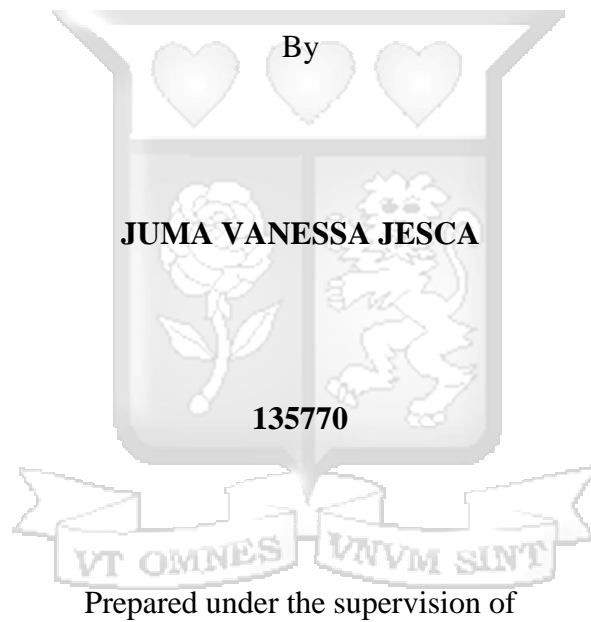


**ADDRESSING GENDER INEQUALITY: A CRITIQUE OF THE GROUND FOR  
ANNULMENT UNDER SECTION 73(1)(F) OF THE MARRIAGE ACT 2014 OF KENYA**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree, Strathmore  
University Law School



**Dr. Jennifer Gitahi**

10th February 2024

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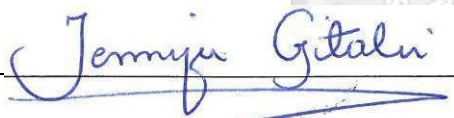


## Declaration

I, JUMA VANESSA JESCA do hereby declare that the work submitted herein to Strathmore University, is my original work and has not been previously to my best knowledge, been submitted to any other institution for the award of a degree or a diploma. All work relied on hereunder has been accordingly referenced.

Signed:  \_\_\_\_\_

This dissertation has been submitted with my approval as Supervisor.

Signed:  \_\_\_\_\_



## Abstract

*In Kenya, laws that regulate marriage and divorce stem primarily from the Marriage Act 2014. The Marriage (Matrimonial Proceedings) Rules 2020 serve as subsidiary legislation, documenting procedural requirements. The specific area of concern is the ground of annulment of marriage under Section 73(1) (f) of the Marriage 2014. The gap in this provision becomes apparent as it allows a party to a marriage to annul the marriage if, at the time of the union and without the husband's knowledge, the wife was pregnant and he is not responsible for the pregnancy. However, it lacks a provision for a scenario where the husband fathers a child with another woman at the time of marriage without his wife's knowledge. The paper is quick to recognize the need for such provision as section 73(1)(f) of the Marriage Act however, the absence of an equivalent provision for wives presents as discriminatory, violating the constitutional principle of equality and non-discrimination under Article 27 of the Constitution of Kenya 2010. The flawed structure of Section 73(1) (f) of the Marriage Act perpetuates a system of gender-based discrimination as well as limits the legal recourse for women within the marriage institution. This paper aims to critique the constitutionality of the ground for annulment under Section 73(1) (f) of the Marriage Act and thereafter propose potential reforms to align it with constitutional principles of equality and non-discrimination as well as promote equal treatment for both genders within the legal system in Kenya.*

## List of abbreviations, cases and legal instruments

### I. Abbreviations

ADR- Alternative Dispute Resolution

### II. Cases

1. Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women’s Link Worldwide & 2 others (Amicus Curiae) (2019) eKLR
2. Hirani v. Hirani, (1983), The England and Wales Court of Appeal
3. In re Estate of Park (deceased), Park v Park (1953), The England and Wales Court of Appeal.
4. S W V N G K (2003) eKLR
5. A L M V P M M (2018) eKLR
6. A L M V P M M (2018) eKLR
7. Karanja Njogu vs Attorney General (Unreported) 27 High Court Criminal Application No 39 of 2000

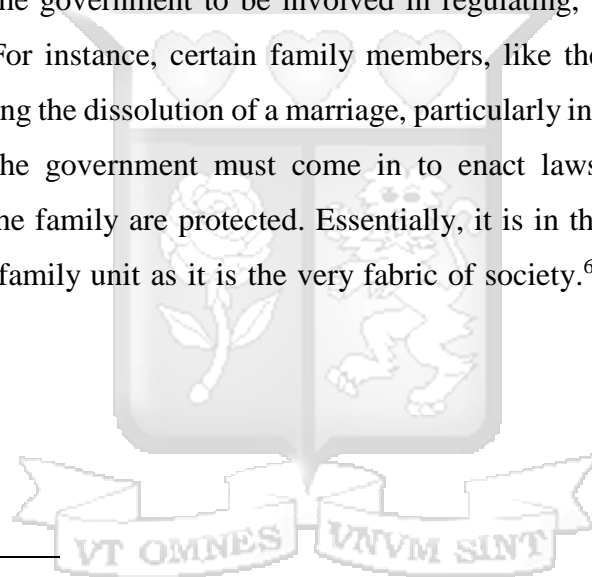
### III. Legal Instruments

1. Constitution of Kenya (2010)
2. Marriage Act (Act No 4 of 2014)
3. Marriage (Matrimonial Proceedings) Rules 2020
4. Matrimonial Causes Act (Act No 9 of 1967 Cap 152) now repealed

# CHAPTER ONE: INTRODUCTION

## 1.1 Background

One of the most distinctive characteristics of man from other species is his social nature.<sup>1</sup> Man's sociability starts from the institution called family. It is the first and most fundamental institution in man's culture and the foundation of natural rights.<sup>2</sup> There is an intrinsic connection between society, family and marriage. Stable societies require stable families, and stable families require stable marriages.<sup>3</sup> As a result, a dysfunctional marital institution will inevitably result in a dysfunctional family, which in turn breeds a dysfunctional society.<sup>4</sup> This domino effect is precisely why it is important for the government to be involved in regulating, albeit to a limited extent, matters of the family.<sup>5</sup> For instance, certain family members, like the children and wife, may require protection following the dissolution of a marriage, particularly in terms of financial support and property sharing. The government must come in to enact laws to guarantee that these vulnerable members of the family are protected. Essentially, it is in the governments interest to protect and promote the family unit as it is the very fabric of society.<sup>6</sup> However, it is crucial to



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<sup>1</sup> Chance MRA, 'The nature and special features of the instinctive social bond of primates' in social life of early man' ,led, Routledge, New York, 1961, 17-33.

<sup>2</sup> Ebrahim G, *The family as a child-rearing unit of society in child health in a changing environment*, 1ed, Red Globe Press London, London, 1982, 68-97.

<sup>3</sup> AEI-Brookings Working Group on Childhood in the United States, 'Children First: Why Family Structure and Stability Matter for Children' <<https://ifstudies.org/blog/children-first-why-family-structure-and-stability-matter-for-children-Institute-for-family-studies>> on 21 December 2023.

<sup>4</sup> Willie V, Weinandy J, & Rainwater, L, 'The structure and composition of "problem" and "stable" families in a low-income population' *25 Marriage and Family Living* 4, 1963, 439-447.

<sup>5</sup> Glendon M, 'The transformation of family law: State, law and family in the United States and western Europe,' 2 ed, *University of Chicago Press*, Chicago, 1989, 7.

<sup>6</sup> McClelland A, 'Mutual obligation and the welfare responsibilities of government' *37 Australian Journal of Social Issues*, 3, 2002, 209-224.

note that the state has no role in “creating” what family is.<sup>7</sup> It must simply recognize and protect it as it is.<sup>8</sup>

The State's aspiration to promote and protect the family unit as the natural and fundamental unit of society is acknowledged in Article 45(1) of the 2010 Constitution of Kenya.<sup>9</sup> In line with this commitment, the Marriage Act 2014 was enacted. The Marriage Act 2014 repealed the Matrimonial Causes Act.<sup>10</sup> It is now the present guiding legislation in family and marriage regimes in Kenya. The Act provides for all systems of marriage in Kenya and accommodates the different existing traditions in the country including polygamous marriages which the previous regime did not provide for.<sup>11</sup> It has also brought with it plenty of other notable novelties ranging from raising the minimum age that a person should attain before contracting a marriage to 18 years in Section 44,<sup>12</sup> to emphasizing that all marriages registered under the Act have equal legal status in Section 35<sup>13</sup> and recommending recourse to Alternative Dispute Resolution (ADR) before divorce proceedings for Christian, Civil and Customary marriages in Sections 64, 66 and 68.<sup>14</sup>

The Marriage Act 2014 also guarantees parties to any form of marriage equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.<sup>15</sup> In addition, the legislation provides specific substantive and procedural requirements applicable to all forms of marriage. Any breach of these requirements renders the marriage either void or voidable. A void

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<sup>7</sup> Yoshino, K, ‘A new birth of freedom: Obergefell v. Hodges’ *Harvard Law Review*, 2015, 147.

<sup>8</sup> Glendon M, *The transformation of family law: State, law and family in the United States and western Europe*, 2 ed, University of Chicago Press, Chicago, 1989, 7.

<sup>9</sup> Constitution of Kenya (2010).

<sup>10</sup> Schedule, Section 97, The Marriage Act (Act No 4 of 2014).

<sup>11</sup> There are 5 types of marriages currently. These include Christian Marriages, Civil Marriages, Customary Marriages, Hindu Marriages and Islamic marriages.

<sup>12</sup> Sections 64, 66 and 68, The Marriage Act (Act No 4 of 2014).

<sup>13</sup> Section 3(3), The Marriage Act (Act No 4 of 2014).

<sup>14</sup> Section 4, The Marriage Act (Act No 4 of 2014).

<sup>15</sup> Section 3(2), The Marriage Act (Act No 4 of 2014).

marriage implies that the marriage is non-existent from the outset due to its inherent invalidity.<sup>16</sup> Breaches that render a marriage void are provided for under section 11 of the Marriage Act.<sup>17</sup> These include; that either party is below the minimum age for marriage, that the parties are within a prohibited marriage relationship, that either party is incompetent to marry due to a subsisting marriage just to mention a few. On the other hand, if a marriage is "voidable", it means there is a defect or issue that allows one of the parties to choose to either affirm the marriage or seek its annulment, rendering it void. Reasons for a voidable marriage may include fraud, lack of consent, or a party's incapacity at the time of the marriage.<sup>18</sup>

Of particular interest to this paper is the ground for annulment stipulated under section 73(1)(f) of the Marriage Act which provides that a party to a marriage may petition the court to annul the marriage on the ground that at the time of the marriage and without the knowledge of the husband, the wife was pregnant and that the husband is not responsible for the pregnancy.<sup>19</sup> The injustice that arises from this provision can be discerned from a plain reading of the section. The provision appears to legalize gender discrimination. The law implies that only members of the female sex fall to be punished under that section as there is no equivalent law that provides sanction against the male gender. Shouldn't the wife also be entitled to go to court to seek a decree of annulment after it is brought to her attention that her husband had a child with another woman at the time of marriage? This, to my mind, amounts to discrimination based on gender. This is contrary to Article 27 of the Constitution which provides for equality and non-discrimination and to be specific Article 27(3) which provides that women and men have equal right to equal treatment.<sup>20</sup>

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<sup>16</sup> Key among these is the violation of the minimum age of marriage, which is set at 18 for both parties; absence of either party to the marriage during the ceremony, fraud, or lack of consent.

<sup>17</sup> Section 14, The Marriage Act (Act No 4 of 2014).

<sup>18</sup> These include; if the officiating person lacked proper authorization or if either party lacked the ability to consummate the marriage or suffered from a recurring mental issue.

<sup>19</sup> Section 73(1)(f), Marriage Act (Act No 4 of 2014).

<sup>20</sup> Article 27(3), Constitution of Kenya (2010).

Moreover, section 73(1)(f) of the Marriage Act appears to contradict the very principles set forth in the Marriage Act itself.<sup>21</sup> The Act grants equal rights of parties emphasizing equality at the time of marriage, during the marriage, and at the dissolution of the marriage.<sup>22</sup> However, section 73(1)(f) introduces a gender-specific ground for annulment, thereby deviating from the Act's initial commitment to gender-neutral treatment.

Due to its flawed structure, this clause has brought forth the injustice of gender inequality. As a consequence, thereof, the provision harms women by limiting their legal options in situations where they may find themselves in complex family dynamics involving children from outside the marriage. The absence of a parallel legal recourse for women in similar situations further exacerbates this gender-based discrimination. Consequently, women may be left with fewer legal protections and less agency in addressing such matters within the confines of their marriages.

Section 73(1)(f) of the Marriage Act not only fails to uphold the principles of equality and non-discrimination enshrined in Article 27<sup>23</sup> of the Kenyan Constitution, but it also perpetuates a system where women may face unequal consequences and legal constraints compared to their male counterparts<sup>24</sup>. The flawed structure of this provision highlights the need for critical examination and potential reform to align it with the constitutional principles of gender equality and non-discrimination.

## 1.2 Statement of problem

Section 73(1) (f) of the Marriage Act 2010 which grants a party to a marriage the right to petition the court to annul the marriage on the ground that at the time of the marriage and without the knowledge of the husband, the wife was pregnant and that the husband is not responsible for the pregnancy, presents a stark gender-based disparity and discrimination within the legal framework

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<sup>21</sup> Section 3(2), The Marriage Act (Act No 4 of 2014).

<sup>22</sup> Section 3(2), The Marriage Act (Act No 4 of 2014).

<sup>23</sup> Article 27, Constitution of Kenya (2010).

<sup>24</sup> Article 27(3), Constitution of Kenya (2010).

governing marriages in Kenya. The provision, as it stands, fails to provide for an instance where the husband impregnates a woman at the time of marriage without the knowledge of his wife, which is discriminatory against the woman. This failure by the law is contrary to Article 27(1) of the Constitution which guarantees equal right to equal protection under the law to all citizens of Kenya.<sup>25</sup> Additionally, this provision fails to uphold the gender equality principles enshrined in Article 27(3)<sup>26</sup> of the Constitution which guarantees equal treatment for men and women. The provision is also contrary to Article 27(4)<sup>27</sup> which acknowledges the need to enact and implement legislation and policies to address past and present discrimination against women and to ensure they have full and equal dignity, including the right to equal opportunities in political, economic, cultural, and social spheres.

Owing to this gap in the law, women's legal alternatives have been severely restricted when in instances involving children from non-marital relationships. For instance, in a scenario in which a wife becomes aware that her husband fathered a child with another woman at the time of their marriage, and without her knowledge, her legal remedy is notably absent. Discovering that the marriage cannot be annulled in such a situation can subject the wife to emotional and psychological stress. They may feel trapped in a marriage that they would have chosen to dissolve had the legal option been available. This stress can have adverse effects on their mental and emotional well-being. Additionally, some women may be forced to stay in the marriage and raise children from other relationships due to the lack of a parallel legal recourse to section 73(1)(f) of the marriage Act.<sup>28</sup> In contrast, male counterparts need not face such difficulties as they have the legal option of annulment. Further displaying this unequal protection under the law.

The flawed structure of this provision highlights the need for critical examination and the necessity to reform section 73(1) (f) of the Marriage Act 2010. My research will aim to evaluate the appropriateness of the ground of annulment of marriage provided for under Section 73(1) (f) of

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<sup>25</sup> Article 27(1), Constitution of Kenya (2010).

<sup>26</sup> Article 27(3), Constitution of Kenya (2010).

<sup>27</sup> Article 27(4), Constitution of Kenya (2010).

<sup>28</sup> Section 73(1)(f), The Marriage Act (Act No 4 of 2014).

the Marriage Act in Kenya as well as to analyze the legal problems that emanate from the said clause. Additionally, it will seek to determine whether the said provision of the Marriage Act offends the provisions of the Constitution of Kenya, 2010, particularly Article 27 thereof.

### 1.3 Research objectives

1. To determine the rationale behind the ground of annulment under 73(1) (f) of the Marriage Act 2014.
2. To determine whether section 73(1) (f) of the Marriage Act 2014 offends Article 27 of the Constitution 2010 rendering it unconstitutional.
3. To determine possible recommendations for reforming Section 73(1)(f) of the Marriage Act 2014 to align it with principles of gender equality and non-discrimination.

### 1.4 Research questions

1. What is the rationale of the provision under 73(1) (f) of the Marriage Act 2014?
2. Does section 73(1) (f) of the Marriage Act 2014 offend Article 27 of the Constitution of Kenya 2010 thereby making it unconstitutional?
3. What are the recommendations for reforming Section 73(1)(f) of the Marriage Act 2014 to align it with principles of gender equality and non-discrimination?

### 1.5 Hypothesis

The provision under section 73(1)(f) of the Marriage Act 2014, allowing for the annulment of a marriage if the wife was pregnant at the time of marriage without the knowledge of the husband and he is not responsible for the pregnancy, is discriminatory against women and violates the principles of gender equality and non-discrimination enshrined in Article 27 of the Constitution of Kenya. Reforming this provision to include a parallel legal recourse for women in similar

situations would align it with the constitutional principle of equality and non-discrimination as well as promote gender equality in the legal framework governing marriages in Kenya.

## 1.6 Justification of study

Gender equality within the marriage regime in Kenya has raised significant concerns, especially regarding the provisions of the Marriage Act 2014. This legislation, serving as the cornerstone in regulating family and marriage practices in Kenya, has faced criticism for harboring provisions that seemingly endorse gender discrimination.<sup>29</sup> Section 73(1) (f) of the Marriage Act is one of the provisions that is inherently gender discriminatory. There is an urgent need to amend it to align it with Constitutional principles of equality and non-discrimination. This study will discuss the appropriateness of the ground of annulment of marriage provided under Section 73(1) (f) of the Marriage Act as well as analyze the gender discrimination inherent within the said clause. The study will also seek to determine whether the said provision of the Marriage Act offends the provisions of the Constitution of Kenya, 2010, particularly Article 27 thereof.

The analysis will be useful in various ways in the foreseeable future. Firstly, the information will be useful to gender equality advocates. The findings can be used to support campaigns to support gender equality and women's rights in Kenya paving way for campaigners to spread awareness and push for legislative changes that support equal rights and protections for both genders. This study will also add to the ongoing discussion on equality, specifically substantive equality which advocates for the removal of barriers that perpetuate inequalities, ensuring that individuals, particularly women, have equal protection under the law. Lastly, this analysis will be useful to the wider population and families in Kenya. A deeper awareness of the legal environment can be helpful for individuals and families within complicated family dynamics, including problems associated with annulment of marriages. When confronted with comparable circumstances, my

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<sup>29</sup>Bwire P, 'Polygamy and effects of gender Rights in law in the Kenyan society; Historical implications on Kenyan Constitution' 6, *Afr Mul-tidiscip, J Res AMJR*, 1, 2021, 58-77.

study's conclusions will assist people in making wise decisions and pursuing the proper legal recourse.

## 1.7 Conceptual framework

### The Concept of Equality

Equality is a fundamental concept within a democratic society. While equality has been described as a simple concept, it's actually a complex concept with various interpretations.<sup>30</sup> Different viewpoints exist on what constitutes equality and how society should uphold it. Historically, legal systems primarily relied on formal rules to ensure equality.<sup>31</sup> However, recent constitutional revisions,<sup>32</sup> influenced by academic discourse, aim to develop a more critical understanding of equality. These reforms recognize the complexity of modern human interactions and the subtle forms of discrimination and disadvantage, signaling a shift towards a more sophisticated approach to promoting equality within the legal framework.

### Formal Equality

The idea of formal equality can be traced back to Aristotle and his dictum that equality meant “things that are alike should be treated alike”.<sup>33</sup> This is the most prevalent understanding of equality. Formal equality is based on the premise that fairness requires consistent or equal

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<sup>30</sup> Holtmaat, R, ‘The concept of discrimination’ *Academy of European Law Conference Paper*, 2004, 2.

<sup>31</sup> For example, consider the Supreme Court of the United States' early interpretation of the "Equal Protection Clause" in *Plessy v Ferguson* 163 US 537 (1896). Similarly, this approach was taken in the incorporation of early anti-discrimination legislation in the United Kingdom, such as the Race Relations Act 1965, and in the Supreme Court's early interpretation of Section 15 of the Canada Charter of Rights and Freedoms in *Andrews v. Law Society of British Columbia*, 1989, 1 SCR 143.

<sup>32</sup> Like the case *Canada* in 1982, and the Supreme Court decision in *Law v Canada (Minister of Employment and Immigration)*, 1999, 1 SCR 497, and *South Africa* in 1996.

<sup>33</sup> Aristotle, *3 Ethica Nicomachea*, Ackrill, J. L. and Urmson J O (eds.), W Ross translation, Oxford University Press, 1980,112-117.

treatment.<sup>34</sup> The formal approach to equality and non-discrimination advocates that a person's physical or personal attributes should not influence their entitlement to equal opportunity resources or outcomes. By upholding the principle of formal equality, societies aim to create a more just and equitable framework where individuals are treated fairly based on universal principles rather than arbitrary distinctions.

## Substantive Equality

Formal equality as a standalone idea has little impact on reducing substantive inequality<sup>35</sup> as it is seen as a basic framework for structuring human interactions, hence on its own, it lacks the ability to address deeper issues of inequality. Consequently, there is a need for a more robust moral foundation that incorporates additional ethical principles to guide acceptable human relationships. Necessitating the adoption of a human rights-based approach. This approach is centered on the concept of dignity, which asserts that all individuals possess an inherent dignity simply by virtue of being human. This is what substantive equality is. Rather than adopting the idea of simply treating people equally, this approach suggests treating them as equals with the right to equal dignity.<sup>36</sup>

Substantive equality aims at rectifying systematic disparities and barriers to ensure fair outcomes for all individuals, particularly groups that have been historically marginalised. Unlike the simplistic notion of formal equality which posits uniform treatment for everyone irrespective of their differences,<sup>37</sup> substantive equality delves into addressing the underlying social and economic disparities that lead to inequality. Substantive equality acknowledges that in order to achieve equal

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<sup>34</sup> Wesson, Murray. 'Equality and social rights: an exploration in light of the South African Constitution', *Public Law*, 2007, 751.

<sup>35</sup> Westen, Peter, 'The empty idea of equality' *Harvard Law Review*, 95(3) 1982, 537.

<sup>36</sup> Dworkin R 'Taking rights seriously' *Duckworth*, London, 1977, 227.

<sup>37</sup> Dworkin R, 'What is equality? Part 2: Equality of resources: in the notion of equality' 1ed, *Routledge*, New York, 2001, 143-205.

outcomes for basic human rights, opportunities, and access to goods and services, the law must take factors like marginalization, discrimination, and unequal distribution into consideration.<sup>38</sup>

Achieving substantive equality requires addressing the root causes of inequality, challenging entrenched power structures, and promoting policies and practices that foster equality, justice, and inclusivity for all members of society. As such gender justice is a key component of substantive equality, emphasizing fairness and impartiality in the treatment of individuals, regardless of gender.<sup>39</sup>

The concept of substantive equality is relevant to this study as it emphasizes the urgent need to reform Section 73(1) (f) of the Marriage Act 2014. Substantive equality will seek to dismantle discriminatory practices and promote a just society where gender-based disparities are eradicated. The concept demands a critical legal analysis of Section 73(1) (f) of the Marriage Act to identify its discriminatory impact on women. By scrutinizing the provision through a substantive equality lens, the focus is on the adverse consequences faced by women due to limited legal options, including emotional stress and perpetuation of a system of discrimination in a patriarch society. Remedial measures form a crucial component of substantive equality. In the case of section 73(1) (f) of the Marriage Act remedial measures would encompass affirmative action programs, aimed at redressing historical and ongoing injustices.<sup>40</sup> This includes reform to align it with gender equality principles. Ultimately, substantive equality prioritizes equitable outcomes over superficial notions of equality of treatment.<sup>41</sup>

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<sup>38</sup>Hughes P, 'Recognizing Substantive Equality as a Foundational Constitutional Principle' 22 *Dalhousie Law Journal* 5, 1999, 5-50.

<sup>39</sup>Hervey T K, 'Sex Equality as Substantive Justice' 62 *Modern Law Review* 4, 1999, 614.

<sup>40</sup> Hughes P, 'Recognizing Substantive Equality as a Foundational Constitutional Principle' 22 *Dalhousie Law Journal* 5, 1999, 5-50.

<sup>41</sup> Greschner D, 'Does law advance the cause of equality' 27 *Queen's Law Journal*, 2001, 299.

## 1.8 Literature review

The pursuit of gender equality has been a fundamental concern throughout human history, rooted in principles of justice, equality, and human rights. Philosophers and scholars such as Mary Wollstonecraft and Simone de Beauvoir long debated the ethical and legal dimensions of gender equality, shaping the discourse on women's rights and social justice. The 18th-century philosopher Mary Wollstonecraft is well known for her piece titled "A Vindication of the Rights of Woman".

<sup>42</sup> Her Activism paved the way for future talks about women's rights and gender equality.<sup>43</sup>

Simone de Beauvoir's piece, *The Second Sex*, challenged conventional notions of femininity and championed women's freedom, transforming the discourse on gender equality.<sup>44</sup> De Beauvoir challenged the idea of inherently feminine through her existentialist philosophy, arguing that gender roles are socially produced and change over time and across cultural contexts.<sup>45</sup> She stressed existential freedom, challenging the passive roles that have historically been assigned to women by allowing people—especially women—to actively construct their identities and life choices.

Additionally, the paper "The Fragility of Goodness" by Martha Nussbaum made a fundamental contribution to the conversation on gender equality.<sup>46</sup> Women's rights, according to Nussbaum, should be acknowledged as fundamental human rights, highlighting the importance of achieving not only legal equality, but also women's total well-being and capacities.<sup>47</sup> The premise that true

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<sup>42</sup> Wollstonecraft M, 'Vindication of the rights of woman' in *Democracy: A Reader*, Columbia University Press, New York, 2016, 297-306.

<sup>43</sup> Wollstonecraft M, 'Vindication of the rights of woman,' 297-306.

<sup>44</sup> De Beauvoir S, 'The second sex' in ,3 ed, *Social theory re-wired*, Routledge, New York, 2023, 346-354.

<sup>45</sup> De Beauvoir S, 'The second sex' in *Social theory re-wired*, 346-354.

<sup>46</sup> Nussbaum C, 'The fragility of goodness: Luck and ethics in Greek tragedy and philosophy' *Cambridge University Press*, England, 2001.

<sup>47</sup> Nussbaum, M. C, *The fragility of goodness*.

gender equality extends beyond basic legal and political rights is central to her approach. By emphasizing the holistic development of women and advocating for the removal of barriers that restrict their capabilities, Nussbaum's work has had a profound impact on policies and initiatives aimed at fostering gender equality, making her a key figure in advancing the cause of women's rights and empowerment.<sup>48</sup>

With regards to the Kenyan jurisdiction and the Marriage Act specifically, there has been several ongoing academic discourse touching on gender inequality and general discrimination within the Act. An example of this is the contention that sections 2, 3, and 6 of Kenya's Marriage Act, permitting a man to have multiple wives, are biased against women.<sup>49</sup> This is because women in polygamous marriages may suffer a number of challenges such as financial losses, unequal inheritance rights, as well as potentially fatal health problems like HIV/AIDS as a result of their husband's various sexual partners. Furthermore, the failure of the Marriage Act 2014 to require the husband to get the first wife's approval before taking for himself a second one has received immense criticism.<sup>50</sup> Nita Bhalla argues that the first wife's consent should be a formal requirement as the Marriage Act affords both the wife and husband equal rights before, during and after dissolution of the marriage.<sup>51</sup> She also argues that polygamy is the biggest contributor to poverty as most men who get into it cannot afford it. Consequently, it is the wives and the children who suffer most.<sup>52</sup> Sometimes the first wife is evicted after the new wife arrives when she refuses to give her consent.<sup>53</sup>

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<sup>48</sup> Nussbaum, M. C, *The fragility of goodness*.

<sup>49</sup> Sections 2, 3, 6, Marriage Act (Act No 4 of 2014).

<sup>50</sup> Bhalla N, 'Put up and shut up: polygamy breeds poverty for Kenyan women and children' Reuters Emerging Markets, 2018.

<sup>51</sup> Section 3(2), Marriage Act (Act No 4 of 2014).

<sup>52</sup> Bhalla N, 'Put up and shut up: polygamy breeds poverty for Kenyan women and children' Reuters Emerging Markets, 2018.

<sup>53</sup> Bhalla N, 'Put up and shut up: polygamy breeds poverty for Kenyan women and children' Reuters Emerging Markets, 2018.

William Aseka's examination of Section 73(g) of the Marriage Act, which prohibits individuals with mental disabilities from marrying, challenges the fundamental principles of equality and non-discrimination.<sup>54</sup> Aseka argues against restricting marriage based on mental illness, citing societal misconceptions about the capabilities of individuals with mental disorders. This discussion is crucial in highlighting the need to address discriminatory practices and promote inclusivity in marriage laws to uphold the rights of all individuals, regardless of their mental health status.<sup>55</sup> The rationale behind the limitation is because marriage cannot be entered into without proper consent.<sup>56</sup>

Additionally, there has been a discourse on the relevance of Section 73 (2)(a) of the Marriage Act 2014 which restricts the filing for petition for decree of annulment after the lapse of one year from the date of marriage.<sup>57</sup> Accordingly, annulments have been a preserve of marriages that have subsisted for over one year despite the existence of legitimate grounds to have the marriage annulled. Recently however, in the case *Susan Bithe Matuku, FIDA Kenya v The Hon. Attorney General* it was declared that Section 73 (2) (a) of the Marriage Act as to the limitation of a one-year limit period to apply for annulment of marriage is unconstitutional.<sup>58</sup> The effect of this is that any party who finds out any factor that renders the marriage void, has a right to get a decree for annulment of the marriage at the time that the discovery was made, time notwithstanding. However, it is important to note that the Marriage Act has not been amended to reflect this decision by the court.

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<sup>54</sup> Baynton DC, 'Disability and the justification of inequality' in *American history, The disability studies reader*, 5ed, Routledge, New York, 2017, 17-34.

<sup>55</sup> Aseka W, 'People with mental disabilities also have the right to marry in Kenya' AfricLaw, 28 May 2014-<<https://africlaw.com/2014/05/28/people-with-mental-disabilities-also-have-the-right-to-marry-in-kenya/>>4 on 28 December 2023.

<sup>56</sup> Aseka W, 'People with mental disabilities ALSO have the right to marry in Kenya' AfricLaw, 28 May 2014-<<https://africlaw.com/2014/05/28/people-with-mental-disabilities-also-have-the-right-to-marry-in-kenya/>> on 28 December 2023.

<sup>57</sup> Section 73(2), Marriage Act (Act No 4 of 2014), states that the court shall only grant a decree of annulment if— (a) the petition is made within one year of the celebration of the marriage.

<sup>58</sup> Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (Amicus Curiae) (2019) eKLR.

As demonstrated above, there has been several discussions touching on gender inequality and general discrimination within the Marriage Act in Kenya. However, none of them have addressed the gender discrimination gap present within section 73(1)(f) of the Marriage Act 2014, hence my desire to interrogate the same. The argument brought forth in this study not only challenges the existing legal norms but also serves as a catalyst for broader discussions on the inadequacies of the Marriage Act in safeguarding women's rights and promoting substantive gender equality.

## **1.9 Methodology**

The study will constitute largely of qualitative data analysis. The main sources of data will be primary sources such as The Marriage Act 2014 and the Constitution of Kenya 2010 and relevant case law. This research will also make use of secondary sources such as books and Articles. to bring out the problems and gaps in the application of the ground of annulment under section 73(1)(f) of the Marriage Act. In general, a deductive approach will be used with the chapters setting up premises from which my claim will be derived.

## **1.10 Chapter breakdown**

My study will be divided into five Chapters. Following this, chapter one forms an introduction to the study. It details, among others, the research objectives, conceptual framework and the justification of the study and thus sets the foundation for the subsequent chapters.

Chapter two will seek to understand the rationale of the provision under section 73(1) (f) of the Marriage Act 2014. To do so, the chapter will delve into a doctrinal analysis. This will involve an in-depth examination of case law and the Marriage Act to understand consent as a requirement of marriage and therefore the basis of Section 73(1)(f) of the Marriage Act.

Chapter three will discuss the injustice that is inherent within the ground of annulment under section 73(1) (f) of the Marriage Act 2014. This will be done by looking at Articles and books by authors who have studied gender equality and the need for the law to envision every possible scenario and provide for it.

Chapter four will discuss the proper understanding of Article 27 of the Constitution of Kenya 2010 and whether section 73(1) (f) of the Marriage act offends it. This will be done through a thorough examination of the provisions under Article 27 of the Constitution and then finally analyzing whether the provision for annulment of the marriage is in line with these principles and provisions outlined in the Constitution. This will be done through using practical reasoning.

Lastly, chapter five will determine possible recommendations for reforming Section 73(1) (f) to align it with principles of gender equality and non-discrimination. This will be done by exploring books and Articles of authors who have written on gender equality and the concept of substantive equality.



## CHAPTER 2: SIGNIFICANCE OF CONSENT OF THE PARTIES TO MARRIAGE AS THE BASIS FOR ANNULMENT UNDER SECTION 73(1) (F) OF THE MARRIAGE ACT 2014

### 2.1 Introduction

The Constitution of Kenya grants every adult the right to marry a person of the opposite sex, based on their free consent.<sup>59</sup> From this provision, we see three requirements for marriage. Firstly, a person must be an adult, that is 18 years and above. Secondly, the union must be with a person of the opposite sex and lastly the requirement of free consent of the parties to enter this covenant. Additionally, the Marriage Act defines marriage as a voluntary union between a man and a woman whether in a monogamous or polygamous union.<sup>60</sup> This definition underscores the fundamental requirement of consent in any marriage. Consent, refers to the mutual agreement, freely given by both parties, to enter into a marital relationship.<sup>61</sup> Consent forms the cornerstone of a valid marriage, ensuring that parties willingly enter into this lifelong commitment. This lifelong commitment is a significant decision that carries profound implications for both parties. Therefore, it is crucial that each party enters into this commitment freely and fully consents to it.<sup>62</sup>

Consent is a fundamental principle in the law of marriage and signifies that both individuals willingly and voluntarily choose to marry each other. It ensures that the marriage is entered into with the full understanding of its implications, rights, and responsibilities<sup>63</sup>. This chapter will embark on an in-depth exploration of the concept of consent within the context of marriage, elaborating on the elements that validate it. Furthermore, this chapter places emphasis on consent

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<sup>59</sup> Article 45(2), Constitution of Kenya (2010).

<sup>60</sup> Section 3, Marriage Act (Act No 4 of 2014).

<sup>61</sup> Garrison M, 'Is consent necessary-An evaluation of the emerging law of cohabitant obligation' *52 UCLA Law Review* 3, 2004, 815.

<sup>62</sup> Anitha S and Gill A 'Coercion, consent and the forced marriage debate in the UK' in *led, Marital rights*, Routledge, New York, 2017, 133-152.

<sup>63</sup> Garrison M, 'Is consent necessary-An evaluation of the emerging law of cohabitant obligation,' 815.

as the foundation for the ground of annulment under Section 73(1)(f) of the Marriage Act, which permits annulment if the wife is pregnant with another man's child at the time of marriage and without the knowledge of the husband.

## 2.2 Elements of a valid marriage

To comprehend the significance of consent within marriage and its alignment with Section 73(1)(f) of the Marriage Act, it is essential to explore the elements that constitute valid consent in the context of marriage. These elements are crucial to ensure that parties enter into marriage willingly, with full awareness of their decision and its implications.

The first element that must be present for consent to be valid is voluntariness. Both parties must provide their consent without any form of coercion, pressure, threats, or undue influence. It must be a free and deliberate choice, uninfluenced by external factors. Voluntariness as an element of consent is seen in the case *Hirani v. Hirani* where a nineteen-year-old Hindu lady who fell in love with a Muslim whom her parents did not approve of. Consequently, the parents arranged for her to marry a man who was unknown to her.<sup>64</sup> The marriage was held followed by a religious ceremony, however it was not consummated, and the lady left after six weeks. She petitioned for a nullity decree on the ground of duress by her parents. She was financially reliant on her parents, who had threatened to divorce her if she didn't get married. The nullity decree was granted by the court, which noted that duress does not always need to be proven by showing a threat to life, limb, or liberty; instead, what matters is whether the pressure or threats were strong enough to overcome the subject's will and influence their assent. Consequently, for duress to invalidate consent, there must be a coercion of the will.<sup>65</sup>

The second element of consent is capacity. Parties must have the legal capacity to provide consent. This means they should be of sound mind and not under the influence of any intoxicating

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<sup>64</sup> *Hirani v. Hirani*, (1983), The England and Wales Court of Appeal.

<sup>65</sup> *Hirani v. Hirani*, (1983), The England and Wales Court of Appeal.

substances. This element of sound mind is seen in the opinion of Caruthers J in the case *Jemima Cole v William Cole* in which he said:

“Marriage, by our law, is a civil contract and may be avoided like any other contract by want of sufficient mental capacity in the parties. If the mind is unsound at the time, it is incapable of consent, and that is an essential element in contracts”.<sup>66</sup>

This goes into emphasizing how essential sound mind and understanding is to consent. Additionally, persons should be of an age where they are legally eligible for marriage, ensuring that they fully comprehend the commitment they are making. In the Kenyan jurisdiction the legal age is eighteen years.<sup>67</sup>

The parties must also have comprehensive understanding and knowledge of the nature of the marriage contract and the legal and social implications it carries. Understanding the implications of the marriage contract ensures that consent is given willingly and with full awareness, reinforcing the importance of informed decision-making in the context of marriage. This includes awareness of the rights, responsibilities, and potential obligations of married individuals. Knowledge ensures that parties enter into marriage with their eyes open. In the case *S W V N G K*, the decree of annulment was granted on the basis that the appellant suffered seizures just prior to the wedding, and there was proof that she continued to be on anti-depressant medicine after the wedding. The court was of the opinion that the appellant was incapable of grasping the nature of the contract she was entering into due to mental imbecility, because she had temporarily lost contact with reality and did not understand what was happening around her.<sup>68</sup>

Finally, it is essential to ensure freedom from fraud or deceit in obtaining consent. Consent must not be secured through misrepresentation or deceitful means. Parties must have a truthful understanding of each other's identity, character, background, and any other relevant information that may influence whether or not they enter into the said marriage. In the case *A L M V P M M* the court nullified the marriage where the respondent

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<sup>66</sup> In re Estate of Park (deceased), *Park v Park* (1953), The England and Wales Court of Appeal.

<sup>67</sup> Section 2(a), Marriage Act (2014).

<sup>68</sup> *S W v N G K* (2003) eKLR.

had posted information about himself saying he was single which was false and misleading.<sup>69</sup> Indeed, that information misled the petitioner to choose him and picked up correspondence with him, and eventually agreed to marry him not knowing he was already married. The court declared this as “marriage based on false pretenses”, and granted the decree of nullity.<sup>70</sup>

### **2.3 Alignment of section 73(1) (f) of the Marriage Act with the fundamental principle of consensual marriage**

The legal concept of consent within marriage entails that individuals make their choices with a profound understanding of the facts and intentions involved. It is at this juncture that deception regarding facts or intentions becomes highly pertinent.<sup>71</sup> When gross deception pertains to matters that could influence the decision of a reasonable person regarding marriage, it is arguable that consent does not exist due to the misrepresentation. This extends beyond a mere lack of informed consent; instead, it implies that the consent was based on misinformation. Concealment or failure to communicate critical information, such as the wife's pregnancy by another man, results in a situation of fraudulent concealment. Conversely, it may also be a case of fraudulent misrepresentation if the wife tells the husband that the child is his.<sup>72</sup> In either scenario, gross deception regarding matters influencing the decision of a reasonable person about entering into the marriage results in a lack of free and full consent, rendering the marriage voidable.<sup>73</sup>

As demonstrated above, the failure to communicate vital information that would be significant in deciding whether or not one would enter into a marriage leads to a lack of consent, necessitating the existence of Section 73(1) (f) of the Marriage Act. This provision mirrors the fundamental principle of consent within the institution of marriage, ensuring that the commitment to marriage

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<sup>69</sup> A L M v P M M (2018) eKLR.

<sup>70</sup> A L M v P M M (2018) eKLR.

<sup>71</sup> Parkinson P, ‘Tricked into marriage’ 42 *Melbourne University Law Review* 1, 2018, 117-148.

<sup>72</sup> Parkinson P, ‘Tricked into marriage,’ 117-148.

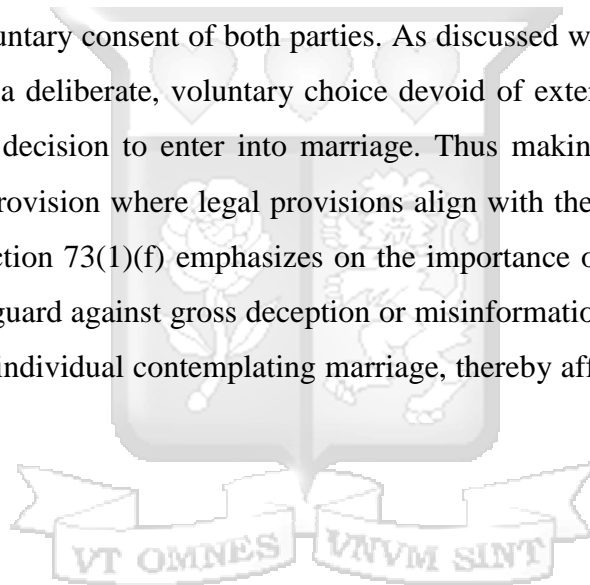
<sup>73</sup> Parkinson P, ‘Tricked into marriage,’ 117-148.

is entered into willingly and with full awareness of the circumstances, thus upholding the sanctity of consensual unions.

## 2.4 Conclusion

Within marriage, the concept of consent stands as an unyielding pillar, shaping the very foundation of this lifelong union. The discussion within this chapter has explored the elements of consent in the context of marriage, illuminating its role and resonance within the Kenyan legal framework, specifically within Section 73(1) (f) of the Marriage Act.

Undoubtedly, the essence of marriage, as enshrined within Kenya's Constitution and the Marriage Act, hinges upon the voluntary consent of both parties. As discussed within this chapter consent, in its truest form entails a deliberate, voluntary choice devoid of external pressures, ensuring a conscious and informed decision to enter into marriage. Thus making Section 73(1)(f) of the Marriage Act a pivotal provision where legal provisions align with the fundamental principle of consensual marriage. Section 73(1)(f) emphasizes on the importance of informed and untainted consent. It stands to safeguard against gross deception or misinformation that could influence the decision of a reasonable individual contemplating marriage, thereby affirming the sanctity of the marriage institution.



## CHAPTER 3: ANALYSING THE GENDER INEQUALITY ARISING FROM SECTION 73(1) (F) OF THE MARRIAGE ACT 2014

### 3.1 Introduction

Chapter two has discussed consent within marriage as the rationale behind the existence of section 73(1) (f) of the Marriage. The paper contends that consent is an indispensable element within the marriage institution, acknowledging the need for the provision under section 73(1)(f) of the Marriage Act. However, the lack of an opposite provision presents as a grave injustice as it presents as gender-based discrimination contrary to Article 27 of the constitution.<sup>74</sup> The clause underscores a system that clearly benefits one gender, exposing gender bias within the marriage breakdown process.

This Chapter will set out to analyze the inherent injustice contained within section 73(1) (f) of Kenya's Marriage Act, 2014 by studying the historical factors that shaped and influenced the evolution of the Kenyan marriage legal system. Subsequently this chapter will discuss the impact of these historical factors on contemporary marriage legislation and finally discuss the legal implications of the gender bias present.

### 3.2 Gender Bias in Traditional Legal Frameworks

Historically, societal beliefs, cultural conventions, and conventional gender roles shaped Kenya's legal landscape, influencing the evolution of marital laws.<sup>75</sup> These laws have, in some situations, perpetrated gender bias within the institution of marriage. Kenyan marital laws can be traced back to customary laws that were strongly embedded in traditional communities.<sup>76</sup> These customary

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<sup>74</sup> Article 27, Constitution of Kenya (2010).

<sup>75</sup> World development report, *Sex equality in family law: historical legacies, feminist activism, and religious power in 70 countries*, 2012.

<sup>76</sup> World development report, *Sex equality in family law: historical legacies, feminist activism, and religious power in 70 countries*, 2012.

laws, which were frequently regulated by patriarchal institutions, stressed male dominance and control within marriage.<sup>77</sup> Women were generally required to be submissive, with limited rights and agency, particularly in marriage and family concerns. Women were regarded as subordinate to men, leading to stark gender discrimination. For instance, in traditional Kenyan societies, the community's response to marital infidelity varied based on gender.<sup>78</sup> Notably, if a man was unfaithful, the community tended to be less harsh compared to when a woman was unfaithful. This reflects ingrained gender biases that favored men and contributed to unequal treatment within marriage.

Furthermore, Kenya's societal fabric has historically and traditionally fostered distinct gender roles, with men and women having different responsibilities and expectations in married partnerships. Within the household, these roles frequently influence power relations, economic contributions, and decision-making authority. Traditionally, men were allocated the roles of providers, decision-makers, and leaders of homes, while women were assigned domestic duties and caring roles. Such societal attitudes influenced not only family dynamics but also legal frameworks, establishing laws that promoted male authority and limited female autonomy in marriage and family matters.<sup>79</sup>

The colonial era further cemented these gender-based legal structures. Despite the fact that British colonial administration provided statutory rules intended to regulate marriages, Kenyan laws generally stuck to traditions, reflecting and reinforcing existing patriarchal practices.<sup>80</sup> These laws frequently institutionalized the discrimination of women within marriage, sustaining disparities in

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<sup>77</sup> World development report, *Sex equality in family law: historical legacies, feminist activism, and religious power in 70 countries*, 2012.

<sup>78</sup> Kasyoka Kioko, 'Determinants of infidelity among married couples in Mwingi central constituency' Unpublished, Kenyatta university, Kitui county, 2015, 37.

<sup>79</sup> Gatwiri G. J., & Mumbi K. A, 'Silence as power: Women bargaining with patriarchy in Kenya' 35 *Social Alternatives* 1, 2016, 13-18.

<sup>80</sup> Nyamu C. I, 'How should human rights and development respond to cultural legitimization of gender hierarchy in developing countries' 41 *Harvard International Law journal* 2, 2000, 381.

property rights, inheritance, and protection under the law.<sup>81</sup> This resulted in systematic gender-based discrimination not only perpetuated by the society of Kenya but also reinforced by the law.<sup>82</sup>

### **3.3 Impact of Gender Bias on Contemporary Marital Laws**

The historical legacy of gender-biased legal frameworks laid the groundwork for contemporary laws governing marriages in Kenya, including Section 73(1) (f) of the Marriage Act.<sup>83</sup> The evolution of legal provisions, rooted in traditional gender roles and historical practices, has perpetuated disparities that continue to affect marital relations and dissolution proceedings.<sup>84</sup> This evolution has been intrinsically linked to societal perceptions of gender roles, often favoring men while limiting the rights of women. Understanding this historical context is pivotal in comprehending the roots of contemporary legal provisions like Section 73(1)(f) and the entrenched gender disparities within Kenya's marital laws.

### **3.4 Legal implications of section 73(1) (f) of the Marriage Act 2014**

Section 73(1) (f) of the Marriage Act establishes a gender-specific provision for annulment, permitting the annulment of a marriage on the ground of undisclosed pregnancy while omitting a corresponding provision for circumstances in which the husband fathers a child outside the marriage without the knowledge of the wife at the time of marriage. The provision explicitly targets wives while failing to offer a reciprocal ground for husbands in similar situations therefore accentuating gender bias within the legal framework which offers annulment rights for men over women in cases involving undisclosed children at the time of marriage.

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<sup>81</sup> Nyamu C. I, 'How should human rights and development respond to cultural legitimization of gender hierarchy in developing countries,' 381.

<sup>82</sup> Swedish International Development Cooperation Agency, *promoting women's human rights and enhancing gender equality in Kenya*, 2006.

<sup>83</sup> Section 73 (1) (f), Marriage Act (Act No 4 of 2014).

<sup>84</sup> World development report, *Sex equality in family law: historical legacies, feminist activism, and religious power in 70 countries*, 2012.

Subsequently, Section 73(1) (f) significantly affects women's legal rights within the context of annulment of marriage.<sup>85</sup> The provision harms women by limiting their legal options in situations where they find themselves in complex family dynamics involving undisclosed pregnancies at the time of marriage leaving them at a disadvantageous point compared to their male counterparts

Section 73(1) (f)'s discriminatory treatment of women in marital relationships has a substantial impact on their legal rights, promoting gender stereotypes and inequalities during the annulment process in Kenya. It exacerbates the assumption that women are primarily responsible for undisclosed pregnancies within marriages, ignoring that men can also find themselves in the same situation. In this way, law not only limits women's equal right to protection under the law but also advertently perpetuates gender biases and stereotypes against women.

### 3.5 Conclusion

The gender-biased nature of annulment ground outlined in Section 73(1) (f) of the Marriage Act perpetuates gender discrimination within the legal framework governing marriage in Kenya. By exclusively catering to undisclosed pregnancies by wives at the time of marriage, while disregarding similar situations involving husbands, this provision significantly limits women's legal rights and reinforces gender disparities within marital laws in Kenya. Addressing this disparity is crucial to ensure equitable treatment and fairness within the annulment process, and ensures alignment of legal provisions with principles of gender equality and non-discrimination.

As we have now examined the legal implications of Section 73(1) (f) of the Marriage Act, the subsequent chapter will shift its focus to explore the principle of equity and non-discrimination as enshrined within the Constitution of Kenya. The discussion will center on whether Section 73(1) (f) aligns with or contravenes the constitutional provisions related to equality and non-discrimination.

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<sup>85</sup>Section 73 (1) (f), Marriage Act (Act No 4 of 2014).

## CHAPTER 4: ANALYSIS OF ARTICLE 27 OF THE CONSTITUTION AND ITS IMPLICATIONS ON SECTION 73(1) (F) OF THE MARRIAGE ACT

### 4.1 Introduction

The Constitution of Kenya serves as the supreme law upon which all other laws in the nation are constructed.<sup>86</sup> Article 2 establishes the Constitution as the highest law in the country.<sup>87</sup> No person may claim or exercise State authority except as authorized under the Constitution.<sup>88</sup> As a result, any statute that violates the Constitution is unconstitutional to the extent of the violation, and any act or omission that does so is unconstitutional.<sup>89</sup>

The commitment to the principles of equality and non-discrimination is woven throughout the Constitution of Kenya 2010. Beginning with Article 10 of the Constitution, sets out the general principles that should inform the interpretation, application, and administration of the Constitution and the law.<sup>90</sup> These principles include democracy, rule of law, inclusiveness, equity, human rights, social justice, equality, diversity, good governance, integrity, transparency, and sustainable development. The effect of Article 10 is that it provides a foundation for the conduct of public affairs and ensures that the country's governance is based on the highest standards of integrity, transparency, and accountability. It also serves as a reference point for evaluating the consistency of laws and government Actions with the values and principles enshrined in the Constitution. This is reaffirmed in Article 20 (4)(a), which includes equality and equity as values to be promoted

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<sup>86</sup>Billy Rongoma, 'The doctrine of supremacy of the constitution' LinkedIn, May 2 2023- <<https://www.linkedin.com/pulse/doctrine-supremacy-constitution-billy-rongoma>>, on December 2 2023.

<sup>87</sup> Article 2(1), Constitution of Kenya (2010).

<sup>88</sup> Billy Rongoma, 'The doctrine of supremacy of the constitution' LinkedIn, May 2 2023 <<https://www.linkedin.com/pulse/doctrine-supremacy-constitution-billy-rongoma>>, December 2 2023.

<sup>89</sup> Article 2, Constitution of Kenya (2010).

<sup>90</sup> Article 10, Constitution of Kenya (2010).

when interpreting the Bill of Rights, and Article 21 (3), which imposes a duty on the state to address the needs of marginalized groups in society.

Most notably, Article 27 of the Kenyan Constitution stands as a the primary Article advocating forequality and non-discrimination.<sup>91</sup> Its first provision states that every person is equal before the law and has the right to equal protection and equal benefits,<sup>92</sup> regardless of factors such as ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language, or birth. This Article is a fundamental provision that ensures the principles of human dignity, freedom, democracy, social justice, and the rule of law are preserved in Kenya.<sup>93</sup> The provision ensures that every individual is accorded equal treatment and protection under the law, irrespective of their background or characteristics. This constitutional guarantee resonates deeply within the fabric of Kenyan society, embodying the nation's commitment to fostering a just and inclusive environment for all its citizens.

Thus, it is crystal clear that equality is a fundamental principle within the Kenyan legal system and must be taken into account when drafting legislation and Acts of parliament. Proceeding from chapter three, which analyzed the injustice that is inherent within section 73(1)(f) of the Marriage Act 2014, this chapter will set out to analyze the proper understanding of Article 27 of the Kenyan Constitution 2010 specifically and critiques the constitutionality of section 73(1)(f) of the Marriage Act 2014

#### **4.2 Analysis of Article 27 of the Constitution of Kenya 2010**

The right to equality and non-discrimination as expressed in Article 27 of the Constitution of Kenya represents the cornerstone of equality in Kenya. The Article begins by providing for the equal protection before the law.<sup>94</sup> This is the guarantee that every Kenyan citizen is accorded equal

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<sup>91</sup> Article 27, Constitution of Kenya (2010).

<sup>92</sup> Article 27(1), Constitution of Kenya (2010).

<sup>93</sup> Article 27(3), Constitution of Kenya (2010).

<sup>94</sup> Article 27(1), Constitution of Kenya (2010).

treatment and protection under the law, irrespective of their background or characteristics.<sup>95</sup> Moreover, equality is defined as including “full and equal enjoyment “of all rights and freedoms.”<sup>96</sup> Article 27(3) then states that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres ensuring and enforcing gender equality.<sup>97</sup> This stands as the foundation of gender equality within the Kenyan legal system. Article 27(4) prohibits discrimination on an extensive list of specified grounds. That is; race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth.<sup>98</sup> The list grants substantially increased protection to women, who are likely to be discriminated on the basis of status like pregnancy. In addition, the provision prohibits discrimination on grounds of disability and age therefore protecting these vulnerable groups.

It is important to note that the list of protected grounds provided in the 2010 Constitution is indicative rather than exhaustive. However, the phrase “The State shall not discriminate directly or indirectly on any ground, including...” creates the possibility of legal challenge by those suffering discrimination on grounds which are not explicitly listed in Article 27(4).

Article 27 (5) provides for the prohibition of discrimination for natural and legal persons This means that both natural and legal people are required to respect and protect individuals' rights without discrimination on the grounds specified in the Article. Article 27(6) creates a duty of affirmative Action, a concept which is defined in Article 260, which states that the State shall take legislative and other measures, including but not limited to affirmative Action programmers and policies designed to redress any disadvantage suffered by individuals or groups as a result of past discrimination.<sup>99</sup> Part 3 of the Bill of Rights in Constitution also imposes affirmative Action

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<sup>95</sup> Article 27(1), Constitution of Kenya (2010).

<sup>96</sup> Article 27(2), Constitution of Kenya (2010).

<sup>97</sup> Article 27(3), Constitution of Kenya (2010).

<sup>98</sup> Article 27(4), Constitution of Kenya (2010).

<sup>99</sup> Article 260, Constitution of Kenya (2010).

requirements on the state in relation to vulnerable persons, including the youth and other marginalized groups.<sup>100</sup>

#### **4.2.1 Limitation to the right to equality and non-discrimination under the Constitution of Kenya 2010**

It is important to note that the Constitution imposes a limitation on the right to equality and non-discrimination under Article 24 of the Constitution. It creates a public interest limitation applicable to all rights contained in the Bill of Rights.<sup>101</sup> It states:

“A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom [...]”.<sup>102</sup>

This provision is noteworthy in respect of the right to equality and non-discrimination in two principal ways. Firstly, though the provision is not specific to the right to equality and non-discrimination provided for under Article 27, it is a limitation applicable to all rights. Notably, Article 24 (2) and 24(3) of the Constitution set out detailed requirements applicable to legislation, the state or persons seeking to justify the limitation of a freedom or right. Secondly, it includes dignity, equality and freedom as the bases of a democratic society, raising the possibility that the equality impact of an exception would be one of the key factors in determining its justifiability.

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<sup>100</sup> Articles 52 – 57, Part 3 of the Bill of Rights, Constitution of Kenya, (2010). These rights are discussed in the section, “Specific rights for vulnerable groups”.

<sup>101</sup>Article 25 of the Constitution of Kenya states that the rights to freedom from torture, cruel, inhuman or degrading treatment or punishment, freedom from slavery or servitude, fair trial and the right to an order of habeas corpus cannot be limited.

<sup>102</sup>Article 24(1), Constitution of Kenya, (2010).

### 4.3 Implication of Article 27 of the Constitution on section 73(1)(f) of the Marriage Act 2014

The supremacy of the Constitution in Kenya is a fundamental principle that ensures the highest governing power in the country is the Constitution itself.<sup>103</sup> Kenya's Constitution is the supreme law of the state, and all legislation must be consistent with it. Consequently, any law that is inconsistent with the Constitution is void to the extent of the inconsistency.

The supremacy of the Constitution is essential for upholding the rule of law and maintaining the integrity of the legal system in Kenya. This is further emphasized by Article 2(1) of the Constitution, which provides that the validity or legality of this Constitution is not subject to challenge by or before any court.<sup>104</sup> The legal consequence being that the Constitution holds the ultimate power, making it the highest governing power in the country.

The supreme nature of the Constitution was captured in the case *Crispus Karanja Njogu vs Attorney General* where the court stated that the Constitution of Kenya is not an Act of Parliament but it exists separately and it is supreme. Further, when an Act of Parliament is in any way inconsistent with the Constitution, the Act of Parliament, to the extent of the inconsistency, becomes void.<sup>105</sup> This case eruditely expressed the application of the doctrine of constitutional supremacy in ensuring that other laws are consistent with the constitution.

In essence, a law is considered to have violated the Constitution if it is inconsistent with the letter and spirit of the Constitution.<sup>106</sup> This means that a law is invalid if it either: contradicts specific

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<sup>103</sup>Billy Rongoma, 'The doctrine of supremacy of the constitution' Linked in, May 2 2023 <<https://www.linkedin.com/pulse/doctrine-supremacy-constitution-billy-rongoma>> on December 2 2023.

<sup>104</sup> Article 2(1), Constitution of Kenya (2010).

<sup>105</sup> *Karanja Njogu vs Attorney General* (Unreported) 27 High Court Criminal Application No 39 of 2000.

<sup>106</sup> Barnett, Randy E, and Evan D Bernick, 'The letter and the spirit: a unified theory of originalism' *Geo, LJ* 107 (2018), 1.

provisions of the Constitution or if the law runs counter to the fundamental principles, values, and objectives embodied in the Constitution.<sup>107</sup>

So then, the question becomes does section 73(1)(f) of the Marriage Act violate the letter and spirit of the Constitution? The answer is in the affirmative. Section 73(1) (f) fails to provide for an instance where the husband impregnates a woman at the time of marriage without the knowledge of his wife. This omission goes against Article 27 of the Constitution of Kenya, which guarantees equality and freedom from discrimination.

Article 27(1) of the Constitution of Kenya provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.<sup>108</sup> Article 27(3) further provides for the right to equal treatment for both genders in political, economic, cultural, and social spheres.<sup>109</sup> Section 73(1)(f) of the Marriage Act discriminates against women by failing to provide for a situation where the husband impregnates a woman at the time of marriage without her knowledge. This omission denies women the right to equal treatment and protection under the law as well as the right to equal treatment.

Section 73(1)(f) of the Marriage Act is also inconsistent with Article 27(6) of the Kenyan Constitution, which mandates the state to take legislative and other measures, including affirmative action programs and policies, to redress any disadvantage suffered by individuals or groups because of past discrimination.<sup>110</sup>

Moreover, the failure to address an instance in which the husband impregnated another woman at the time of marriage and without the knowledge of the wife is a form of gender-based discrimination, a practice which is against the very spirit of the Constitution. The provision goes

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<sup>107</sup> Barnett, Randy E, and Evan D. Bernick ‘The letter and the spirit: a unified theory of originalism’ *Geo,LJ* 107 (2018), 1.

<sup>108</sup> Article 27(1) Constitution of Kenya (2010)

<sup>109</sup> Article 27(3), Constitution of Kenya (2010)

<sup>110</sup> Article 27(6) Constitution of Kenya, (2010).

against principles such as equality, equity, and non-discrimination which are an integral part of the Kenyan Constitution.<sup>111</sup>

It is therefore clear that section 73(1) (f) of the Marriage Act not only contradicts Article 27 of the constitution, but it also goes against the spirit of the Kenyan Constitution. There is therefore an urgent need to reform the provision to align it with both the letter and spirit of the Constitution of Kenya.

#### 4.4 Conclusion

In conclusion, the examination of Section 73(1)(f) of the Marriage Act in light of Article 27 exposes a grave injustice. The provision's failure to address situations where a husband impregnates a woman at the time of marriage without the knowledge of the wife constitutes a form of gender-based discrimination, infringing upon women's right to equal treatment and protection under the Constitution of Kenya. The principle of the supremacy of the Constitution discussed within this chapter emphasizes the importance of aligning all laws, including the Marriage Act, with the Constitution's letter and spirit. Consequently, section 73(1)(f) of the Marriage Act not only contradicts specific provisions of Article 27 but also runs counter to its fundamental principles and values of the Constitution of Kenya.

In light of these findings, it is evident that Section 73(1) (f) of the Marriage Act requires urgent review. The next Chapter will discuss the recommendations for reforming section 73(1)(f) of the Marriage Act to align it with principles of gender equality and non-discrimination. Failure to

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<sup>111</sup> Section 73(1)(f), Marriage Act (Act No 4 of 2014).

<sup>112</sup> Article 27(6), Constitution of Kenya (2010).

address this inconsistency will perpetuate gender-based discrimination, undermining the broader societal goal of gender equality and justice envisioned by the Constitution of Kenya 2010.



## CHAPTER 5: RECOMMENDATIONS AND FINAL CONCLUSION

### 5.1 Introduction

Building upon the analysis in the preceding chapters, this chapter embarks on an exploration of the imperative task at hand: proposing possible reforms to section 73(1)(f) of the Marriage Act to align it with the constitutional principle of equality and non-discrimination. As discussed throughout the paper, section 73(1)(f) of the Marriage Act exposes a gap within the Kenyan legal system as it fails to provide for the specific and critical marital scenario where a husband conceives a child with another woman at the time of marriage, unbeknownst to his wife. By only recognizing and providing for situations where the wife is pregnant at the time of marriage and the husband is not responsible, the law inadvertently perpetuates gender discrimination and stereotypes. Moreover, this failure harms the women of Kenya by limiting their legal options compared to their male counterparts further exacerbating this gender-based discrimination thereby necessitating the need for reform to rectify this injustice.

As this paper comes to a close, this chapter will provide recommendations that will not only rectify the injustice within section 73(1)(f) of the Marriage Act but also contribute to the broader goal of fostering a legal landscape that aligns with the constitutional principle of equality and non-discrimination.

### 5.2 Expanding the scope to ensure equal protection

In addressing the need for a more inclusive and gender equal legal framework, it is paramount to reconsider the language and terminology used in section 73(1)(f) of the Marriage Act.<sup>113</sup> The existing provision explicitly centers on the husband's ability to petition for annulment based on the wife's undisclosed pregnancy at the time of marriage, inadvertently excluding scenarios where the roles are reversed. This exclusive language perpetuates gender-based biases and fails to recognise that either spouse may find themselves in a similar situation. The first step to rectifying this innate

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<sup>113</sup> Section 73(1)(f), Marriage Act (Act No 4 of 2014).

injustice is expanding the Scope of this provision. The reform should broaden the language to encompass both parties within a marriage. In addition to the existing section 73(1)(f) which provides that at the time of the marriage and without the knowledge of the husband, the wife is pregnant, and the husband is not responsible for the pregnancy, an additional provision should be included. The provision could read as follows:

“At the time of marriage and without the knowledge of the wife, the husband impregnates another woman.”

The legal implication of this modification is the promotion of fairness and equal protection for both genders under the law. The modification also ensures that the provision is applicable to both genders within the marriage, complying with the constitutional principle of equality and non-discrimination<sup>114</sup>. Additionally, the modification will eliminate stereotypes, recognizing that both husbands and wives can find themselves in situations where they are unaware of their partner's infidelity or deceit at the time of marriage.

### **5.3 Awareness and education programs to foster understanding and promote gender equality**

In the quest for a comprehensive reform of Section 73(1) (f) of the Marriage Act, it is imperative to acknowledge the significance of addressing social norms and stereotypes that arise from culture.<sup>115</sup> Creating awareness and education campaigns is a vital strategy in the fight against gender-based discrimination rooted in cultural beliefs. These programs are not only instrumental in educating the public but also serve to educate legal professionals and individuals entering into

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<sup>114</sup> Article 27, Constitution of Kenya (2010).

<sup>115</sup> Nyamu C. I, 'How should human rights and development respond to cultural legitimization of gender hierarchy in developing countries' 41 *Harvard International Law journal* 2, 2000, 381

marriage, fostering a broader understanding of the revised provisions and the importance of gender equality within the legal framework of Kenya.<sup>117</sup>

Societal norms and stereotypes often play a significant role in shaping perceptions and influencing behaviors, contributing to gender-based discrimination. Educators can challenge these deeply rooted norms by putting in place targeted awareness and education programs, which opens the door for a shift in public views toward more inclusive and equitable perspectives. The campaign should be designed to reach a wide audience, dispelling misconceptions and ensuring that the implications of the revised legal provisions are well understood. This includes educating the public on the nuances of the amended Section 73(1) (f) of the Marriage Act and its broader implications for gender equality. Public engagement can occur through various channels such as media campaigns, community workshops, and informational materials distributed through educational institutions.

Legal professionals play a pivotal role in the interpretation and application of laws. To ensure effective implementation of the amended provision, targeted education programs should be implemented for legal practitioners. Seminars and continuing legal education programs can be organized to familiarize legal professionals with the revised legal framework. This ensures that they are equipped to navigate and apply the amended provision impartially, promoting gender-inclusive legal practices.

Guiding and counseling individuals entering into marriage is also important. Individuals entering into marriage often rely on societal norms and traditions, which may perpetuate gender-based inequalities. Awareness and education programs should specifically target engaged couples, providing them with information on their rights and responsibilities within marriage. This will also include educating them regarding the revised Section 73(1)(f). Lastly, Informational brochures, and online resources can be effective tools in guiding individuals towards more equitable marital

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<sup>117</sup> Fergus and Rogier, 'Unlocking the potential for change: Education and prevention of gender-based violence' ResearchGate, January 2013-

<[https://www.researchgate.net/publication/269571845\\_Unlocking\\_the\\_potential\\_for\\_change\\_education\\_and\\_prevention\\_of\\_gender\\_based\\_violence](https://www.researchgate.net/publication/269571845_Unlocking_the_potential_for_change_education_and_prevention_of_gender_based_violence)> on 21 December 2023.

dynamics. Beyond the revised specific legal provision, these programs will emphasize the broader importance of gender equality within the Kenyan legal framework. By fostering a deeper understanding of the principles of equality and non-discrimination, society can progress towards dismantling systemic gender biases and stereotypes that may influence legal outcomes.

#### **5.4 Conclusion**

The research presented in this paper reveals a significant gap within section 73(1)(f) of the Marriage Act 2014. Its failure to address a scenario in which the husband sires a child with another woman at the time of marriage, without the knowledge of the wife perpetuates gender-based discrimination contrary to Article 27 of the Constitution of Kenya 2010. The recommendations put forth in this chapter, each with its distinct focus, collectively strive towards rectifying this inherent injustice. The proposal for expanding the scope of section 73(1)(f) of the Marriage Act not only rectifies the injustice within the Marriage regime but also paves the way for a more inclusive and equitable legal landscape.

Simultaneously, the emphasis on awareness and education programs recognizes the societal cultures and norms that influence legal outcomes. These public education programs will go a long way in dispelling stereotypes and fostering a deeper understanding of gender equality. Additionally, targeted education programs for legal professionals to ensure they understand the revised provision and are well equipped to apply it impartially dismantles gender-based discrimination. Finally, as we advocate for these reforms, it is crucial to understand that the pursuit of gender equality and non-discrimination extends beyond legal provisions. It is a societal commitment, a shared responsibility to foster an environment where justice, fairness, and inclusivity prevail.

In conclusion, the proposed recommendations will not only address the specific inadequacies within section 73(1) (f) of the Marriage Act 2014 but also contribute to the broader societal goal of an equal society envisioned by the Constitution of Kenya 2010. The call for reform echoes not just in legal corridors but resonates in the collective consciousness of a nation striving for equality and justice.

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