in the nature of chattel…and that there is no limit to the number of women that may be so purchased*'[97]. They used the definition as set by *Hyde v Hyde,* specifically arguing that the customary marriage did not meet the essential voluntary aspect required. This clearly shows the disdain that the courts held for customary marriages and the rejection thereof. The courts refused to acknowledge the spousal privileges provided to man and wife, protections which would have been upheld if the marriage had been Christian or Civil in nature, similar to how it would have been applied in England at the time.

The rejection of Customary marriage can also be seen in *R v Mwakio Asani*, where the court stated, "*It is unfortunate that the words wife and marriage have been applied in this connection. If only the woman party had been described as a concubine or something of the sort, the question could never have arisen*[98]."

While the Judicature Act provided that courts be guided by customary law where one or both parties where affected, the exception provided was that it was applicable in so far as "it is not repugnant to justice, morality or contrary to written laws[99]." *R v Amkeyo* is an example of a case where customary practices should have been applied. However, it shows that the courts did not only transplant their laws but rather their principles and attitudes to the detriment of existing customary practices.

[96] Ojienda T, Aloo L O, 'Researching Kenyan Law'-<https://www.nyulawglobal.org/globalex/Kenya.html> on 16 November 2020.

[97] *R v. Amkeyo* (1952) 19 East African Court of Appeal

[98] *R v Mwakio Asani s/o. Mwanguku* (1930) 14 KLR 133

[99] *Judicature Act* 1967

Post-2010 Constitution Period

With the promulgation of the 2010 Constitution of Kenya, so to came the supreme legislative recognition of Customary Law, as it provides: "*the constitution recognizes culture as the foundations of the nation and as the cumulative civilization of the Kenyan people and nation*[100]". The Court in *Monica Jesang Katam v Jackson Chepkwony & Another*, used this provision to decide on the validity of woman-to-woman marriages as per Nandi Customs. Woman-to-woman marriage practices occur where, a wife who is barren or childless, marries another woman for the purpose of bearing her husband children. It is a situation where a woman marries her surrogate.

The petitioner in this case was seeking a grant of Letters of Administration as the deceased had died interstate. The petitioner argued that she should be granted the Letters as she was the widow. This was objected and the courts therefore needed to determine whether or not a woman-to-woman marriage existed and if so, whether it was legal. The court had to look at the existing law and how to properly apply them. The court accepted Nandi Customary law as the governing law and using scholarship by Eugene Cotran on Nandi Customary Law, found that woman-to-woman marriage was a valid and recognized family institution. The court also used *EC v KC and JK* which demonstrated how such a custom functioned. Based on the evidence provided, as well as the protection afforded by **Article 11(1) of the Constitution**, the court held that the petitioner was indeed a wife as per her customary ceremony and practice, granting her the Letters of Administration[101]. This shows a new appreciation for Customary Law by the courts made easier by the research and scholarship undertaken by Cotran, among others.

While the Constitutional provision provides the backbone for the safeguard of Customary Law in family, further protections are provided by the Marriage Act of 2014. This can be seen in the case of *J F B v M O O & Another*[102]. This case revolves around the discussion of who was legally responsible to bury the remains of the deceased from the Gendia Adventist Hospital. A potential husband to whom she deserted or the man she subsequently eloped with.

The appellant, who married the deceased under Luo Customary Law in 1996, argued that he should be responsible for her burial, while the 1st respondent argued that no legal marriage between the deceased and appellant existed. He argued that it was cohabitation, which was not

[100] Article 11(1), *Constitution of Kenya* (2010).

[101] *MONICA JESANG KATAM v JACKSON CHEPKWONY & another (*2011*) eKLR.*

[102] *J F B v M O O & another* (2018) eKLR.

recognized under Luo custom, as he himself had married her in 1993 and again in 2014. The appellant rejected the respondent's marriage claim adducing evidence that he paid dowry in 1998. The respondent as a result testified that he married the deceased in 1993 without paying dowry as is custom, but she left him in 1995 only for them to remarry again in 2014 and was thusly issued with a Marriage Certificate. The court, using customary law was of the belief that because the 1st respondent had not paid dowry in any form, that marriage did not exist. Similarly, because the appellant had paid dowry, the marriage under customary law did exist and because the dowry was never returned the marriage was never dissolved. Therefore, the subsequent 2014 Christian marriage was annulled, and the appellant had the right to bury the remains.[103]

Conclusion: Effect of Common Law

The discussion above shows two things. First is the fact that prior to the implementation of the 2010 Constitution and further the 2014 Marriage Act, the effects of the Legal Transplantation of Common Law were excessive. The courts had the ability and opportunity to apply customary law in those cases and chose not to do so. The English ideal of marriage had seeped deep into the thinking of the courts, specifically what they speculated to be morally repugnant and unjust. There was therefore a deep-rooted preference to the more accepted Christian and Civil marriages introduced by Common Law.

The direct recognition of customary law in the Constitution and the Marriage Act have dramatically reduced the effect that the transplantation of Common Law has had on the Institution of marriage. Customary practices are directly referenced as the guiding law in relation to certain cases, providing easier application for them in subsequent cases. Had the pre-2010 cases taken place in today's society, it is easy and correct to say that the judgments would be different. The preference of Common Law no longer exists in the same way that it did in the previous Colonial Period.

[103] *J F B v M O O & another* (2018) *eKLR*

Chapter 5: Conclusion and Recommendation

Introduction

This chapter concludes the dissertation in its entirety. This paper had 2 main aims that it hoped to meet. The first was examining the transplantation of English Common Law into the marriage institution within the Kenyan Legal System. This was done through the analysis of the legislation that were enacted in relation to marriage. Secondly, the paper was to then investigate the introduction of Common Law on Customary Practices, through the decisions of cases. This chapter aims to summarize and conclude the findings clearly and concisely and provide recommendations (if any) to the research question.

Summary of the Problem

This research was undertaken on the grounds that society benefits when a family is stable as it is the foundational pillar of any society. The argument put forward was that because Common Law is inherently individualistic, there was a clear destabilization of the family if implemented, unlike Customary Marriage which was explained in Chapter 1. By implementing Common Law and subjugating Customary Law under it, it would likely have a negative effect on the society in general. This paper used the Legal Transplantation Concept as well as referring to Legal Pluralism to show how the effects of Legal Transplantation affected the Institution of Marriage, specifically customary marriage.

The Findings

Through the analysis and examination of the legal framework that existed previously and the one in place today, the study concluded 2 related things. Firstly, the legal framework that governed marriage in Kenya was complicated and secondly, did not cover customary marriage. Multiple legislations overlapped. It found that while the **Judicature Act** did provide that customary law should be applied to those who were affected by it, no other legislation existed on how that application should take place. The framework previously ignored customary law, which led to the subordination of customary law in general and specifically the marital aspect of it.

Further research of the same, found that the implementation of the 2010 Constitution and the 2014 Marriage Act attempted to reverse some of the issues noted, specifically the reduction of the multitude of legislations and the legal acceptance of Customary Law. It took notice of the

importance of the formalization of marriage and therefore implemented that in relation to the validity of a customary marriage.

In addition to the examination of the legal framework, this study also analysed the decisions of the courts based on the existing legislation. The analysis of case law prior and post 2010 found 2 things. Pre-2010, the effect of Legal Transplantation was great. While the courts had opportunity to apply customary law, they did not. They preferred to use precedent as set in *Hyde v Hyde* which limited their application of customary law. This affected customary marriage based on the fact that the courts did not recognise the validity of such a marriage.

Secondly, the implementation of a new legislative framework created space for the courts to properly reference customary practice in their decisions. Post-2010, the case law shows a new appreciation for customary marriage. Customary practices are directly referenced as the guiding law in relation to certain cases, providing easier application for them in subsequent cases and most importantly, customary marriage is viewed as a valid form of marriage.

Conclusion

This study shows clearly that there has been an attempt to reverse the effects of legal transplantation and even though it took the better part of 40 years to accomplish, the reversal has been successful. This can be seen through the reformation of the previous legislations into one, the 2014 Marriage Act. It should further be considered a success due to the formalization of customary law into the Marriage Act where previously none existed. Finally, this formalization had a direct effect on the way in which the courts apply customary law, a viewpoint that did not exist prior to the 2014 Marriage Act.

This research shows that while overall, the Legal Transplantation of Common Law had a negative effect on customary marriage, it should be noted that there were some positives, including the added protections for a wife within a marriage.

Recommendation

Classification and Codification of Customary Marriage Practices

Through the process of doing this research one of the issues arising was the lack of codification of the different customary practices that exist in Kenya. First, by codifying these practices, it provides the chance for cultural changes to be acknowledged allowing for a more accurate application of those customary practices. This would limit the issues of confusion as was seen in the case *J F B v M O O & Another*. The codification would allow for the classifying of different customary practices, providing an easy reference for the courts to refer to if need be. It would act in the same that the Marriage Act does when distinguishing between Christian, Civil, Customary, Hindu, and Islamic marriages. This codification would enhance the institution of marriage.

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