AFRICAN CUSTOMARY MARRIAGE IN KENYA: A CASE FOR NOTIFICATION AND CONSENT REGARDING SUBSEQUENT MARRIAGES

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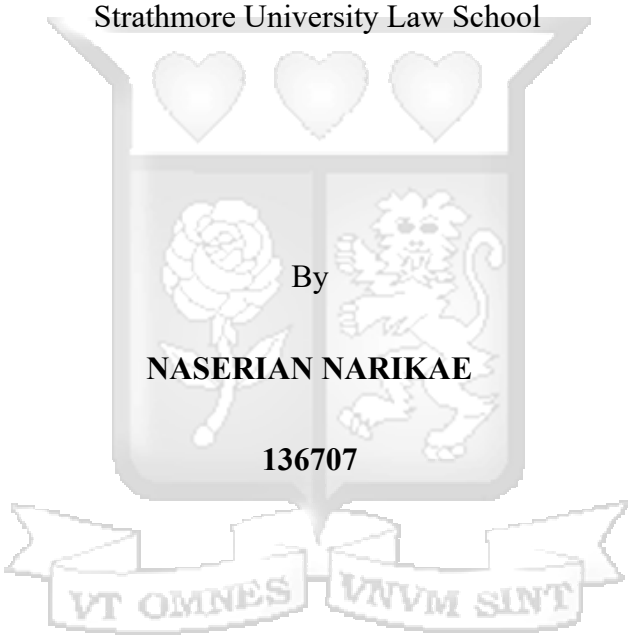

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TABLE OF CONTENTS

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DECLARATION

Declaration

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

Signed: .....

Date: 02/07/2024

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

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ABSTRACT

The Marriage Act, 2014 is the regime of law that primarily regulates the regime of marriage in Kenya. This Act provides for Customary polygamous marriages, from their inception to their dissolution. The Marriage Act, 2014, however, is quiet on the matter of notification and consent of subsequent marriages in Customary polygamous marriages.

This study purposes to examine whether the lack of a provision requiring the mandatory notification and consent of a current wife or wives of subsequent marriages in Customary marriages violates Article 45(3) of the Constitution of Kenya and Section 3(2) of the Marriage Act.

The study plans to achieve this purpose by pursuing set objectives. The study will examine the legal framework governing Customary polygamous marriages in Kenya, the application and interpretation of these provisions, as well as the realisation of equality in Customary polygamous marriages. The study also seeks to analyse the effect of the absence of a notification and consent clause regarding subsequent marriages in the Marriage Act, 2014, on the equality of parties in Customary polygamous marriages.

This author will undertake a desk-based approach to conduct this research. Primary and secondary sources will be used in this paper, including various pieces of legislation and journal articles, among others.

This paper's hypothesis is that the absence of a provision requiring the mandatory notification and consent of a current wife or wives of subsequent marriages, does indeed violate the equality of parties in Customary marriages.

This work then intends to recommend that an amendment is made to the Marriage Act, 2014, to incorporate a provision requiring the mandatory notification and consent of a current wife or wives of subsequent marriages in Customary marriages. In order to realise the equality aims of Article 45(3) of the Constitution of Kenya and Section 3(2) of the Marriage Act, and further achieve substantive equality and equity in Customary polygamous unions.

LIST OF ABBREVIATIONS, CASES, AND LEGAL INSTRUMENTS

Abbreviations

CEDAW- Convention on the Elimination of All Forms of Discrimination Against Women.

ICCPR- International Covenant on Civil and Political Rights.

UDHR- Universal Declaration of Human Rights.

UNGA- United Nations General Assembly.

Cases

DMK v IL (2021) eKLR.

Eva Naima Kaaka & another v Tabitha Waithera Mararo (2018) eKLR.

JOK v SAO (2018) eKLR.

Mary Wanjuhi Muigai v Attorney General & another (2015) eKLR.

In re Estate of James Njenga Muiruri (Deceased) (2021) eKLR.

Mmusi v Ramantele (2007) High Court of Botswana at Gabarone.

Legal Instruments

Constitution of Kenya, (2010).

Civil Procedure Act, (2010).

Judicature Act, (1967).

Marriage (Customary Marriage), Rules, (2017).

Marriage Act, (2014).

Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, vol. 1249 (CEDAW).

Convention on the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 21 (13th session, 1994).

International Covenant on Civil and Political Rights General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), CCPR/C/21/Rev.1/Add.10, General Comment No. 28. (General Comments).

International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (ICCPR).

Protocol to the African charter on Human and Peoples' Rights on the Rights of Women in Africa, 1 July 2003 (Maputo Protocol).

Universal Declaration of Human Rights, 10 December 1948, 217 A(III) (UNGA) (UDHR).

CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND

The advent of colonialism brought to Kenya what is termed as the "dual" court system. This system included English Courts, which catered for the English people and operated according to Common law. There were also "Native" courts that applied to the native Kenyans and were guided by local customs and laws, in as much as they were deemed not to be in contradiction to the principles of morality and justice.[1]

Family, Marriage, and Succession law, however, were handled in a different fashion. They were governed by a plural system that included English Law, Islamic Law, Hindu Law, and Customary (African) Law.[2] Similar to the dual system mentioned above, English Law was handled by a Common law court, and Customary law was administered by the Native courts, while Islamic Law was administered by the Kadhis Courts. As far as marriage was concerned "natives" and non-Europeans had the choice to marry under common law, but only if there was an intention to practice monogamy. [3]

Kenya became an independent country in 1963. However, some aspects such as the colonial legal system were retained even after independence. The dual system was condensed into a singular court system, which applied both Customary and common law.[4] The Kenyan government took note of the complex family law system and established a commission on the law of marriage and divorce in 1967.[5] This Commission's mandate was to create a cohesive and universal law that governed Kenyans on the consolidation of marriage and divorce, that was unique to the Kenyan context. The Commission was also focused on equality and the position of women in personal law.[6] The Commission then released a report that detailed

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[1] Cotran E, "The Development and reform of the law in Kenya", 27 (1), Journal of African Law, Vol. 27, 1983,42.

[2] Cotran E, "The Development and reform of the law in Kenya",46.

[3] Cotran E, "The Development and reform of the law in Kenya",46.

[4] Cotran E, "The Development and reform of the law in Kenya",49.

[5] Cotran E, "Marriage, divorce and succession laws in Kenya: Is integration or unification possible?",40 (2), Journal of African Law, 1996,194.

[6] Report of the Commission on the Law of Marriage and Divorce, Nairobi, 1968, 2.

areas that the Commission deemed as lacking, and the Commission's corresponding recommendations. Some recommendations included: the equal status of all marriages,[7] a universal minimum age for marriage,[8]and prohibited degrees of consanguinity between marriage partners.[9] The report also delved into the issue of polygamy and detailed the country's opinion on the matter, which was generally in favour of polygamy.[10] The report bore several recommendations concerning polygamy. It stated that both monogamous and polygamous marriages should be recognised.[11] The recognition of the equality of multiple wives in polygamous marriages,[12] as well as the provision for wives in polygamous marriages to object to a consecutive marriage were also recommended.[13] The Commission based on the report drafted a Bill, which was, however, poorly received. This was largely because the Bill's recommendations were deemed to be estranged from custom and tradition and viewed as biased towards women. The Bill, therefore, was never actualised into law.[14]

In 2010, a new Constitution was promulgated in Kenya. The Constitution features an expansive Bill of rights, as well as themes of gender equality. Moreover, it embraces culture and custom. The Constitution under Article 45(4) instructed that legislation be put in place by Parliament to deal with marriage under all systems and customs.[15] Parliament, in accordance with the Constitution drafted the Marriage Bill. The Bill was eventually read, passed in Parliament, and consequently received presidential assent on the 29th of April 2014. Prior to this, on the 20th of March 2014, during the third reading of the then proposed Bill, an amendment to delete a sub-clause that required the notification of subsequent marriages to the

[7] Report of the Commission on the Law of Marriage and Divorce, Nairobi, 1968,13.

[8] Report of the Commission on the Law of Marriage and Divorce, Nairobi, 1968,17.

[9] Report of the Commission on the Law of Marriage and Divorce, Nairobi, 1968, 21.

[10] Report of the Commission on the Law of Marriage and Divorce, Nairobi, 1968, 22.

[11] Report of the Commission on the Law of Marriage and Divorce, Nairobi, 1968, 23.

[12] Report of the Commission on the Law of Marriage and Divorce, Nairobi, 1968, 25.

[13] Report of the Commission on the Law of Marriage and Divorce, Nairobi, 1968, 26.

[14] Cotran E, "Marriage, divorce and succession laws in Kenya: Is integration or unification possible?", 202.

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

current wife or wives in a polygamous union, had been proposed. This proposal had sparked a heated debate within Parliament, with many male members speaking for its deletion and in turn making several offensive comments about the place of women in marriage.[16] The female members of Parliament strongly advocated against this amendment and, in a famous turn of events, walked out in protest when it became apparent that they would not be heard.[17] Subsequently, the amendment was passed and the Bill read for the third and final time. The Bill got the President's assent on the 29th of April 2014 and commenced on the 20th of May 2014.[18]

Although the Bill proposed by the 1968 Report of the Commission on the Law of Marriage and Divorce never became law, the 2014 Marriage Act, contains more than a few of the recommendations of the Commission. These include the equal status of all marriages,[19] a universal minimum age to marry legally,[20] marriage as being either monogamous or polygamous,[21] and not setting a maximum number on the wives a man in a Customary marriage can legally take. The Marriage Act also defined 'marriage'[22] and explicitly mentioned the equality of all parties before, during and after marriage.[23]

In the second half of 2014, Mary Wanjuhi Muigai brought forward a petition to the High Court questioning the constitutionality of the 2014 Marriage Act. The petitioner alleged that the Act did not provide for the consultation of an existing wife or wives before the introduction of a subsequent wife.[24] This petitioner supported her argument using the equality

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[16] National Assembly Hansard Report, 20 March 2014, 56-65.

[17] National Assembly Hansard Report, 20 March 2014, 56-65.

[18] *Marriage Act* (2014).

[19] Section 3(3), *Marriage Act*, (2014).

[20] Section 4, *Marriage Act* (2014).

[21] Section 6(2) and (3), *Marriage Act* (2014).

[22] Section 3(1), *Marriage Act* (2014).

[23] Section 3(2) *Marriage Act* (2014).

[24] Mary Wanjuhi Muigai v Attorney General & another [2015] eKLR para. 12 and 13.

provisions mentioned in the Constitution.[25] The judge in this case stated that "to talk of the equality of men and women within a polygamous situation is a bit of an oxy-moronic phrase".[26]This was in reference to the Kenyan practice of Polygyny[27] and not Polyandry, and the inherent advantage men have in the Kenyan practice of polygamy. The judge determined that the absence of consent of a wife or wives in the event of a subsequent marriage in the Marriage Act, 2014, is in contravention of the provisions of gender equality in the Constitution and is therefore unconstitutional.[28]

1.2 STATEMENT OF PROBLEM

The Constitution of Kenya in Article 45 (3) provides that "*parties to a marriage are entitled to equal rights at the time of the marriage, during … and at the dissolution of the marriage*."[29] This provision is also echoed in Section 3(2) Marriage Act, 2014.[30] The law in Kenya governing African Customary marriages, is the Marriage Act, 2014, alongside African Customary Law. Section 6 (3) of the Marriage Act, 2014 provides for this form of marriage but in reference to polygamous or potentially polygamous marriages, makes no mention of the issue of the notification and consent of existing wives in the case that the man intends to marry another. This, as confirmed by the abovementioned amendment made by Parliament on 20th of March 2014, meant that men who married under Customary unions could lawfully not inform their current wife or wives about any later marriages.[31] This poses a major problem, as this arrangement greatly disadvantages women and leaves them in the dark within their own marriage and the parties within it. There is obvious inequality and great imbalance of power in such situations with one man wielding control in the marriage or marriages, over several

[25] Mary Wanjuhi Muigai v Attorney General & another [2015] eKLR para. 14.

[26] Mary Wanjuhi Muigai v Attorney General & another [2015] eKLR para. 70.

[27] The practice of a singular man marrying multiple female partners.

[28] Mary Wanjuhi Muigai v Attorney General & another [2015] eKLR para. 78 (ii).

[29] Article 45(3), *Constitution of Kenya*, (2010).

[30] Section 3(2), *Marriage Act*, (2014).

[31] National Assembly Hansard Report, 20 March 2014, 56-65.

women and children, with and without their knowledge and consent.[32] This sentiment is echoed by the public as evidenced by the parliamentary protests regarding the deletion of the consent clause during the third reading of the Marriage Bill, and in the decision in Mary Wanjuhi Muigai V Attorney General (2014).

This study aims to examine whether the lack of a provision requiring notification and consent of a current wife or wives regarding subsequent marriages in Customary marriages violates Article 45(3) of the Constitution of Kenya and Section 3(2) of the Marriage Act, which provide for the equal rights of parties at, during, and at the dissolution of marriage.

1.3 RESEARCH OBJECTIVES

1. To examine the legal framework that governs marriage with a special focus on Customary polygamous marriages in Kenya.
2. To investigate how provisions of the Marriage Act, 2014 regarding polygamous marriages are interpreted and applied through Court jurisprudence.
3.
    a) To analyse equality and non-discrimination in polygamous marriages under African Customary Law in Kenya.
    b) To evaluate how the absence of a provision requiring mandatory notification and consent of a current wife or wives of subsequent marriages affects the equality of parties in Customary polygamous marriages in Kenya.

1.4 RESEARCH QUESTIONS

1.
    a) What is the legal framework, in Kenya, that governs the institution of marriage, specifically its definition and application?
    b) Which laws specifically provide for African Customary polygamous marriages in Kenya?

[32] Kenyan Laws and Harmful Customs Curtail Women's Equal Enjoyment of ICESCR Rights, 2008, 18-20.

2. How are provisions of the Marriage Act, 2014, regarding polygamous marriages interpreted and applied by the Courts?
3.

    a) How are the principles of equality and non-discrimination realised in polygamous marriages under African Customary law in Kenya?

    b) How does the absence of a provision requiring the mandatory notification and consent of a current wife or wives of subsequent marriages affect the equality of parties in Customary polygamous marriages in Kenya?

1.5 HYPOTHESIS

This author's hypothesis is that the lack of a provision requiring the mandatory consent and notification of a current wife or wives in the case of subsequent marriages in African customary marriages in Kenya violates the provision of the equal rights of the parties to a marriage in Article 45(3) of the Constitution of Kenya, and Section 3 (2) of the Marriage Act 2014. This is because the lack of such a provision results in inequality and discrimination between the wives or wife and the husband. A husband in such a union can freely marry and engage with other women despite his marital status or even his wife's/wives' ignorance or disapproval, which violates the sanctity of marriage as far as the equality of parties envisaged in Article 45(3) of the Constitution of Kenya, and Section 3 (2) of the Marriage Act 2014 is concerned. Moreover, women who aspire to practice their culture and customs should not be punished by engaging in a form of marriage that offers them limited protection or say within the marriage.

1.6 JUSTIFICATION

This study will be useful as it examines the nature and use of Customary polygamous marriages in Kenya, while critically assessing the position of women in such unions and their rights within such marriages.

This study seeks to address the problematic nature of Customary polygamous marriages, especially the lack of a provision establishing mandatory notification and consent of a current wife or wives within Customary polygamous marriages of subsequent marriages.

This research paper, also, aims to examine the realisation of Article 45(3) of the Constitution of Kenya, and Section 3 (2) of the Marriage Act 2014 in Customary polygamous marriages and the presence of equal rights for the parties in a Customary marriage. This study, therefore, is crucial from the standpoint of marital consent and equality. This is notably important in the case of Kenya, a country that utilises codified law and a common law system in tandem with uncodified laws and a Customary law system.

This study will benefit several persons such as judges, members of the legislature, policymakers, and other researchers studying the application of Marriage law and gender equality in Kenya. It will also be of use to other law students interested in or studying Family law. In addition, the study will assist women and men intending to get married under Customary law in Kenya.

The author believes this study will help guide judges, members of the Legislature, and policymakers as they deliberate on matters regarding Customary marriage, as well as, in the creation and amendment of laws touching on the subject. This author aims to do this by providing an analysis of the issues related to lack of consent and notification of prior wives. This information will provide policymakers with a deeper understanding of the subject matter thus enabling Parliament and the Courts to legislate and implement improved and informed laws that better consider the parties involved.

1.7 THEORETICAL FRAMEWORK

The concept that guides this dissertation is substantive equality. Substantive equality remedies inequality by identifying traits that could place an individual or a group of people at a disadvantage, and then directly addressing the disadvantage to remedy the inequality.[33] This differs from the traditional formal conception of equality, proposed by Aristotle, also known as formal equality. Formal equality achieves equality by treating people who are identical in

[33] Stancil P, "Substantive equality and procedural justice" 102(4), Iowa Law Review,2017,1644.

nature, in the same way.[34] Substantive equality goes past formal equality and seeks to create a fair starting point by eliminating the consequences of the above-mentioned disadvantages.[35] This is guided by the idea that all people are "morally equal", regardless of their differences (such as gender, race, or sexuality).[36] This author intends to focus specifically on Sandra Fredman's four-dimensional interpretation of substantive equality.[37] This approach consists of the following dimensions. The first dimension is "to redress disadvantage", which seeks to eliminate the consequences of disadvantage, through asymmetric and affirmative action.[38] The second dimension is to "address stigma, stereotyping and the like".[39] Fredman visualises this dimension through the concept of recognition, where our society's recognition or lack thereof of our identities result in various inequalities. Therefore, dealing with this social element could better address the issue.[40] The third dimension is "to enhance voice and participation", where Fredman emphasises the importance of political and social participation in combating inequality.[41] The final dimension is "to accommodate difference and achieve structural change". The author states that differences should be celebrated because they have value and are tied to a person's distinctiveness, therefore the disadvantage caused by the difference should be the subject of eradication and not the difference itself.[42]

Fredman developed this approach to serve as a framework that could adequately tackle the complicated characteristics of inequality.[43]Fredman postulates that this framework is best

[34] Stancil P, "Substantive equality and procedural justice",1643.

[35] Stancil P, "Substantive equality and procedural justice",1645.

[36] Stancil P, "Substantive equality and procedural justice",1644.

[37] Fredman S, "Substantive equality revisited"14(3), International Journal of Constitutional Law, 2016, 713.

[38] Fredman S, "Substantive equality revisited",729.

[39] Fredman S, "Substantive equality revisited",731.

[40] Fredman S, "Substantive equality revisited",731.

[41] Fredman S, "Substantive equality revisited",732.

[42] Fredman S, "Substantive equality revisited",733.

[43] Fredman S, "Substantive equality revisited",713.

suited to tackle inequality as it touches on all aspects of equality without neglecting or conflicting with others, namely distributive inequality, prejudice as well as participation inequality. Fredman argues that this framework remedies an issue in the discourse about substantive equality. She states that the dimensions should be considered together, in order to achieve a holistic realisation of equality.[44]

This concept will be used in this study to understand the institution of African Customary polygamous marriages. This idea will also be used to investigate whether the lack of a provision requiring the mandatory notification and consent of a current wife or wives in the case of subsequent marriages violates Article 45(3) of the Constitution of Kenya, and Section 3 (2) of the Marriage Act 2014. This notion is also the lens from which to view this study.

1.8 LITERATURE REVIEW

While conducting this research, this author has encountered authors who have touched on this study's focus: the lack of a provision requiring the mandatory notification and consent of a current wife or wives to subsequent marriages in Customary polygamous marriages. However, these authors only mention this topic in passing. This study's focus is yet to be the main subject of a research paper. This illustrates a gap which this study seeks to bridge.

1.8.1 CUSTOMARY LAW AND GENDER INEQUALITY

Muna Ndolo in his paper, "Legal Pluralism, Customary Law, and Women's Rights", delves into the reality of legal pluralism in Africa, specifically the conflict between Customary law, gender rights and human rights.[45] Ndolo writes extensively of the lasting negative effects of colonialism on the place, nature, and growth of Customary law, which is felt even in postcolonial Africa. Ndolo states that Customary law application appears to be discriminatory, with a bias against women. This bias, coupled with Customary law's communal nature, which values the community over the individual, clashes with the regime of human rights. This occurs because human rights strive for equality and the realisation of individual dignity. To combat these various issues, Ndolo proposes a three-pronged reform of

[44] Fredman S, "Substantive equality revisited",728.

[45] Ndolo M, "Legal pluralism, customary law and women's rights", 32 (1), Southern African Public Law, 2017.

Customary law, which includes the integration of human rights instruments that target the prohibition of gender discrimination, followed by the translation of these instruments into the constitutions of African countries and finally the review and reform of discriminatory Customary laws and norms. This, Ndolo posits, will breathe life into Customary law, effectively turning it into a "living law".[46]

Gail Presby in her piece, "Women's Rights in Kenya Since Independence: The Complexities of Kenya's Legal System and the Opportunities of Civic Engagement", highlights the role of women and their rights in regard to Customary law in Kenya.[47] Presby, much like Ndolo, observes that Customary law has been seen as discriminatory towards women. Moreover, despite the entrenchment of gender equality in the Constitution, Customary Law still determines several areas of personal law, such as succession and marriage. Presby also mentions the failed attempts at codifying Customary Law. When discussing the inclusion of Customary polygamous marriages in the Marriage Act, 2014, Presby notes that not all the elements of Customary law were codified, such as the consent of the first wife, which was a key element of polygamous Customary marriages. Presby alludes to the fact that colonialism worsened the discrimination of women in Customary law by pushing patriarchal narratives and minimising the powerful roles of women in the community. Presby further agrees with and advocates for Ndolo's concept of reviewing and renewing Customary Law to ensure gender equality.[48]

In his paper, "Gender Equality in African Customary Law: Has the Male Ultimogeniture Rule Any Future in Botswana?"[49] Charles Manga Fombad examines the divide between Customary law and human rights by analysing the male ultimogeniture case, *Mmusi v*

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[46] Ndolo M, "Legal pluralism, customary law and women's rights", 1-21.

[47] Presby G, "Women's rights in Kenya since independence: the complexities of Kenya's legal system and the opportunities of civic engagement", 6 (1), The Journal of Social Encounters, 2022, 32-48.

[48] Presby G, "Women's rights in Kenya since independence: the complexities of Kenya's legal system and the opportunities of civic engagement", 32-48.

[49] Fombad C, "Gender equality in African customary law: has the male ultimogeniture rule any future in Botswana?", 52 (3), The Journal of Modern African Studies, 2014, 475-494.

Ramantele.[50] As seen in Ndolo and Presby's articles, Fombad also recognises the instances of oppression caused by the application of Customary law on marginalised parties such as women and children. Fombad similarly supports the notion of review, but uniquely focuses on the role of the courts and the judges presiding over these contentious matters. Fombad recommends that judges assume a bigger role by researching and reviewing the customs and norms to deconstruct their intentions and to better revamp and revitalise them to fit the new modern society that promotes gender equality.[51]

1.8.2 POLYGAMOUS CUSTOMARY MARRIAGES AND HUMAN RIGHTS

Lorraine Bowan, in her paper "Polygamy and Patriarchy: An Intimate Look at Marriage in Ghana Through a Human Rights Lens" critically examines the realm of Customary polygamous marriages, the role of human rights and the impact of such on women and girls in Ghana.[52] Bowan makes note of two schools of thought: the champions of human rights who call for the superiority of human rights, and "cultural relativists" who value the collective rights of a community over those of an individual. Bowan further states that polygamy is deeply rooted in the concept of patriarchy, consequently subjugating women and girls. The author proposes that the use of international law and human rights could curb and correct the inequalities caused by Customary law, by protecting the marginalised.[53]

Adebayo and Bankole in their article, "An Appraisal of Polygamy in Contemporary Family Law Practice: Validity and Challenges" discuss the Kenyan context regarding Customary polygamous marriages.[54] The duo uses the Kenyan legal regime regarding marriage to demonstrate the presence of polygamy and its acceptance in Kenyan law, as well as its equal

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[50] Mmusi v Ramantele (2007), High Court of Botswana at Gabarone.

[51] Fombad C, "Gender equality in African customary law: has the male ultimogeniture rule any future in Botswana?", 475-494.

[52] Bowan L, "Polygamy and patriarchy: an intimate look at marriage in Ghana through a human rights lens", 1(2), Contemporary Journal of African Studies, 2013, 45-64.

[53] Bowan L, "Polygamy and patriarchy: an intimate look at marriage in Ghana through a human rights lens", 45-64.

[54] Adebayo A & Bankole F, "An appraisal of polygamy in contemporary family law practice: validity and challenges", 3(1), African Journal of Law and Human Rights, 2019.

standing with other marriages. The pair mentions the parliamentary omission of the wife's right to object to a subsequent marriage in the 2014 Marriage Act, but only as far as the discussion of the Act's development is concerned.[55] Adebayo and Bankole also examine polygamy in India, Nigeria, and Britain. The authors, in their article argue for the recognition and accordance of status of polygamy in Nigeria. The duo further identifies the difficulties in doing so, including the inequality of marriage systems, with polygamy being considered inferior.[56] This article identifies the institutional infection of discrimination regarding the practice of Customary law in polygamous marriages in Nigeria, spotting the spread from as far as the judiciary to the legislature.

Lea Mwambene in her article, "What is The Future of Polygny (Polygamy) in Africa?", focuses majorly on the inequality polygamy creates in terms of property rights.[57] She claims that the concept of joint ownership in the Kenyan Matrimonial Property Act means that a husband and a singular wife in a polygamous union can own property to the exclusion of the other wives, resulting in a situation where the husband owns more property than each wife, thus creating inequity.[58] Mwambene analyses the laws regarding polygamy in several African countries including Kenya. While exploring the Marriage Act, 2014, Mwambene briefly notes the nonexistence of a provision requiring consent from an existing wife or wives in the case of subsequent marriage. She states that such a provision would be an essential addition to the Marriage Act. Mwambene focuses her discussion on the diverse approaches taken by different African states to control polygamy through abolition, legislation, or regulation.[59] Mwambene offers a unique point of view, one that considers the plight of all wives in polygamous marriages as victims of injustice within polygamous unions, without much protection and support.

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[55] Adebayo A & Bankole F, "An appraisal of polygamy in contemporary family law practice: validity and challenges",6.

[56] Adebayo A & Bankole F, "An appraisal of polygamy in contemporary family law practice: validity and challenges", 3.

[57] Mwambene L, "What is the future of polygny (polygamy) in Africa?", 20 (1), Potchefstroom Electronic Law Journal, 2017.

[58] Mwambene L, "What is the future of polygny (polygamy) in Africa?",15.

[59] Mwambene L, "What is the future of polygyny (polygamy) in Africa?",15.

Sonya Cotton in her article "Do Equality and Non-discrimination Apply to Polygamous African Customary Marriages? A Constitutional and Statutory Analysis of Fourteen African Commonwealth States" investigates the regime of polygamous Customary marriages in Africa and delves into the claims of "sham constitutionalism".[60] Cotton asserts that these criticisms fail to consider the pluralistic legal systems of most African countries, and the resulting difficulties in regulation. Cotton states that a major barrier to achieving women's rights is the "dual desire" to embrace international human rights as well as Customary Law, despite their seemingly conflicting values. Social, economic, cultural, and institutional aspects are commonly ignored when examining the inequality of women. However, these aspects along with the concept of intersectionality are paramount to achieving true equality, alleges Cotton. This intersectionality approach, according to Cotton, better captures all the women in polygamous Customary marriages, including subsequent wives, who are commonly disregarded. The article further analyses the legal entrenchment of polygamous Customary marriages and the principles of equality in several countries in Africa. [61]

The literature currently available surrounding Customary polygamous unions focuses on the issue of inequality.[62]The various authors commonly state that polygamy is applied in a way that is beneficial to men and not women. As seen above, several authors focus on the inequality and discrimination and the general violations of the rights of women in polygamous Customary marriages, and through the application of Customary law. These works call for reformulations of the law, but they appear to cater to the regime as a whole and are not necessarily detailed solutions. Although Mwambene and Adebayo and Bankole have mentioned the lack of a provision for the notification and consent of a wife/ wives in an African Customary polygamous marriage to subsequent wives, this is not the main focus of

[60] Cotton S, "Do equality and non-discrimination apply to polygamous African customary marriages? A constitutional and statutory analysis of 14 African commonwealth states", 9 (1), Global Journal of Comparative Law, 2020.

[61] Cotton S, "Do equality and non-discrimination apply to polygamous African customary marriages? A constitutional and statutory analysis of 14 African commonwealth states", 87-116.

[62] Mwambene L "What is the future of polygyny (polygamy) in Africa?", 15. Cotton S, "Do equality and non-discrimination apply to polygamous African customary marriages? A constitutional and statutory analysis of 14 African commonwealth states", 87-116.

their articles and thus the issue is only considered briefly. In this way this current study is unique and offers a distinct perspective.

This work seeks to investigate inequality and discrimination and focuses solely on the lack of a provision for the notification and consent of a wife/ wives in an African Customary polygamous marriage to subsequent wives, and consequently offers a solution by proposing an amendment to the Marriage Act, 2014. This study also aims to assess the adherence of the practice of Customary polygamous marriages with the provision for the equal rights of the parties to a marriage in Article 45(3) of the Constitution of Kenya, and Section 3 (2) of the Marriage Act, 2014. This author believes that this sets this work apart from the other literary works in the area. However, it is this author's view that this study can complement the already existing literature and offer a different but relevant perspective on the issues surrounding polygamous Customary marriages.

1.9 METHODOLOGY

The research done in this study will use qualitative data, with a heavy focus on primary sources such as the Marriage Act, 2014, the Constitution of Kenya, 2010, as well as International Conventions and Treaties. This study will also utilise various documents such as the Hansard reports related to the parliamentary debates and deliberations on the Marriage Bill 2013, the precursor to the Marriage Act, 2014. This study employs secondary sources such as scholarly works including books, journals, case law and commentaries. The research conducted in this study shall be primarily desk-based research and doctrinal analysis will be the main method used to arrive at the study's conclusion.

1.10 CHAPTER BREAKDOWN

Chapter One of the study contains the background of the study, research objectives and questions, the study's hypothesis, the conceptual framework as well as the justification of the study. This chapter will focus on introducing the topic of the study.

Chapter Two will examine the legal framework that governs marriage in Kenya. The chapter will investigate the definition of Marriage and its application in Kenya as found in the law. It will also delve into the legal provisions governing Customary polygamous marriages in Kenya. This will serve as the foundation of the study.

Chapter Three of the study will investigate how provisions of the Marriage Act, 2014 regarding polygamous marriages are interpreted and applied in the Kenyan legal regime. This will provide an understanding of the position of and rationale behind African Customary polygamous marriages and show its relevance and place in the Kenyan legal regime, by assessing Court Jurisprudence. It will also offer a basis for the reader to understand the motivations behind polygamous African Customary marriages and their application in Kenya.

Chapter Four will analyse equality and non-discrimination in polygamous marriages under African Customary Law in Kenya.

Chapter Five, the closing chapter, will contain the conclusion of the study and propose recommendations from the findings of the study in relation to the overarching research question.

CHAPTER TWO

THE LEGAL FRAMEWORK GOVERNING THE INSTITUTION OF AFRICAN CUSTOMARY MARRIAGES IN KENYA

2.1 INTRODUCTION

In this chapter, this author will explore the legal framework that governs marriage in Kenya. The chapter will also identify the laws that specifically apply to African Customary marriages in Kenya. This will be done by distinguishing the framework governing African Customary marriages before the Marriage Act, 2014, and thereafter the framework after the introduction of the Marriage Act, 2014. The chapter further intends to discuss various legislation that inform the legal regime of marriage, namely, the Constitution of Kenya, 2010, the Judicature Act, and the Marriage Act, 2014, and the provisions within them.

2.2 THE POST-COLONIAL FRAMEWORK GOVERNING AFRICAN CUSTOMARY MARRIAGES PRIOR TO THE MARRIAGE ACT, 2014.

After gaining independence in 1963, Kenya was left with a fragmented legal system with multiple divisions.[63] In terms of marriage, Kenya inherited seven different laws from colonial rule: the Marriage Act Cap 150, the African Christian Marriage and divorce Act Cap 151, the Matrimonial Causes Act Cap 152, the Subordinate Court (Separation and Maintenance) Act Cap 153, the Mohammedan Marriage and Divorce Registration Act Cap 155, the Mohammedan Marriage Divorce and Succession Act Cap 156, and the Hindu Marriage and Divorce Act Cap 157.[64] These laws made no direct mention of African Customary marriages, and mainly discussed monogamous marriages except for polygamous Islamic marriages. In this system, Customary marriages were guided by the uncodified customs and cultures of the concerned parties, and not by formal law.[65]

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[63] Kamau W, "Customary law and women's rights in Kenya",2011, 4- <http://theequalityeffect.org>- on 15 December 2023.

[64] Schedule, Marriage Act, (2014).

[65] Cotran E, "Marriage, divorce and succession laws in Kenya: is integration or unification possible", 196.

In an attempt to fuse and harmonise this multiplicity of marriage laws, the Kenyan government created the Law of Marriage and Divorce Commission in 1967. The Commission was tasked with recommending and proposing a singular marriage and divorce law that reflected a forward-looking and united Kenya.[66] As far as Customary marriages were concerned, the proposed Bill of the Commission aimed to regulate the practice of Customary law. The Bill included provisions with regard to equality, the registration of all marriages, and the distinction between monogamous marriages and polygamous marriages at the time of marriage.[67] The Bill, however, was never realised, despite numerous tries to pass it. This was due to Bill's alleged "feminine-forward" agenda, and un-African ideals.[68]

In 1967, the Judicature Act was enacted, and it spoke to the practice of African Customary Law. The Judicature Act states that African Customary Law could apply to non-Africans, so long as at least one party to the issue is African.[68] The Act also put in place the repugnancy clause, which stipulates that when Customary Law is "repugnant to justice and morality or inconsistent with any written law," it is no longer applicable in Kenyan Courts of Law.[70]

Customary law is characterised as a "living" law that changes with its subjects, hence its uncodified nature. Nonetheless, the Kenyan government along with legal authorities sought to codify Customary laws so as to better apply and integrate Customary law into the Kenyan Legal framework, in what is known as the Restatements.[69] The Restatements recounted the key elements of marriage under different cultures in Kenya.[70] In fact, the Restatements became an authority on customs that govern Customary marriages and was heavily relied on by the Courts to settle marital disputes pertaining to Customary marriages. This was especially beneficial, as during this period, Customary laws were acknowledged through Court decisions.[71]

The Constitution of Kenya, 2010, is another source for the framework regarding marriage in present day Kenya. The first and most explicit mention of marriage in the Constitution is found

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[66] Cotran E, "Marriage, divorce and succession laws in Kenya: is integration or unification possible",195.

[67] Cotran E, " Marriage, divorce and succession laws in Kenya: is integration or unification possible",202.

[68] Section 3(2), *Judicature Act,* (1967).

[70] Section 3(2), *Judicature Act,* (1967).

[69] Cotran E, " Marriage, divorce and succession laws in Kenya: is integration or unification possible", 197.

[70] Cotran E, " Marriage, divorce and succession laws in Kenya: is integration or unification possible", 197.

[71] Kareithi M W, "A historical-legal analysis of woman-to-woman marriage in Kenya", Unpublished LLD Thesis, University of Pretoria, Pretoria, 2018, 158.

in Article 45. The Article defines the family unit as the basis of society,[72] and establishes the right of every adult to marry a person of the opposite gender.[73] The Article also explicitly mentions that "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."[74] Article 45 (4) mandates Parliament to create law which recognises various categories of marriage. From this provision it is clear that marriage is an important concept in Kenyan law, with the family unit being an essential pillar of society. It is apparent that marriage only applies to consenting heterosexual couples, who have achieved the age of majority, and are equal parties at every stage of marriage.

The Constitution further mentions marriage in Article 170, which establishes the Kadhis' courts, which are courts that administer Sharia law to those who profess Muslim faith. Article 170 prescribes the Kadhis' court's jurisdiction, limiting it to issues of "personal status, marriage, divorce or inheritance".[75] Those who subscribe to the Islamic faith have the option to utilise Sharia law in the Kadhis' courts to resolve marital matters.[76]

2.3 THE MARRIAGE ACT, 2014.

As mentioned above, Article 45(5) of the Constitution of Kenya instructs Parliament to enact a law that recognises marriage. This culminated in the creation and enactment of the Marriage Act, 2014.[77] The Marriage Act, 2014, is the law that governs all marriages in Kenya. The Act provides for the general provisions of marriage in part II,[78] stating the characterisation of marriage in Section 3(1), as the "voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act."[79] Section 3(2) also reflects Article 45(3) of the Constitution in stipulating that "parties to a marriage have

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[72] Article 45(1), *Constitution of Kenya* (2010).

[73] Article 45(2), *Constitution of Kenya* (2010).

[74] Article 45(3), *Constitution of Kenya* (2010).

[75] Article 170(5), *Constitution of Kenya* (2010).

[76] Article 165(3), *Constitution of Kenya* (2010).

[77] Article 45(5), *Constitution of Kenya* (2010).

[78] Sections 3- 16, *Marriage Act*, (2014).

[79] Section 3 (1), *Marriage Act*, (2014).

equal rights and obligations at the time of the marriage, during the marriage and at the dissolution of the marriage", placing equality as a key concept. [80] The same Section states that all marriages within the Act are of the same legal standing.[81]

Part II of the Marriage Act, 2014 prescribes the minimum marriage age.[82] The Act states that marriages must be witnessed by at least two people. The witnesses must be of sound mind and over eighteen years.[83] The Act also stipulates the different types of marriages,[84]prohibited marriage relationships, [85] void and voidable marriages, [86] and other necessary formal requirements.

The types of marriages envisioned in the Act include Christian, Civil, Customary, Hindu, and Muslim marriages.[87] Christian, Hindu and Civil marriages are classified as monogamous.[88] Islamic and Customary marriages are considered to be polygamous or potentially polygamous in nature. [89] The Marriage Act, from Part III to Part VII, provides the requirements for the celebration of a marriage under each type of marriage, including the formalities and details of officiation.[90]

The Marriage Act, 2014 also prescribes the assignment of registrars and marriage officers,[91] and the subsequent registration of marriages.[92] The remainder of the Act focuses on marital disputes and the subsequent proceedings. It also provides for the maintenance of spouses in the event of a divorce, and the offences to marriage, as well as corresponding penalties.[93]

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[80] Section 3 (2), *Marriage Act*, (2014).

[81] Section 3 (3), *Marriage Act*, (2014).

[82] Section 4, *Marriage Act*, (2014).

[83] Section 5*, Marriage Act*, (2014).

[84] Section 6, *Marriage Act*, (2014).

[85] Section 10, *Marriage Act*, (2014).

[86] Sections 11 &12, *Marriage Act*, (2014).

[87] Section 6, *Marriage Act*, (2014).

[88] Section 6 (2), *Marriage Act*, (2014).

[89] Section 6 (3), *Marriage Act*, (2014).

[90] Sections 17-49, *Marriage Act*, (2014).

[91] Sections 50- 52, *Marriage Act*, (2014).

[92] Sections 53- 63, *Marriage Act*, (2014).

[93] Sections 64- 98, *Marriage Act*, (2014).

Schedule, *Marriage Act*, (2014).

The Marriage Act, 2014, is a detailed piece of legislation that repealed and combines seven different Acts concerning marriage in Kenya. These Acts include: the Marriage Act Cap 150, the African Christian Marriage and divorce Act Cap 151, the Matrimonial Causes Act Cap 152, the Subordinate Court (Separation and Maintenance) Act Cap 153, the Mohammedan Marriage and Divorce Registration Act Cap 155, the Mohammedan Marriage Divorce and Succession Act Cap 156, and the Hindu Marriage and Divorce Act Cap 157.

2.4 WHICH LAWS SPECIFICALLY PROVIDE FOR AFRICAN CUSTOMARY MARRIAGES PRESENTLY IN KENYA?

As mentioned above, the Marriage Act, 2014 is the legislation that guides the application of marriage law in Kenya, alongside African Customary Law.

Section 6 (1) (c) of the Marriage Act, 2014 establishes Customary marriage as a recognised type of marriage under the Act.[94] Section 6 (3) states that Customary marriages are considered to be polygamous or potentially polygamous.[98] Sections 43, 44 and 45 of the Marriage Act, 2014, provide for the requirements necessary for one to celebrate a marriage under Customary law. Section 43 provides that the marriages should be governed by the culture and customs of one or more parties to the marriage.[95] It also stipulates that where the customs guiding the Customary marriage necessitate the payment of a dowry, then a token sum will be sufficient.[96]

The notification of a Customary marriage is to be done before the lapse of three months after the celebration of the marriage and the conclusion of formalities, to the registrar of Customary marriages.[97] Section 45 instructs that the above-mentioned notification should include: the customary law used to celebrate the marriage, and a written testimony from the married party, that the formalities have been completed. This declaration should be signed by two adult witnesses central to the celebration.[98] The registration of Customary marriages is covered by Section 55 of the Marriage Act, 2014. Registration is also covered by the Marriage (Customary

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[94] Section 6 (1) c, *Marriage Act*, (2014).

[98] Section 6 (3), *Marriage Act*, (2014).

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

[96] Section 43 (2), *Marriage Act*, (2014).

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

[98] Section 45, *Marriage Act*, (2014).

Marriage) Rules, 2017. The Rules stipulate the process and form of registration of Customary marriages, as a supporting piece of legislation to the Marriage Act, 2014.[99] This is a novel provision, as prior to the Marriage Act, 2014 there was no requirement for parties to a Customary marriage to formally register their marriage. According to the Marriage (Customary Marriage) Rules, 2017, Customary marriages conducted before 2017 are also subject to these provisions and must register their unions. The requirement to register is difficult to adhere to, with parties finding it difficult to comply due to limited funds, and a lack of technical knowledge. Another issue that hinders registration is that most parties subscribed to Customary marriages are from rural areas that may be isolated, making it difficult for them to be aware of and fulfil the requirements for registration.[100]

Section 68 states that in the case of a marital dispute in a Customary marriage, the parties can seek conciliation, mediation, or customary dispute resolution, prior to the parties' petitioning for the termination of the marriage.[105] The use of alternative dispute mechanisms is to be guided by the Constitution's principles.[101] The inclusion of Section 68 allows for parties to continue being guided by custom even at the dissolution of their marriages. Moreover, this Section demonstrates that the Marriage Act recognises the importance of traditional modes of dispute settlement, and in turn the administration of Customary law. The grounds for divorce are outlined in Section 69, including: adultery, cruelty, desertion, exceptional depravity, irretrievable breakdown of the marriage, as well as any valid ground under the applicant's customs.[107]

Outside of the Marriage Act, the Judicature Act recommends the use of African Customary Law in civil cases, where at least a party is guided by African Customary Law, and the customs are in line with written law and principles of morality and justice.[102] Additionally, the Civil

[99] Section 3, *Marriage (Customary Marriage) Rules*, (2017).

[100] Kenyan Laws and Harmful Customs Curtail Women's Equal Enjoyment of ICESCR Rights, 2008, 18.

Section 68, *Marriage Act*, (2014).

[101] Section 68(2), *Marriage Act*, (2014). Section

69, *Marriage Act*, (2014).

[102] Section 3(2), *Judicature Act,* (1967).

Procedure Act, in Section 87(1) states that in the event that "questions may arise as to the laws or customs of any tribe, caste or community" the Courts may "summon to its assistance one or more competent assessors, and such assessors shall attend and assist accordingly."[103]

2.5 CONCLUSION

Looking at this chapter, the legal regime applicable to African Customary marriages in Kenya, has undergone a metamorphosis from its post-colonial days. Up until the introduction of the Marriage Act, 2014, there were no specific statutory provisions for Customary marriages. Individuals relied on their own customs to regulate these unions, in addition to Court decisions on cases regarding Customary law. Despite being subordinated in various ways, such as the repugnancy clause in the Judicature Act, numerous efforts were made to recognise Customary marriages and unify all the streams of marriage in Kenya. The advent of the Constitution of Kenya, 2010, introduced numerous provisions on marriage, established the Marriage Act, 2014, and recognised the right to celebrate cultural practices and customs. This made significant progress in the acknowledgment and development of Customary law and marriages. Indeed, the Marriage Act, 2014, severally mentions and provides for Customary marriages. The Act also acknowledges Customary marriages as equal to other types of marriages, a huge step that was unprecedented. The combination of these factors, has increased the status and importance of Customary marriages in Kenya, affording those who marry under it more protection and reassurance. The law, however, cannot stand alone, and so in the next chapter, this author shall analyse various court cases that deal with Customary polygamous marriages.

[103] Section 87(1), *Civil Procedure Act,* (2010).

CHAPTER 3

KENYAN COURT JURISPRUDENCE REGARDING CUSTOMARY POLYGAMOUS MARRIAGES

3.1 INTRODUCTION

This chapter will investigate the interpretation and application of African Customary law by the Courts. The author intends to do so by reviewing and analysing court cases and rulings made by Kenyan courts after the 2014 Marriage Act. This is in order to observe and analyse the effect of the application of the Marriage Act, 2014 on Customary polygamous marriages.

3.2 MARY WANJUHI MUIGAI V ATTORNEY GENERAL & ANOTHER (2015)

The first case that this author will be analysing is Mary Wanjuhi Muigai v Attorney General & another.[104] This petition was heard before the High Court at Nairobi, and put forward by Mary Wanjuhi Muigai, the petitioner. The respondents were the Hon. Attorney General and the Commission for the Implementation of the Constitution. The petitioner lodged two main claims, the first being that the alleged exclusion of Baha'i religious marriages from the Marriage Act, 2014 was discriminatory. The other claim raised was that the lack of a provision requiring the consent of wives to the marriage of subsequent wives in polygamous marriages is unconstitutional. For the purposes of this paper, this author will focus on the petitioner's second claim. The petitioner asserted that the absence of such a provision violates Article 45 of the Constitution of Kenya, 2010, which stipulates the equality of parties, before, during, and after the marriage; and Article 27(3) which calls for equality. The first respondent, the Attorney General, in response to this claim stated that the inclusion of polygamy in the Marriage Act, 2014 was a recognition of customs and cultural practices that are constitutional. The first respondent, therefore, claimed the petitioner's claim was unfounded because polygamous marriages do not interfere with the enjoyment of Articles 27(3) and 45(3) of the Constitution. Moreover, any person affected had entered the polygamous marriage knowingly and willingly.

[104] Mary Wanjuhi Muigai v Attorney General & another (2015) eKLR.

The Court then deliberated whether the lack of a provision requiring the consent of wives to subsequent marriages in polygamous unions is unconstitutional and discriminatory to women. In doing so, the Court considered the equality of women in polygamous unions, quoting Article 16(1) of the Universal Declaration of Human Rights and the United Nations Human Rights Committee. The Court noted that the Article declared that polygamy denies women their dignity and equality. The Court further stated that Kenya has been urged numerously by international convention committees to ban polygamy to realise gender equality. Consequently, the Court ruled that the exclusion of such a provision was indeed unconstitutional and discriminates against women and gender equality. The Court reasoned that this was because the lack of such a provision violated Articles 27(3) and 45(3) of the Constitution of Kenya, 2010 which provide for the equality of women and men, as well as the international conventions ratified by Kenya.

This decision was radical, in that the Court explicitly pronounced itself on the discrimination and inequality caused by the lack of a provision requiring the consent of wives to subsequent wives in polygamous marriages. This shows that Courts, or at least this court, are not necessarily in agreement with the provisions that regulate polygamous customary marriages but are open to reaching and conceiving equitable outcomes that transcend set customs, culture, and practice. In fact, this case relates to this paper's main topic, and is central to this author's argument. This author also posits that the lack of a provision requiring the notification and consent of a current wife or wives of a subsequent marriage in a polygamous union violates the constitutional provisions on gender equality, as well as the equality provisions of the Marriage Act, 2014.

3.3 IN RE ESTATE OF JAMES NJENGA MUIRURI (DECEASED) (2021)

The second case for consideration is the succession case, In re Estate of James Njenga Muiruri (Deceased), before the High Court at Nakuru.[105] The facts of the case are as follows: the petitioner (Racheal Kukunya Njenga) was the deceased's second wife, while the

[105] In re Estate of James Njenga Muiruri (Deceased) (2021) eKLR.

protestor (Grace Wangari Njenga) was the deceased's first wife. The petitioner together with the deceased had six surviving children, while the protestor had none. The deceased died intestate and left behind two five-acre parcels of land, which each housed a wife and their respective children. The petitioner applied for the grant of letters of administration regarding the estate of the deceased, and successfully received the grant. This led to the protestor filing an affidavit of protest, due to the division model envisioned in the aforementioned grant of letters of administration. The protestor, in her submissions, wished to inherit the five-acre piece of land she was residing in solely, disregarding the standard procedure. This was because she claimed that she assisted and participated in the acquisition of the twin parcels, and this was the deceased's intention. The petitioner submitted that the two parcels should be divided according to the law, with each child and wife being counted as units. Moreover, she argued that one of her children ploughed the land occupied by the protestor prior to the deceased's death.

The Court identified one issue: how should the deceased's property be divided amongst the protestor, the petitioner, and the petitioner's issues?

The Court took into account the guiding provision for intestacy in a polygamous household, in Section 40 of the Law of Succession Act. The Section provides that the property of the deceased "in the first instance, be divided among the houses according to the number of children in each house". The Section stipulates that any surviving wife or wives, are counted as units, in addition to the number of children. The Court also considered the protestor's longstanding stay on "her" parcel and her undisputed contribution to the land acquired, as well as the presence of the petitioner's son on the protestor's "parcel" to plough and till the land.

The Court concluded that it would be unfair to reduce the protestor to a singular unit, as per a strict interpretation of Section 40 of the Law of Succession Act. The Court, then, ruled that the protestor would inherit half of the five acre parcel she sought, while the petitioner and her issues would inherit the other half and the five-acre parcel they inhabited.

This case demonstrates an untraditional interpretation of polygamous customary marriages in the judicial setting. This is seen in the departure by the Court from the strict application of Section 40 of the Law of Succession Act, to a more just position that best achieved equity, in this case for the first wife who had no children. It is interesting to note that this adaptation of Section 40 of the Law of Succession Act, where Courts apply their discretion on order to

achieve equitable distribution in the event of dissolution of a Customary polygamous marriage by death. This is currently a widespread practice for Courts in numerous succession cases.

3.4 DMK v IL (2021)

The next court case this author will be reviewing is, DMK v IL,[106] a civil appeal case, heard at the High Court at Bungoma. This appeal was filed by the appellant, DMK, the alleged husband to the respondent, IL, after the respondent had objected to the appellant's upcoming marriage to another woman. The issue was initially presided over by the Deputy County Commissioner of Bungoma South, who found that the two were properly married, and that the objection was justified. The appellant stated that he was not married to the respondent under any circumstances, and consequently such an objection was unfounded, and the decision was erroneous in fact and in law. The respondent submitted that she was married to the appellant under Bukusu customary law in line with Section 43(1) of the Marriage Act, 2014. She also asserted that according to Section 9 of the Marriage Act, the appellant cannot enter into a subsequent Christian marriage before obtaining a divorce.

The Court identified a single issue to consider: were the appellant and the respondent in a customary marriage at the time of the respondent's objection?

In order to answer this question, the Court consulted Section 43 of the Marriage Act, 2014 as well as the work "Law of Marriage and Divorce" by Eugene Cotran, to establish the crucial elements of a Luhya customary marriage. The Court found that indeed a customary marriage existed between the appellant and the respondent and subsequently upheld the previous verdict.

This particular case exhibits the Court's recognition of customary marriages as valid and legitimate marriage systems. This is evidenced by the Court's reference to not only the Marriage Act, but also to the documented authentic Luhya customs that govern the Bukusu marriage in question, to truly determine if there was an existing customary marriage between the parties. Moreover, this case is an example of the varied interpretations of customary marriages, as each customary marriage is unique to their own community and culture.

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[106] DMK v IL (2021) eKLR.

3.5 JOK v SAO (2018)

The fourth case this author will be studying is the civil appeal case of JOK v SAO,[107] heard at the High Court at Siaya. The appeal was filed by the appellant JOK, who was aggrieved by the previous decision of the trial magistrate. The trial magistrate ruled that the appellant and the respondent were married under Luo customary law, and thus the appellant was ordered to guarantee the maintenance of the respondent and the minors. The appellant asserted that there was no marriage between him and the respondent, the relationship between them was casual and the key elements of a Luo customary marriage had not been satisfied. The respondent replied that there had been a Luo customary marriage and brought forward several witnesses who were present when the appellant allegedly paid dowry for the respondent.

The Court in this matter identified several issues, but for the purposes of my discussion the author will examine only one: were the appellant and respondent duly married under Luo customary law?

The Court began by considering Sections 6(1) and 43 (1) and (2) of the Marriage Act, 2014. The Court therein noted the essential elements of a customary marriage: dowry payment and fulfilment of customs. The Court established that the appellant had in fact paid token amounts of dowry to the respondent and had met with the respondent's family as per Luo customs. The respondent and appellant, however, according to the evidence adduced did not register the marriage as required by Section 55(1)2 of the Marriage Act, which made their marriage voidable under Section 12(e) of the Marriage Act. This meant that the customary marriage between the respondent and the appellant was not valid, and consequently the appellant was not entitled to pay for the maintenance of the respondent.

The Court determined in this case, that the marriage between the appellant and the respondent was invalid solely due to a lack of registration. This strict adherence, in my opinion, only served as an obstacle to justice. The appellant's intent to marry the respondent was clear in the facts of the case. Moreover, it was established during the case that the two were properly married under Luo customary law, regardless of registration. By failing to give proper weight to these facts the Court erred and failed to actualise the respondent's right to maintenance and achieve equity.

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[107] JOK v SAO (2018) eKLR.

3.6 EVA NAIMA KAAKA & STELLA SEIYAN KAAKA V TABITHA WAITHERA MARARO (2018)

The final case this author will be analysing is the civil appeal case, Eva Naima Kaaka & Stella Seiyan Kaaka v Tabitha Waithera Mararo[108], that was heard at the Court of Appeal in Nairobi.

This appeal stemmed from the revocation of a grant of letters of administration of the estate of the deceased, Nicholas Kaaka Kapore, that were given to the appellants. This revocation was actioned by the respondent, the alleged second wife of the deceased, who claimed that she along with her child TNK were wrongfully excluded from inheriting the deceased's estate. A DNA test had been done to confirm that TNK was the deceased's child, and it was found to be true. The first appellant averred that the respondent was not a wife of the deceased, but a tenant in the deceased's apartments. The appellant however, during the course of proceedings agreed that TNK was the child of the deceased that she had prior knowledge of. The respondent adduced evidence through witness sworn affidavits that alleged that the respondent and the deceased had married in accordance with Maasai-Kikuyu customary law.

The Court herein found that there were three issues to consider: whether the respondent and the deceased were married as per Maasai-Kikuyu customary law, whether there was a presumption of marriage under Kikuyu customary law, and finally, whether the respondent and her child could be considered the deceased's dependants according to Section 29 of the Law of Succession Act. This author, however, will only focus on the first issue, as it directly relates to customary polygamous marriages under the Marriage Act, 2014.

The Court when deliberating this issue, took note of the witness statements that detailed the dowry paid by the deceased. The Court then referred to Eugene Cotran's "Casebook on Kenya Customary Law" to establish the elements of necessity in a Kikuyu customary marriage. The Court consequently discovered that the defining element, Ngurario, was not undertaken, and the respondent's family allegedly refused to complete this rite. Thus, the Court ruled that the customary requirements for a Kikuyu customary marriage were not fulfilled and therefore there was no customary marriage existed between the respondent and the deceased.

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[108] Eva Naima Kaaka & another v Tabitha Waithera Mararo (2018) eKLR.

This case showcases the Court's strict interpretation and application of customary laws and cultural rites, especially with the use of verified records of customary law and caselaw. This use of codified records of Customary law is nevertheless problematic, especially because Customary law is an evolving, living law. Therefore, relying on written accounts of the same undermines the character of Customary law. Moreover, courts could potentially miss important developments and shifts within Customary law that could alter the outcome of a case, while relying on outdated customs.

3.7 CONCLUSION

In conclusion, the judicial interpretation and application of the Marriage Act, 2014 regarding Customary polygamous marriages by Kenyan Courts, is generally by the books and strict.[109] This is evidenced by the fact that Courts diligently seek credible sources of customary law, apply the said customary law to the letter and do not make exceptions to the necessary formalities provided in the Marriage Act, 2014. Nonetheless, when it comes to other areas that are affected by polygamous customary marriages such as succession, the Court has proved repeatedly that they will make concessions to ease the inequity and inequalities experienced by virtue of being in a polygamous marriage. This is evident in the Court's intervention concerning the unfair and unequal distribution of property, in the case that the deceased was married to multiple wives under Customary law, an issue overlooked by the law. The case of Mary Wanjuhi Muigai v Attorney General & another is the clearest example of the Court's acknowledgment of the inherent inequality of Customary polygamous marriages as currently envisaged in the Marriage Act, 2014. So, it does appear that the Courts are aware of the real-life challenges experienced by wives in Customary polygamous marriages, publicly proclaim the same, and attempt to address these challenges through discretionary Court rulings.

[109] Kariuki F, "Customary law jurisprudence from Kenyan courts: implications for traditional justice systems",2015, 10- https://su-plus.strathmore.edu/server/api/core/bitstreams/198547ba-0b59-4162-8c2fd3c3eed189a8/content on 2 January 2024.

CHAPTER FOUR

EQUALITY AND NON-DISCRIMINATION IN POLYGAMOUS MARRIAGES UNDER AFRICAN CUSTOMARY LAW IN THE KENYA

4.1 INTRODUCTION

In this chapter, the author will examine equality and non-discrimination in Customary polygamous marriages. The chapter will begin by identifying the provisions that provide for equality and gender non-discrimination in the Kenyan legal regime, and thereafter analyse the relation of these provisions to Customary polygamous marriages. Finally, the chapter will identify the challenges faced in the application of the principles of equality and gender non-discrimination to Customary polygamous marriages.

4.2 EQUALITY AND NON-DISCRIMINATION UNDER KENYAN LAW

The Constitution of Kenya proclaims itself as the supreme law in Kenya, from which courts, governments, laws, state organs, and people draw their power and mandate.[110] In fact, the Constitution further states in Article 2(4), 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 invalid."[111] The Judicature Act states that African Customary law can only be utilised in the courts when it is consistent with written law, and when it is not "repugnant to justice and morality."[112] Considering these provisions, it follows that African Customary Law is guided by and is subordinate to the Constitution and subsequently constitutional values of non-discrimination and equality. This can be seen in Article 27 of the Constitution, which discusses freedom from discrimination and equality.

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[110] Article 2(1), *Constitution of Kenya*, (2010).

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

[112] Section 3(2), *Judicature Act,* (1967).

The Article explicitly states every person is entitled to equal treatment in all aspects of life.[113] Furthermore, ethnicity, sex, culture, social origin, and marital status shall not be a basis for discrimination for any person.[114] Article 45 of the Constitution proclaims the equality of parties to a marriage before, during, and at the end of the marriage,[115] which is emphasised in Section 3 (2) of the Marriage Act.[122] While Article 44 acknowledges that everyone is free to engage in and enjoy the culture of their choosing,[116] Article 44 (3) limits this enjoyment, in that no one person can oblige another to follow the same.[117]

The Constitution further provides that ratified treaties and conventions are a part of Kenyan law.[118] Following this provision, these treaties and conventions are considered to be "written law" which customary law must be consistent with.[119] In light of this, it is crucial to study the treaties and conventions ratified by Kenya.

The Universal Declaration of Human Rights (UDHR), the United Nations proclamation of fundamental human rights that should be afforded to all, speaks clearly on equality and non-discrimination. Article 1 states that all people are "equal in dignity and rights",[120] while Article 16 explicitly discusses marriage and family. Article 16 declares that women and men are equal at the instance of marriage, throughout its duration and at its end,[121] a provision that is echoed in Article 45 (3) of the Constitution of Kenya.

The International Covenant on Civil and Political Rights (ICCPR) is primarily concerned with ascertaining the enjoyment of political and civil freedoms in line with the UDHR. Article 3 of the ICCPR asserts that women and men are entitled to the equal enjoyment of all

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[113] Article 27(1), *Constitution of Kenya*, (2010).

[114] Article 27(5), *Constitution of Kenya*, (2010).

[115] Article 45(3), *Constitution of Kenya*, (2010).

[122] Section 3(2), *Marriage Act*, (2014).

[116] Article 44(1), *Constitution of Kenya*, (2010).

[117] Article 44(3), *Constitution of Kenya*, (2010).

[118] Article 2(6), *Constitution of Kenya*, (2010).

[119] Section 3(2), *Judicature Act,* (1967).

[120] Article 1, *Universal Declaration of Human Rights*, 10 December 1948, 217 A(III) (UNGA).

[121] Article 16, *Universal Declaration of Human Rights.*

political and civil rights.[122] Article 23, similar to the UDHR and the Constitution of Kenya, provides for the equality of duties and rights "of spouses as to marriage, during marriage and at its dissolution."[123] Discrimination on any grounds is forbidden by Article 26, which further emphasises the equality of all people. [131]

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), seeks to secure the dignity and equality of women by banning all types of discrimination perpetuated against women. Article 2 pushes for the realisation of the equal rights of women and men.[124] This is reiterated in Article 15, which calls for gender equality.[125] Article 5 directs state parties to "modify the social and cultural patterns of conduct of men and women", in order to get rid of discriminatory and prejudicial standards and customs.[134] Women and men's equality in marriage is central to Article 16, which seeks to eliminate discrimination of women, in marriage and family matters.[126]

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, also known as the Maputo Protocol, is largely focused on elevating the position of women in Africa by outlawing harmful practices and discrimination. In alignment with the Protocol's mandate, Article 2 declares that state parties are required to fight and correct discrimination affecting women.[127] Article 6 is concerned with marriage and necessitates states to guarantee the equality of women and men in marriage. The Maputo Protocol asserts that monogamous marriages are the desired option. It also states that women in polygamous unions should be especially protected.[128]

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[122] Article 3, *International Covenant on Civil and Political rights*, 16 December 1966, 999 UNTS 171.

[123] Article 23(4), *International Covenant on Civil and Political rights.*

Article 26, *International Covenant on Civil and Political rights.*

[124] Article 2, *Convention on the elimination of all forms of discrimination against women*, 18 December 1979, vol. 1249, p. 13.

[125] Article 15, *Convention on the elimination of all forms of discrimination against women*.

Article 5, *Convention on the elimination of all forms of discrimination against women.*

[126] Article 16, *Convention on the elimination of all forms of discrimination against women.*

[127] Article 2, *Protocol to the African charter on human and peoples' rights on the rights of women in Africa,* 1 July 2003.

[128] Article 6, *Protocol to the African charter on human and peoples' rights on the rights of women in Africa.*

As discussed above, it is abundantly clear that Kenya has a comprehensive legal framework that addresses gender inequality and discrimination. The Constitution explicitly subjects the application of Customary law to this framework. This means that Customary polygamous marriages should be based on the equality of women and men and non-discrimination. Moreover, any violation of these principles would invalidate the use of Customary law in that circumstance. This concept is well illustrated in the law, but what about in practice?

4.3 EQUALITY AND NON-DISCRIMINATION IN AFRICAN CUSTOMARY LAW

Considering the non-discrimination and equality legal provisions discussed above, it follows that there is a conflict between the aforementioned provisions and the application of African Customary Law in polygamous marriages. Despite the subordination of Customary law to the Constitution and written law, the conflict seemingly arises from the very core of customary polygamous marriages, especially in their polygynous nature.[129]The ICCPR General Comment number 28 on the equality of women and men discusses equality in marriage and clearly states that polygamy denies women their dignity and is not in line with the concept of equality. Further the Comment calls for the complete elimination of polygamy.[130] This view is echoed in the CEDAW's General Recommendations number 21. The Recommendations also consider polygamy to be a barrier to the equality of women and men, and specifically singles out states that have equality as a constitutional principle while providing for Customary polygamous marriages, claiming that it is a contradictory practice and against the Convention.[140] This reflects the current situation in Kenya. This means that as long as the practice of customary polygamous marriage continues, true gender equality cannot be achieved, despite the presence of non- discrimination and equality provisions in the Constitution and written law. In light of these views, it can be deduced that if Article 2(4) of

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[129] Kamau W, "Customary Law and Women's Rights in Kenya",2011, 11- <http://theequalityeffect.org>- on 15 December 2023.

[130] International covenant on civil and political rights General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), CCPR/C/21/Rev.1/Add.10, General Comment No. 28. (General Comments).

[140] Convention on the elimination of all forms of discrimination against women, General Recommendation No. 21 (13th session, 1994).

the Constitution was strictly applied then the current practice of customary polygamous marriages would be considered invalid.

Nonetheless, the complete abolition of Customary polygamous marriages is not a realistic solution that can help women achieve equality at this historical moment. This is primarily due to the deep societal entrenchment of polygamy in almost all Kenyan cultures and customs. Polygamy was present prior to colonisation and survived colonial derogation and subordination. Polygamy was and still is typically a solution to societal issues such as security, agriculture, procreation, community unity and harmony.[131] This, in addition to the association of "Africanness" with polygamy, continues to date, making the practice virtually impossible to eradicate.[132] This issue has been further perpetuated by the presence of cultural relativism. Cultural relativism argues that human rights should adhere to and be defined by the culture and customs of the society in question and should not be applied universally.[133] Proponents of this way of thinking push for the continuation of customary practices like polygamy and have discouraged the integration and real-life application of equality and non-discrimination. This can be witnessed clearly in the parliamentary discussions relating to the Marriage Bill 2013.[134] Most cultural relativists claim that principles of equality and non-discrimination are unnecessary and "un-African" and aim to perpetuate the patriarchal nature of Customary polygamous marriages, even resorting to omitting previous well established uncodified customs, such as the consent and notification of a current wife or wives of subsequent marriages.[135]

It is noteworthy, that some women freely and willingly choose to marry under Customary polygamous marriages, and it would be contrary to the goal of achieving equality and

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[131] Oyugi P, "Article 6 of the African women's rights protocol: towards the protection of the rights of women in polygamous marriages", 1, African Human Rights Yearbook, 2017, 297.

[132] Cotton S, "The constitutional and statutory position of the 'other' wife: a comparative study of constitutional rights and polygamous customary marriages in commonwealth Africa.", published MPhil in Law dissertation, University of Cape Town, Cape Town, 2018, 11.

[133] Kamau W, "Customary law and women's rights in Kenya",2011, 36 - <http://theequalityeffect.org>- on 15 December 2023.

[134] National Assembly Hansard Report, 20 March 2014, 56-65.

[135] Kamau W, "Customary law and women's rights in Kenya",2011, 33 - <http://theequalityeffect.org>- on 15 December 2023.

freedom for women to bar them from making or even having that choice. Bearing in mind the issues that make the eradication of customary polygamous marriages difficult, it follows that the best option would be to expressly incorporate the principles of equality and non-discrimination into the customs. Considering that Customary law is a living law that changes with the society, it would not be remiss to incorporate these principles. This solution would help reduce the confusion caused by legal pluralism by having clear cut equality and non-discrimination provisions. Moreover, this solution would appease the cultural relativists in opposition, while bettering the position of women and the achievement of their rights in customary polygamous marriages.

4.4 THE EFFECT OF THE ABSENCE OF A NOTIFICATION AND CONSENT PROVISION IN THE MARRIAGE ACT, 2014, REGARDING POLYGAMOUS CUSTOMARY MARRIAGES IN KENYA.

In this section, the author, would like to specifically consider the impact of the lack of a provision requiring the mandatory notification and consent of a current wife or wives of subsequent marriages on the equality of the parties in the union.

The Marriage Bill, 2013 initially contained a provision requiring the notification and consent of a current wife or wives of subsequent marriages in polygamous customary marriages. This, however, was soon amended and removed from the Bill during parliamentary hearings, and is not present in the Marriage Act, 2014.[136] The female members of Parliament contested this decision, due to the inequality the lack of such a provision would bring.[137]

Indeed, the omission of a notification and consent provision negatively impacts the equality of parties to Customary polygamous marriages. Under customary polygamous marriages, only men have the freedom to marry several women, and therefore men hold a considerable amount of control and power in these unions.[138] The deletion of the notification provision increases this amount of power and control by excluding the current wife or wives from

[136] National Assembly Hansard Report, 20 March 2014, 56.

[137] National Assembly Hansard Report, 20 March 2014, 57.

[138] Strauss G," Is polygamy inherently unequal?", 122, Ethics, 3, 2012, 517.

deciding or even knowing who will join their marriage. This means that the husband in the union has the sole mandate to make this decision, even though he is not the only party in the union. This is a clear violation of Article 45(3) of the Constitution of Kenya,[139] and Section 3(2) of the Marriage Act, 2014,[150] which stipulate the equality of parties to a marriage before, during and after marriage.

Moreover, the introduction of subsequent wives affects the already existing marriage greatly. The resources, assets, and property within the marriage will be split to accommodate the new wife or wives and children. In several instances, the men in customary polygamous marriages will use the family's joint resources to pay the dowries of subsequent wives, unknown to their "first" wives.[140] This leaves the first wife in a vulnerable position, as family resources are being channelled away from her household, affecting her lifestyle, and she cannot object to these actions.[141]

The deletion of the provision requiring the notification and consent of current wives regarding subsequent wives also adversely affects the health and safety of the parties to the marriage. Women in polygamous unions are especially susceptible to sexually transmitted diseases, HIV and AIDS, and other communicable illnesses, due to the multiplicity of partners in the marriage.[142]

The lack of a provision in the Marriage Act, 2014, requiring the mandatory notification and consent of a current wife or wives of subsequent marriages in polygamous customary marriages further contravenes the values and principles of Customary law. Under Customary law, women are respected and revered due to their positions in the society as matriarchs, mothers, and cultivators. Following this, it is important to protect women in Customary polygamous marriages, as it is therein that these roles are realised. Therefore, measures such as the right to be notified and to consent to subsequent marriages are central to Customary law and its values. Furthermore, several cultures implemented these notification and consent

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[139] Article 45(3), *Constitution of Kenya* (2010).

[150] Section 3(2) *Marriage Act* (2014).

[140] Kenyan Laws and Harmful Customs Curtail Women's Equal Enjoyment of ICESCR Rights, 2008, 17.

[141] Kenyan Laws and Harmful Customs Curtail Women's Equal Enjoyment of ICESCR Rights, 2008,17.

[142] Kenyan Laws and Harmful Customs Curtail Women's Equal Enjoyment of ICESCR Rights, 2008,18.

practices prior to the Marriage Act, 2014.[143] An example of this being the Luo culture, where the first wife is consulted and decides who her co- wives will be.[144] This culture is also reflected in many other Tribal groups across Kenya, including the Maasai and Luhya people.

It is undeniable that polygamy is inherently unequal, with men having the capacity to marry several wives, while women can only marry one man. However, the omission of a provision requiring the mandatory notification and consent of subsequent marriages further exacerbates this inequality and disproportionately harms women. Substantive equality- a concept that proposes that inequality can be remedied through the direct solution of the disadvantage- can be utilised in this case.[145] As established above, polygamy is intrinsically unequal, and that is difficult to change. However, by bolstering women's protection in such unions, this inequality can be reduced. Therefore, the inclusion of a provision requiring the mandatory notification and consent of a current wife or wives of subsequent marriages would achieve substantive equality for wives within an unequal system of marriage. It will do so by allowing women a measure of control over their marriages and consequently their lives. This is especially important, as there are still several women who choose the system of Customary marriages, and they deserve protection, security, and equality under the law.

4.5 CONCLUSION

In conclusion, there are clear and comprehensive provisions for equality and non-discrimination in Kenyan Law, and these provisions apply to Customary polygamous marriages. However, this does not reflect in reality. This is partly due to the deeply ingrained conflicts between Customary law and written law, the patriarchal nature of Customary Law, and the presence of cultural relativism in Kenya's Parliament and society. Even so, it is not

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[143] Presby G, "Women's rights in Kenya since independence: the complexities of Kenya's legal system and the opportunities of civic engagement", 35.

[144]Adair N, Longstreet J, " The Mikayi senior wife, An examination of the roles of women and wives in the Luo community, Kenya" on 26 August 2018- < https://macleki.org/stories/the-mikayi-senior-wife/ >- on 11 April 2024.

[145] Stancil P, "Substantive equality and procedural justice",1644.

possible to completely ban the practice of Customary polygamous marriages. Therefore, it is the author's proposition that in order to achieve equality and gender non-discrimination that can benefit women in the present, Article 5 of the CEDAW should be implemented. The Article advocates for the modification of customs to ensure equality and gender non-discrimination. The next chapter will address this through the recommendation of the addition of a provision in the Marriage Act, 2014 requiring husbands in Customary polygamous marriages to notify and obtain the consent of their current wives before any subsequent marriages.

CHAPTER FIVE: FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

As the author concludes this dissertation, it is necessary to culminate the prior discussion on equality and non-discrimination in polygamous customary marriages under African Customary Law. As discussed in chapter four, polygamy clearly contravenes the principles of equality and non-discrimination.[146] In light of these views, the author would like to propose recommendations that could possibly better realise the right to equality in polygamous customary marriages under African Customary Law in Kenya. After this, the author will offer her conclusion to this research paper.

5.2 RECOMMENDATIONS

As noted in chapter four of this paper, the Constitution of Kenya is the supreme law of Kenya.[157] African Customary Law is therefore subject to the Constitution[147] and consequently its equality and non-discrimination provisions, such as Articles 27 and 45 of the Constitution, as well as International legal instruments. This means that African Customary Law's application to polygamous marriages is subject to and should adhere to Articles 27 and 45 of the Constitution. Thus, the absence of a provision in the Marriage Act 2014 regarding the mandatory notification and consent of a current wife or wives of subsequent marriages in polygamous Customary marriages, as captured in the Act, violates the aforementioned Articles and is, therefore, unconstitutional.

The author, therefore, proposes the amendment of the Marriage Act, 2014 to include a provision that requires husbands in polygamous marriages to notify and get the consent of their wife or wives of their intention to contract a subsequent marriage under African Customary Law. Although this would not altogether tackle the longstanding problems of inequality and discrimination in polygamous customary unions that plague women in Kenya,

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[146] International covenant on civil and political rights General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), CCPR/C/21/Rev.1/Add.10, General Comment No. 28. (General Comments). [157] Article 2(1), *Constitution of Kenya*, (2010).

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

this is a step towards achieving substantive equality. This is especially important, as the practice of polygamy is still prevalent in Kenya. Considering this, the introduction of such an amendment can help bridge the gap between women and men in polygamous customary marriages, and better allow women who choose this system of marriage to enjoy their constitutionally guaranteed rights of equality and non- discrimination. In addition, this approach is in line with Article 5 of the Convention on the Elimination of All Forms of Discrimination against Women. The Article calls for State Parties to "To modify the social and cultural patterns of conduct of men and women…based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."[148]

Moreover, this proposed amendment could help alleviate other prevalent issues such as succession disputes between co-wives in the case of the husband's demise in a polygamous customary marriage. This was highlighted in chapter three of this paper, under which several disputes such as these were reported and heard before Kenyan Courts. Introducing the proposed amendment in this case would greatly help the Courts by solidly establishing the existence and acknowledgement of multiple wives in customary polygamous marriages, through the notification and consent provision. This would allow the Courts to deal with key succession matters at hand more efficiently.

5.3 FINDINGS AND CONCLUSION

This paper puts forward the evidence that although polygamous customary marriages in Kenya ought to be guided by constitutional principles of equality and non-discrimination, this does not take place in reality. This, as shown throughout the paper, is partly due to the silence in the Marriage Act, 2014, when it comes to marriages involving more than two parties. The addition of provisions that define the specific rights and duties of parties to customary polygamous marriages in the Marriage Act, 2014 would better secure the equality of women in polygamous customary marriages. Furthermore, these provisions could help circumvent mischief that could injure women in customary polygamous marriages emotionally,

[148] Article 5, *Convention on the elimination of all forms of discrimination against women.*

financially, physically, and health-wise.[149] Moreover, defining the parties' rights and duties can ensure that Article 2(4) of the Constitution is realised and the application of African Customary Law in polygamous marriages is in line with the constitutional principles of equality and non- discrimination.

As the author stated earlier, it is unrealistic to completely ban the practice of customary polygamy in Kenya, which would truly realise the equality and non-discrimination provisions. However, women should not just be left unprotected in such marriages, therefore, adjustments should be made to place women in better positions, even in inherently unfair circumstances.

This paper strongly proposes the inclusion of an amendment to the Marriage Act, 2014 that requires husbands in polygamous marriages to notify and get the consent of their wife or wives of their intention to contract a subsequent marriage under African Customary Law. Nonetheless, further research can be conducted that identifies other areas of weakness in the Marriage Act, 2014 regarding polygamous customary marriages.

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