



Strathmore University
Law School

**Fiction, Reality or Somewhere in Between? An Examination of
the Application of African Customary Law in the Customary
Marriage Legal Regime in Kenya**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,
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By
Midwa, Amelia Achieng
135367

Prepared under the supervision of

Dr. Jane Wathuta

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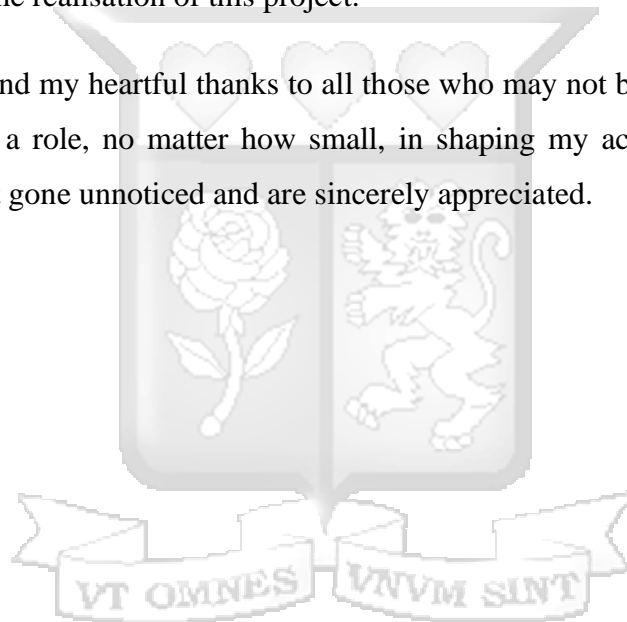
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Declaration

I, **AMELIA ACHIENG MIDWA**, 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.

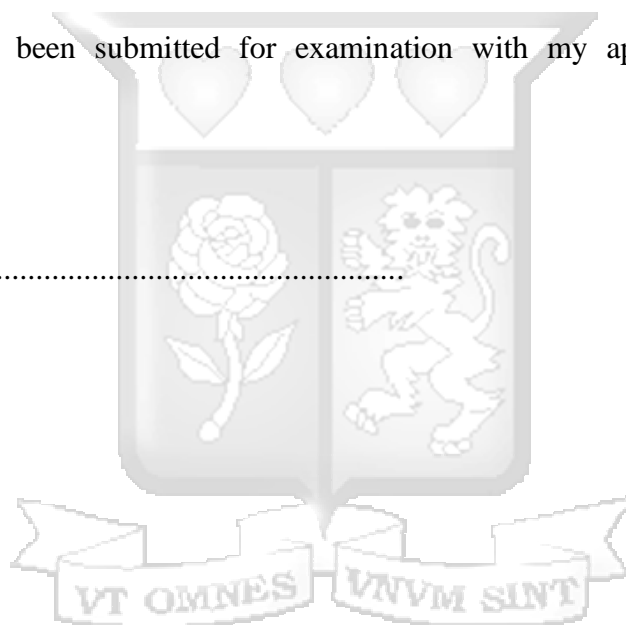
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Date:

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

Signed:.....

Dr. Jane Wathuta



Abstract

Following a prolonged period of marginalisation, marriages contracted under customary law are now constitutionally and statutorily recognized in Kenya. Moreover, their equal status to other forms of marriages continues to be emphasized by the Kenyan Judiciary. Despite these positive developments, there still exists a particular problem plaguing the practice of African Customary Law (ACL) within the customary marriage legal regime in Kenya, which forms the subject matter of this dissertation.

Upon examination of recent jurisprudence from the Kenyan courts, it appears that courts are subjecting ACL to the methods of legal reasoning inherited from colonisation. These reasoning templates can be considered inconsistent with the nature of customary law, hence begging the question whether the application of ACL by the Kenyan courts is a reality. This study argues that ACL is not applied by the Kenyan Courts within the customary marriage legal regime in Kenya post the promulgation of the 2010 Constitution (post-2010). It finds that ACL has instead been substituted by an inauthentic version of customary law that cannot be properly called ACL. The study proceeds to propose two solutions, which are the application of Traditional Dispute Settlement Mechanisms (TDRMs) in customary marriage disputes and a guiding criterion for the ascertainment of the content of customary law within the formal court system.

This study adopts a qualitative methodology, placing key reliance on secondary sources such as books and journal articles. Primary sources such as case law on customary marriages and laws such as the Constitution of Kenya and the Marriage Act (2014) are relied on.

List of Abbreviations

ACL	African Customary Law
AJS	Alternative Justice Systems
CESCR	Committee on Economic, Social and Cultural Rights
CuCs	Court Users Committees
ICESCR	International Covenant on Economic, Social and Cultural Rights
TDRMs	Traditional Dispute Resolution Mechanisms



List of Cases

- Anna Munini & Another v Margaret Nzambi* (1984) eKLR.
- ASA v NA and another* (2020) eKLR.
- Case V Ruguru* (1970) East Africa Law Reports.
- Eliud Maina Mwangi v Margaret Wanjiru Gachangi* (2013) eKLR.
- Esiroyo v Esiroyo* (1973) East Africa Law Reports.
- Eunita Anyangi Geko & Another v Philip Obunga Orinds* (2013) eKLR.
- Eva Naima Kaaka & another v Tabitha Waithera Mararo* (2018) eKLR.
- Gwao Bin Kilimo v Kisunda Bin Ifuti* (1938) 1 T.L.R 403.
- Hortensia Wanjiku Yawe v Public Trustee* (1976) eKLR.
- Hyde v Hyde* (1866) English Court of Probate and Divorce.
- I v I* (1971) East Africa Law Reports.
- In Re Estate of Joseph Irungu Gichiri (deceased)* (2020) eKLR.
- Joyce Atemo v Mary Ipali Imujaro* (2003) eKLR.
- K v K* (1976) eKLR.
- Karuru v Njeri* (1968) East Africa Law Reports.
- Kinyanjui Kimani v Muiru Gikanga and Another* (1965) East Africa Law Reports.
- Muli v Kithuka* (1969) Unreported.
- Munyao Ndolo & 3 others v Mary Nduku Mutisya* (2018) eKLR.
- MWK v MWN* (2017) eKLR.
- New Great Insurance Co. of India Ltd. v Lilian Evelyn Cross and another* (1968) East Africa Law Reports.

Nyali Limited v Attorney General (1955) The United Kingdom Court of Appeal.

Priscilla Waruguru Gathigo v Virginia Kanugu Gathigo (2004) eKLR.

Rex v Amkeyo (1917) East Africa Law Reports.

Rosemary Aoko Munjal v Noel Namenya Munjal (2015) eKLR.

Selle v Associated Motor Boat Company (1968) East Africa Law Reports.

TSO v SO (1979) eKLR.

Wambwa v Okumu (1970) East Africa Law Reports.

Wilfred Mongare Orina v Askah Mocheche Momanyi (2019) eKLR.



List of Legal Instruments

Constitution of Kenya (2010).

East Africa Order in Council (1897).

Evidence Act (Act No 19 of 2014).

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3.

Judicature Act (Act No. 16 of 1967).

Kenya (Jurisdiction of Courts and Pending Proceedings) Regulations (1963).

Kenya Order in Council (1921).

Magistrates' Court Act (Act No. 26 of 2015).

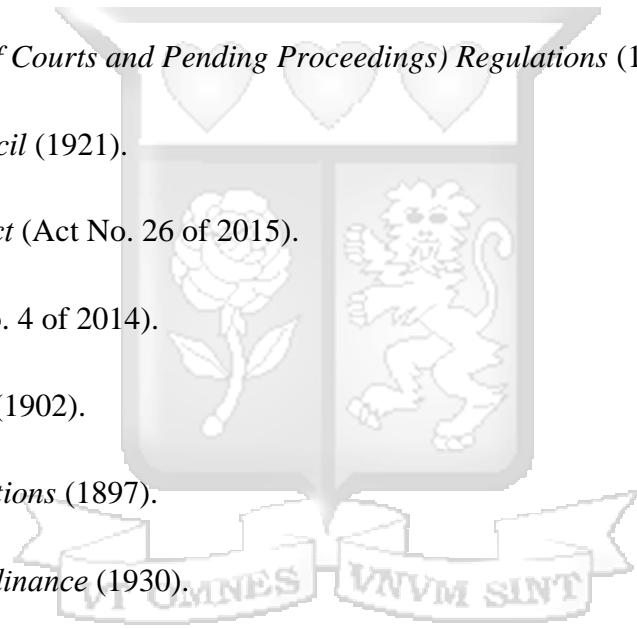
Marriage Act (Act No. 4 of 2014).

Marriage Ordinance (1902).

Native Courts Regulations (1897).

Native Tribunal's Ordinance (1930).

The African Courts Ordinance (1951).



1. Chapter 1: Introduction

1.1 Background

The formal marriage law system in Kenya, set in motion by the 1897 general reception clause,¹ was the typical dual model that characterized British imperialism in Africa.² A split was created between the indigenous and European legal systems.³ Despite the separateness created and maintained between the two parallel systems, their distinction was not absolute. The indigenous law, African Customary Law (ACL), was paired with the British model of justice and morality, and resultantly viewed as inferior.⁴ Even so, Africans continued to contract marriages under ACL (customary marriages).⁵ ACL as used in this project refers to the unwritten, living and evolutionary body of rules, morality and religion viewed as obligatory, that have been practiced and developed by African peoples since time immemorial.⁶

The wave of independence encouraged African states such as Kenya to look into ways of integrating the different regimes of law for uniform application in the new pluralistic state.⁷ The embrace of legal pluralism in marriage law was, among other ways,⁸ evidenced in the change of judicial attitudes towards customary marriages.⁹ However, there still existed some form of preference by the judiciary towards previously established modes of thinking that were prejudicial to ACL.¹⁰ This, in addition to the failure to statutorily recognize African customary

¹ *East Africa Order in Council* (1897). Cotran E, 'The development and reform of the law in Kenya' 27(1) *Journal of African Law*, 1983, 42.

² Daniels R, Trebilcock M and Carson L, 'The legacy of empire: the common law inheritance and commitments to legality in former British colonies' 59(1) *The American Journal of Comparative Law*, 2011, 156.

³ Allot A, 'What is to be done with African customary law? The experience of problems and reforms in anglophone Africa' 28(1/2) *Journal of African Law*, 1984, 56-57.

⁴ African customary laws were subject to the repugnancy clause articulated in the *Native Courts Regulations* (1897). Also see Kang'ara S, 'Beyond bed and bread: Making the African state through marriage law reform- Constitutive and transformative influences of Anglo-American legal thought' 9(2) *Hastings Race and Poverty Law Journal*, 2012, 363.

⁵ Kang'ara S, 'Beyond bed and bread', 361.

⁶ Mwangi C, 'Traditional knowledge and the inclusive subordination of African customary law in Kenya: lessons from personal law' 16(1) *Journal of African Law*, 2022, 48; Also see Onyango P, *African customary law: an introduction*, 1st ed, Law Africa, Nairobi, 2013, 18.

⁷ Cotran E, 'Marriage, Divorce and Succession Laws in Kenya: Is integration or unification possible?' 40(2) *Journal of African Law*, 1966, 195-196.

⁸ These 'other ways' included the institution of the commission of the Commission on the law of marriage and divorce (1968) in the post-colonial state for the reformation of marriage laws, as well as the attempts to codify African customary law.

⁹ Read J, 'Marriage and divorce: A new look for the law in Kenya' 5(1/2) *East African Law Journal*, 1969, 52-53; *Muli v Kithuka* (1969) Unreported. The idea of the inferiority of ACL marriages was dispelled with.

¹⁰ *Esiroyo v Esiroyo* (1973) East Africa Law Reports. The court emphasizes that written law is preferred to ACL, even where one of the parties is subject to customary law.

marriages, contributed to the sense of inferiority of ACL and customary marriages.¹¹ This state of affairs still did not prevent Kenyans from contracting customary marriages.

After the promulgation of the 2010 Constitution, integration of the different regimes of marriage law was finally realized.¹² Customary marriages are now not only constitutionally acknowledged in Article 45(4)(a) of the Constitution,¹³ but also statutorily recognized under Part V of the Marriage Act, 2014.¹⁴ Their equal status to other marriages has also been captured in the Marriage Act¹⁵ and been emphasized by the Kenyan Judiciary.¹⁶ However, despite these positive developments, there still exists a particular problem endemic to the practice of ACL in Kenya with regard to marriage law.

Post the promulgation of the 2010 Constitution, it appears that some judicial officers continue to perceive ACL through the legal lenses inherited from the colonial era. Written digests and case law have seemingly become the primary source of ACL when presented with questions pertaining to customary marriage.¹⁷ This was recently demonstrated in the 2020 case of *ASA v NA and another*,¹⁸ where the court chose to rely on Eugene Cotran's Restatements and case law to establish the presence of a Luo customary marriage. The court preferred this approach even after being presented with expert evidence on Luo customary marriages.

As a result of this method of application of ACL, it could be concluded that a static and hybrid system of judicial customary marriage law has developed. This 'official' customary law fails to reflect the rules and customs observed by communities in 'real-time' (this can be referred to as living, true or popular ACL).¹⁹ The approach of the Kenyan courts could be seen to discount

¹¹ Commission on the law of marriage and divorce, *Report of the Commission on the law of marriage and divorce*, 1968, 13.

¹² Chebii J, 'Developments in family law in Kenya: reflections on the recent reforms in family law' 12(1) *The Law Society Journal of Kenya*, 2016, 6-7.

¹³ Article 45(4)(a), *Constitution of Kenya* (2010)

¹⁴ Part V, *Marriage Act* (Act No. 4 of 2014). Section 43 in particular recognizes ACL as the governing law pertaining to customary marriages.

¹⁵ Section 3(3), *Marriage Act* (Act No. 4 of 2014).

¹⁶ This was particularly emphasized in *Re Estate of Joseph Irungu Gichiri* (deceased) (2020) eKLR.

¹⁷ These are general observations made from the examination of case law. See *Munyao Ndolo & 3 others v Mary Nduku Mutisya* (2018) eKLR, *Eva Naima Kaaka & another v Tabitha Waithera Mararo* (2018) eKLR, *In Re Estate of Joseph Irungu Gichiri (Deceased)* (2020) eKLR, *Rosemary Aoko Munjal v Noel Namanya Munjal* (2015) eKLR, *Eliud Maina Mwangi v Margaret Wanjiru Gachangi* (2013) eKLR, *MWK v MWN* (2017) eKLR among others.

¹⁸ (2020) eKLR.

¹⁹ Tebbe N, 'Inheritance and disinheritance: African customary law and constitutional rights' 88(4) *The Journal of Religion*, 2008, 488-489.

the very nature of ACL, which is unwritten, flexible and mirrors the lived realities of the people governed by it.²⁰

This approach taken by Kenyan Courts can be viewed as problematic due to the recognition of the right to culture in the Constitution,²¹ particularly in instances where official ACL fails to reflect the living ACL. The specific aspect of the right to culture that is of relevance here is the right of everyone to participate in cultural life. ‘Cultural life’ refers to a living and dynamic process with a past, future and present. It is not a static invention whose development ceased in the past.²² In order for participation to be fully realized, *inter alia*, the state ought to take positive action to ensure the preconditions for participation in cultural life,²³ the actions by the state ought to be acceptable to the communities involved and the actions ought to be appropriate, such that they respect the culture of the community.²⁴ On this basis, it is important that individuals are realistically governed by the customary laws they observe to realize the right to culture. This can be done if ACL is applied in a manner that appreciates and recognizes its nature appropriately.²⁵

1.2 Statement of Problem

Despite the historical subordination of ACL and resultantly customary marriages in Kenya, Kenyans have continued to contract customary marriages. This is now not only statutorily safeguarded by Part V of the Marriage Act (2014), but also constitutionally protected by Article 45(4)(a), the Article 44 right to culture, and Article 2(6) by incorporating international treaty rules that safeguard the right to culture. However, these safeguards and the cultural rights of those who contract customary marriages are currently threatened by the approach Kenyan courts have taken toward the application of ACL, particularly regarding customary marriages. A stream of awkward jurisprudence which subjects ACL to the methods of legal reasoning

²⁰ See Roberts S, ‘Introduction: Some notes of ‘African customary law’ 28(1/2) *Journal of African Law*, 1984, 2 and Kamau W, ‘Customary law and women’s rights in Kenya’ *Equality Effect*, 2014, 6-7 -< <http://theequalityeffect.org/wp-content/uploads/2014/12/CustomaryLawAndWomensRightsInKenya.pdf>> on 25 November 2022. This has been replaced with the view that ACL is invariable and adverse to change.

²¹ Article 44 and 11, *Constitution of Kenya* (2010). Additionally, Article 2(6) provides that any treaty ratified by Kenya shall form part of the laws of Kenya, and this includes the International Convention on Economic Social and Cultural Rights and the Universal Declaration of Human Rights which both provide for the right of everyone to participate in cultural life.

²² *CESCR General Comment No. 21, Right of Everyone to Take Part in Cultural Life*, 21 November 2009, 3.

²³ *CESCR General Comment No. 21*, 2.

²⁴ *CESCR General Comment No. 21*, 5.

²⁵ Tebbe N, ‘Inheritance and disinheritance: African customary law and constitutional rights’, 494.

Accommodating previously disenfranchised groups works to promote constitutional commitments to equal citizenry, dignity and fostering a sense of belonging.

inherited during colonisation is emanating from the Kenyan Courts, which discounts the nature of ACL. This begs the question whether the application of ACL by the Kenyan Courts is an illusion, with ACL being substituted by some 'Africanised' form of common law. Based on the foregoing, this study aims to investigate whether ACL is applied by the Kenyan Courts within the customary marriage legal regime post the promulgation of the 2010 Constitution, in light of the nature of ACL and the recent jurisprudence emerging from the Kenyan courts.

1.3 Research Objectives

1. To examine the judicial approaches to ACL in the customary marriage legal regime in Kenya before and after the promulgation of the 2010 Constitution and identify the influences the past regime (pre-2010) has had on the contemporary one (post-2010).
2. To investigate the nature of ACL and assess whether Kenya's post-2010 judicial approaches to ACL in the customary marriage legal regime can be characterised as application of ACL properly understood.
3. To determine appropriate solutions to the contemporary practice of ACL in the customary marriage legal regime in Kenya that reflect and appreciate the nature of ACL.

1.4 Research Questions

1.
 - a. What were/are the judicial approaches to ACL in the customary marriage legal regime in Kenya before and after the promulgation of the 2010 Constitution?
 - b. How have the pre-2010 judicial approaches to ACL in the customary marriage regime in Kenya influenced the post-2010 judicial approaches in the regime?
2.
 - a. What is the nature of ACL?
 - b. Does Kenya's post-2010 judicial approach to ACL in the customary marriage legal regime reflect the application of ACL properly understood?
3. What are the most appropriate solutions to the contemporary practice of ACL in the customary marriage legal regime in Kenya that reflect and appreciate the nature of ACL?

1.5 Hypothesis

The Kenyan courts have adopted an approach to ACL that subjects it to the methods of legal reasoning inherited during colonisation. This has led to the development of a static, inauthentic,

and hybrid system of judicial customary marriage law. This largely conflicts with, discounts, and fails to reflect the true nature of ACL, which is unwritten, flexible and evolutionary. As such, the hypothesis of this study is that ACL is not applied by the Kenyan Courts within the customary marriage legal regime in Kenya post the 2010 Constitution, but has instead been substituted by an ‘Africanized’ species of common law disguised as ACL.

1.6 Justification

Kenyans continue to exercise their right to culture and contract customary marriages, which is not only safeguarded statutorily, but also constitutionally. However, recent jurisprudence emanating from the Kenyan courts guided by inherited rubrics of legal thought has favoured the practice of a *faux* version of ACL, failing to appreciate its true nature. This study not only highlights, but also proposes solutions to this problem. For this reason, this study will serve as a useful guide to Kenyan judges and advocates when presented with matters pertaining to customary marriages. The study is also largely important from a human rights perspective given that the failure to properly apply ACL in customary marriage matters creates a barrier to realizing the right to culture.

Furthermore, this study is a unique addition to the literature on the practice of ACL in Kenya, which as of now is yet to question whether ACL is indeed applied post-2010 in the customary marriage legal regime. The discussions are mainly focused on the implications of ACL on Traditional Dispute Resolution Mechanisms (TDRMS),²⁶ intellectual property,²⁷ equality and women’s rights,²⁸ among other fields. Therefore, this study will be useful to ACL scholars. It is also important to point here that this study may be of use to scholars of African religion. This is because much of ACL, including customary marriage law, is intertwined with religious beliefs, practices and institutions.²⁹

²⁶ For instance, Kariuki F, ‘Customary law jurisprudence from Kenyan courts: implications for traditional African justice systems’ Strathmore University, 2015, Bwire B, ‘Integration of African customary legal concepts into modern law: Restorative justice: A Kenyan example’ 9(1) *Societies*, 2019, Owino L, ‘Application of African customary law: Tracing its degradation and analysing the challenges it confronts’ 1(1) *Strathmore Law Review*, 2016. They acknowledge the application of ACL based on Article 152(3) of the Constitution of Kenya.

²⁷ For instance, Mwangi C, ‘Traditional knowledge and the inclusive subordination of African customary law in Kenya’.

²⁸ For instance, Kamau W, ‘Customary law and women’s rights in Kenya’ *Equality Effect*, 2014 -< <http://theequalityeffect.org/wp-content/uploads/2014/12/CustomaryLawAndWomensRightsInKenya.pdf>> on 25 November 2022.

²⁹ Tebbe N, ‘Inheritance and disinheritance: African customary law and constitutional rights’, 470-471.

1.7 Conceptual Framework: Colonial Legal Thought as a Post-colonial Legal Culture

This study is primarily premised on the concept of ‘colonial legal thought as a post-colonial legal culture’. It attempts to explain the intellectual tools employed by colonial judges in deciding cases, and how they diffused into the post-colonial period.

Colonialism³⁰ in and of itself is a highly diverse process, with different manifestations geographically, historically and culturally.³¹ It is important to note that the ‘variation’ of colonialism that is of significance to this conceptual framework is that specific to British occupation in Africa. British colonialism in Africa could be likened to globalization of English law, generating a ‘centripetal jurisprudence’. This is a philosophy of law which placed English Common Law and its legal reasoning techniques at its centre.³² It involved the transplantation of incompatible foreign laws and legal institutions that were viewed as far more superior to the local laws.³³

Beyond the transfer was the underlying motivation of the British to transform local societies.³⁴ New forms of consciousness, such as Eurocentric understandings of law, were imposed on the colonized by use of institutions which included courts.³⁵ In exercising control over its colonies in Africa, British administrators sought to extend the same standards of law and justice that prevailed in England at the time.³⁶ This resulted in the diffusion of various methods of reasoning to the colonized territories. Based on this understanding of colonialism, colonial legal thought refers to the techniques of legal reasoning that were transferred, developed and employed by the British during colonial rule in Africa, largely drawn from the English Common Law that was transplanted.³⁷

³⁰ Colonialism refers to a project that creates institutions and power structures that maintain the relationship between the colonizer (ruler) and colonized (subject) with the motive of suppressing the colonized. It creates an asymmetrical relationship between the two parties, where the colonized, their institutions and their way of life are viewed as less human compared to that of the colonizer. It is not synonymous to colonisation, which refers to the time period within which colonialism occurred. See Ndlovu-Gatsheni S, ‘Fifteenth anniversary of decolonization in Africa: a moment of celebration or critical reflection?’ 33(1) *Third World Quarterly*, 2012, 72. Also see Faciolince M, ‘Decolonization, decoloniality and the future of African studies’ FP2P, 17 January 2020 <<https://frompoverty.oxfam.org.uk/decolonization-decoloniality-and-the-future-of-african-studies/>> on 11 September 2022.

³¹ Merry S, ‘Law and colonialism’ 25(4) *Law and Society Review*, 1991, 895.

³² Ibhawoh B, ‘Historical globalization and colonial legal culture: African assessors, customary law and criminal justice in British Africa’ 4(3) *Journal of Global History*, 2009, 430.

³³ Merry S, ‘Law and colonialism’, 895.

³⁴ Merry S, ‘Law and colonialism’, 890.

³⁵ Merry S, ‘Law and colonialism’, 892.

³⁶ Ibhawoh B, ‘Historical globalization and colonial legal culture’, 431.

³⁷ Kang’ara S, ‘Beyond bed and bread’, 359-360.

Turning to the reasoning techniques that form part of the colonial legal thought, Atiyah argues that the English legal system has *always* had two distinguishing characteristics: its ‘*extreme* emphasis on predictability’ and its ‘*extensive* use of formality’.³⁸ One of the aspects of predictability in the English legal system is the common law doctrine of precedent, hinged on analogical reasoning.³⁹ This is because the hallmark of analogical reasoning, as Sunstein puts it, is the feature of principled consistency where judgements on specific similar cases ought to be congruent with one another.⁴⁰ The idea is that if the facts of a prior case (source case) are *relevantly similar* to a current case (target case), the target case should be decided the same way as the source case.⁴¹ This promotes the ability to *predict* what a court is likely to decide in cases with similar facts.

With regard to legal formalism, it is a deductive form of reasoning that takes a syllogistic form, where the outcome of a case is determined based on only those premises considered to be valid. These premises are often trivial.⁴² One form of formality is authoritative formality, where validity is conferred on a specific rule based on its origin or source. For instance, a court judgement is considered valid by a lower court simply because it originates from a higher court, without placing focus on substantive considerations such the accuracy of the prior holding.⁴³

It is important to note that despite analogical reasoning and formalism being part of colonial legal thought, it cannot be said that colonial legal thought is purely British in origin. During colonization, it was not possible for the dominant English law to occupy all spheres of colonial life. Some sort of hybridization occurred at the peripheries due to the interaction between the local law, which was allowed to exist, and the transplanted law.⁴⁴ New intellectual tools developed to enrich colonial legal thought, largely based on the common law framework.

Among the intellectual inventions that emerged during this period was the concept of ‘Otherness’. This came by as a result of the British attempting to understand local identities in

³⁸ Atiyah P, ‘Justice and predictability in the Common Law’ 15(2) *University of New South Wales Law Journal*, 1992, 448.

³⁹ Gvozdenovic M, ‘Statute, Common Law and analogical reasoning: Pouring oil on troubled waters’ 43(3) *Statute Law Review*, 2022, 322; Rigoni A, ‘Common-Law judicial reasoning and analogy’ 20(2) *Legal Theory*, 2004, 136.

⁴⁰ Sunstein C, ‘On analogical reasoning’ 106(3) *Harvard Law Review*, 1993, 746.

⁴¹ Rigoni A, ‘Common-Law judicial reasoning and analogy’, 139.

⁴² Posner R, ‘Legal formalism, legal realism and the interpretation of statutes and the constitution’ 37(2) *Cape Western Reserve Law Review*, 1986, 181.

⁴³ Atiyah P, ‘Justice and predictability in the Common Law’, 452-454.

⁴⁴ Ibhawoh B, ‘Historical globalization and colonial legal culture’, 445-447.

relation to themselves.⁴⁵ The concept came to exclude any rule not based on a western model from the concept of law.⁴⁶ Local law was labelled ‘the other’, as it was viewed as a primitive, less developed form of law, and resultantly marginalized.⁴⁷ However, the British in a ‘saviourism’ attitude hoped that their intervention would help evolve the law and began efforts to ‘fit’ the law into their Western model. For example, it was common for anthropologists to be commissioned to codify local law, transforming it from an informal, unwritten and flexible system to one that was fixed and determinable.⁴⁸ Such written codes were resultantly heavily relied on in the spirit of predictability. This ‘fitting’ practice and reliance on written codes can also be considered a legal invention that formed part of the colonial legal culture.

Having expounded on the intellectual tools that form part of the colonial legal thought, the discussion now turns to an analysis of how these tools found their way to the post-colonial legal period and how this relates to legal culture. Echoing the words of Rheinstein, decolonization only changes the constitutional basis of the legal order. The colonial laws largely remain the same, with the laws of the crown simply becoming the laws of the newly sovereign population.⁴⁹ In a similar sense, decolonization does not result in a return to the pre-colonial state, but a movement into the post-colonial state where the effects of colonialism become an inseparable part of the culture of post-colonial institutions.⁵⁰ Based on this understanding, it can be argued that the tools of colonial legal thought had some form of post-colonial continuity, and can be viewed from the lens of Karl Klare’s ‘legal culture’.

Legal culture refers to ‘professional sensibilities, habits of mind, and intellectual reflexes’.⁵¹ A clear defining element of a legal culture is that its participants view particular principles or ways of reasoning as normal. The legal culture significantly shapes the perceptions and beliefs of its participants, such that they address particular legal problems in a homogenous way with the ‘normal’ modes of reasoning. As a result, other techniques of reasoning that depart from the normal are viewed as unpersuasive.⁵²

⁴⁵ Merry S, ‘Law, jurisprudence and social thought: Colonialism, post-colonialism and legal theory’ 17(1) *Political and Legal Anthropology Review*, 1994, 890.

⁴⁶ Roy A, ‘Post-colonial theory and law: A critical introduction’ 29(2) *Adelaide Law Review*, 2008, 320.

⁴⁷ Merry S, ‘Law and colonialism’, 898.

⁴⁸ Merry S, ‘Law and colonialism’, 899-900.

⁴⁹ Rheinstein M, ‘Law and social changes in Africa’ 1962(4) *Washington University Law Quarterly*, 1962, 444.

⁵⁰ Roy A, ‘Post-colonial theory and law’, 318.

⁵¹ Klare K, ‘Legal culture and transformative constitutionalism’ 14(1) *South African Journal on Human Rights*, 1998, 166.

⁵² Klare K, ‘Legal culture and transformative constitutionalism’, 167.

On how this looks in relation to common law, Stone argues that common law, due to its prolonged practice in a legal system, creates a habit of mind. This habit of mind is a 'mental attitude which finds precedent good because some judge in the past has decided it'.⁵³ Unless a judicial actor is on guard, they 'accept uncritically the system and all its fruits', and distrust any innovation in the law originating from non-judicial sources.⁵⁴ This appears to be the post-colonial legal culture of nations that were previously colonised by the British in Africa. Judicial officers seem to apply the same legal techniques, conceptual templates and reasoning methods characteristic of colonial legal thought regardless of the circumstance.⁵⁵ They could be argued to wear the same glasses as those worn by the colonial magistrates, in finding arguments related to precedent and codification more persuasive than the 'uncertain' ones appealing to informal, unwritten and dynamic law.

This conceptual framework will guide the author in their critique of the contemporary judicial approach to ACL in the customary marriage legal regime in Kenya. First and foremost, it will be used to reveal the foundational problem with the current judicial approach to ACL. This will greatly aid in demonstrating whether Kenya actually practises ACL properly understood. Second, the conceptual framework will be instructive in developing the solutions proposed in the project. This is because it will aid in bringing to light the underlying and systemic shortcoming of the current judicial approach to ACL in the customary marriage legal regime, hence identifying the specific issue addressed by the solutions.

1.8 Literature Review

So far, the literature questioning the application of ACL in the Kenyan legal system has investigated the matter in issues different from the one in the present study. Musau in his 1984 study, for instance, seeks to assess the application of ACL *in general* in colonial and post-colonial Kenya, as well as predict its future via a historical analysis of the development of ACL.⁵⁶ Furthermore, his investigation concludes that ACL has *lost its role* in post-colonial Africa, due to its subordination by the Legislature and Judiciary.⁵⁷ This conclusion is based on

⁵³ Stone H, 'The Common Law in the United States' 50(1) *Harvard Law Review*, 1936, 10.

⁵⁴ Stone H, 'The Common Law in the United States', 10.

⁵⁵ Bennet T, 'Reintroducing African customary law to the South African legal system' 57(1) *The American Journal of Comparative Law*, 2009, 11.

⁵⁶ Musau D, 'The application of African Customary Law in Kenya' Unpublished, University of Nairobi, Nairobi, 1984, 2.

⁵⁷ Musau D, 'The application of African Customary Law in Kenya' Unpublished, University of Nairobi, Nairobi, 1984, 25.

his analysis of post-independent Kenya from the year 1963 to 1984,⁵⁸ hence fails to factor in the recent developments with regard to ACL and the customary marriage legal regime.

Despite this, this literature review seeks to explore the scholarly work surrounding two thematic areas of the study. These are the dichotomy between ‘official’ and ‘living’ ACL and the development of ACL from the pre-2010 era to the post-2010 era.

1.8.1 On the Dichotomy Between ‘Official’ and ‘Living’ ACL

Currently, there exist critical studies that find issue with the contemporary application of ACL by courts in Kenya. In doing so, they have developed the terms ‘official’ and ‘living’ ACL to contrast the version of ACL that is applied by courts and the version practised by communities in real time.

Bwire’s work emphasizes the need for ACL applied by Kenyan Courts to be ‘up to date’.⁵⁹ The work takes notice of the inconsistency of ACL with the rigidity of the doctrine of precedent, emphasising the dichotomy between ‘official’ and ‘living’ ACL.⁶⁰ He recognises that a decision given on customary law 10 years ago cannot be blindly followed today, as it ‘no longer represents the law’.⁶¹ It is important to note here that this is examined in relation to the development of an African legal philosophy via TDRMs.⁶²

The conflict between judicial ACL and living ACL is further illustrated in Kamau’s contribution. In analysing the nature of ACL in general, she summarily critiques the Restatements (attempts to codify ACL) for failing to reflect the reality of contemporary African communities.⁶³ Kamau also addresses the fact that the practice of reliance of codifications developed in 1968, coupled and buttressed with the doctrine of precedent has led to the fossilization of ACL. Her brief critique also addresses the differences that exist between ACL as reflected in ‘judges’ law and ACL as practiced by communities.⁶⁴ This theme of conflict

⁵⁸ Musau D, ‘The application of African Customary Law in Kenya’ Unpublished, University of Nairobi, Nairobi, 1984, 15.

⁵⁹ Bwire B, ‘Integration of African customary legal concepts into modern law’, 4.

⁶⁰ Bwire B, ‘Integration of African customary legal concepts into modern law’, 4-5.

⁶¹ Bwire B, ‘Integration of African customary legal concepts into modern law’, 4.

⁶² Bwire B, ‘Integration of African customary legal concepts into modern law’, 2-3.

⁶³ Kamau W, ‘Customary law and women’s rights in Kenya’ *Equality Effect*, 2014, 7-<

<http://theequalityeffect.org/wp-content/uploads/2014/12/CustomaryLawAndWomensRightsInKenya.pdf>> on 25 November 2022.

⁶⁴ Kamau W, ‘Customary law and women’s rights in Kenya’ *Equality Effect*, 2014, 7-<

<http://theequalityeffect.org/wp-content/uploads/2014/12/CustomaryLawAndWomensRightsInKenya.pdf>> on 25 November 2022.

between ‘living’ and ‘official’ ACL is assessed in the context of an examination of the conflict between ACL in general and women’s rights.⁶⁵

Kamau further explores the ‘official’ ACL- ‘living’ ACL dichotomy in another piece. In ‘*Judicial approaches to the applicability to customary law to succession disputes in Kenya*’, she argues that the approaches taken by Kenyan courts in the application of ACL in succession cases dealing with women set up a dichotomy between customary law and state law.⁶⁶ These two approaches are the ‘norm of equality’ and ‘norm of difference’,⁶⁷ which are argued to inhibit growth of customary law.⁶⁸

Juma similarly studies the divergence between ‘official’ and ‘living’ customary law in Kenya. He argues that ‘African Customary Law and African customary practices, beliefs or value systems are not synonymous’. It is posited that ACL represents a generic form of law present in formal court decisions and codifications, while African custom represents those dynamic and adaptable practices and beliefs characteristic of African communities.⁶⁹ These arguments are explored in the context of attempting to reconcile ACL with human rights.⁷⁰

In conclusion, Kenyan scholarship has acknowledged the conflict between the ‘living’ customary law applied and practiced by African communities in ‘real-time’, and the judicial strain of ACL based on the application of codifications and precedent. However, this has not been done within the context of the customary marriage legal regime in Kenya.

1.8.2 On the Development of ACL from the Pre-2010 Constitution Era to the Post-2010 Constitution Era

Among the recent literature on ACL in Kenya relates to the development of ACL from the period before the enactment of the 2010 Constitution of Kenya to the period after the enactment of the Constitution. Scholars engaged in these debates acknowledge that ACL is indeed applied post the promulgation of the 2010 constitution, though in a flawed manner. They focus their

⁶⁵ Kamau W, ‘Customary law and women’s rights in Kenya’ *Equality Effect*, 2014, 2-3-<
<http://theequalityeffect.org/wp-content/uploads/2014/12/CustomaryLawAndWomensRightsInKenya.pdf>> on 25 November 2022.

⁶⁶ Kamau W, ‘Judicial approaches to the applicability to customary law to succession disputes in Kenya’ 1(1) *East Africa Law Journal*, 2015, 141.

⁶⁷ Kamau W, ‘Judicial approaches to the applicability to customary law to succession disputes in Kenya’, 152-53

⁶⁸ Kamau W, ‘Judicial approaches to the applicability to customary law to succession disputes in Kenya’, 141.

⁶⁹ Juma L, ‘Reconciling African customary law and human rights in Kenya: Making case for institutional reformation and revitalization of customary adjudication processes’ 14(3) *St. Thomas Law Review*, 2002, 464.

⁷⁰ Juma L, ‘Reconciling African customary law and human rights in Kenya’, 462.

discussions on the implications of the attempts to subordinate ACL on TDRMS, intellectual property, among other fields within the new constitutional dispensation.

Take for instance Kariuki who acknowledges that the ACL regime in relation to the practice of TDRMS has been strengthened by the constitutional safeguards provided in Article 159(2)(c)⁷¹ and its expanded application to the resolution of some criminal disputes.⁷² However, he notes that the success of TDRMs in promoting access to justice in Kenya is largely hinged on the recognition of customary law as a significant source of law.⁷³ He acknowledges that the jurisprudential history of ACL in Kenya acts as a significant barrier to this recognition, with particular reference to Article 3(2) of the Judicature Act which provides for the repugnancy clause.⁷⁴

Owino takes a similar position. However, she considers the application of ACL in Kenya generally. She traces the historical degradation of ACL in Kenya, which she argues was put to an end with the promulgation of the 2010 Constitution.⁷⁵ She refers to the approach taken post the 2010 Constitution as the ‘deliberate resuscitation of ACL in Kenya’, with the promotion of TDRMs and their application to criminal cases.⁷⁶ However, Owino outlines six problems, including the issue of repugnancy, associated with the practice and application of ACL in post-2010 Kenya.

Mwangi adopts a similar approach to that one taken by Kariuki, though within the context of protection of traditional knowledge. He begins by identifying ACL as a plausible regime that could be utilized in the protection of traditional knowledge.⁷⁷ His work then assesses the challenges of adopting an ACL regime due to the historical subordination of ACL in Kenya, and how this affects the promise of ACL in protecting traditional knowledge.⁷⁸

⁷¹ Article 159(2)(c), *Constitution of Kenya* (2010).

⁷² Kariuki F, ‘Customary law jurisprudence from Kenyan courts: implications for traditional African justice systems’ Strathmore University, 2015, 9-10.

⁷³ Kariuki F, ‘Customary law jurisprudence from Kenyan courts: implications for traditional African justice systems’ Strathmore University, 2015, 10.

⁷⁴ Kariuki F, ‘Customary law jurisprudence from Kenyan courts: implications for traditional African justice systems’ Strathmore University, 2015, 11-12. Also see Section 3(2), *Judicature Act* (Act No. 16 of 1967).

⁷⁵ Owino L, ‘Application of African Customary Law’, 145-150.

⁷⁶ Owino L, ‘Application of African Customary Law’, 150- 153.

⁷⁷ Mwangi C, ‘Traditional knowledge and the inclusive subordination of African customary law in Kenya’, 71.

⁷⁸ Mwangi C, ‘Traditional knowledge and the inclusive subordination of African customary law in Kenya’, 62-70.

In summary, Kenyan literature acknowledges the application of ACL in Kenya, especially post the promulgation of the 2010 Constitution, noting the historical flaws that may plague the future application of ACL.

1.8.3 Contribution to Existing Literature

There exist various studies investigating ACL. However, so far, the studies have proceeded on the premise that ACL is indeed practiced in Kenya, especially after the promulgation of the 2010 Constitution (though in a flawed manner). Furthermore, the one study that somewhat resembles this project addresses the state of affairs as they were *generally* in 1984. For this reason, this study will be a unique addition to the ongoing discourse on ACL by assessing the actual application of ACL within the scope of the customary marriage legal regime. Additionally, this study will contribute to existing ACL scholarship by contextualizing the discussion on the dichotomy between ‘living’ ACL and ‘official’ ACL within the customary marriage legal regime in Kenya.

1.9 Methodology

This study is composed of two major parts. The first part explores the judicial approaches to ACL in the customary marriage legal regime in Kenya before and after the promulgation of the 2010 Constitution, identifying the ways the past regime has influenced the present one. This is logically followed by the second part which assesses the nature of ACL and whether the current practice of ACL (if any) conflicts with it. In doing so, this study adopts a qualitative methodology, placing key reliance on secondary sources such as books, chapters in books, journal articles, reports, dissertations and working papers. Primary sources such as case law on customary marriages and laws such as the Constitution of Kenya and the Marriage Act (2014) will also be relied on. In general, the study will employ a deductive approach as the two major parts essentially form the premises for the eventual claim.

The first part of the work will adopt a combination of a historical and doctrinal analysis. The author intends to employ this ‘historical-doctrinal’ analysis methodology to address the first sub-part, which first, elaborates on the judicial approaches to ACL in the customary marriage legal regime before the promulgation of the 2010 Constitution and second, expounds on the contemporary approaches to ACL within the regime post-2010. Elaborating on post-2010 judicial approaches will require an examination based on the jurisprudential history of the colonial and post-colonial courts. This is where the historical analysis comes in. It is important to note here that this is coupled with a doctrinal examination given that case analyses ought to

be conducted to discern these judicial approaches, even if the discussion is largely underpinned in history. The section dealing with post-2010 colonial approaches, on the other hand is largely doctrinal, employing the case study method to extract the judicial approaches currently employed in Kenya. This stream of inductive reasoning (arriving at general conclusions based off an analysis of a single subject, in this case judicial approaches to ACL) is carried on to the second sub-part, which is aimed at identifying the aspects of ACL judicial approaches in the past regime that have slipped into the current regime.

Similar to the first part, the second part of the study will employ a combined methodology. The first sub-part will adopt a philosophical approach, assessing the jurisprudential and anthropological context and underpinnings of ACL, aimed at revealing what is meant by real ACL or ACL properly understood. This provides the necessary backdrop into understanding the second sub-part. The second sub-part undertakes a critical analysis of the judicial approaches to ACL post-2010, seeking to establish whether ACL is actually applied in Kenya based on the previous discussions. The study will finally conclude by proposing solutions to the contemporary practice of ACL in the customary marriage legal regime that best appreciate the nature of ACL. The conclusions from the previous discussions will be applied here.

1.10 Chapter Breakdown

Chapter one, being this introduction, explores the foundational aspects of the entire study such as the research questions and objectives, the conceptual framework and methodology. It essentially sets the pace for study with all the other chapters being premised on it.

Chapter two will examine the judicial approaches to ACL in the customary marriage legal regime employed by the Kenyan courts pre and post-2010. Based on this discussion, aspects of the pre-2010 regime that have found their way to the post-2010 regime will be identified. This chapter makes the argument that post-2010 courts, despite the reform of laws governing customary law marriages in Kenya, employ the inherited legal techniques of precedent, reliance on written sources and formalism when addressing ACL matters. This is particularly with regard to ascertaining the content of ACL.

Chapter three will primarily serve the role of proving the hypothesis of this study. It will do this by first analysing the nature of ACL followed by a discussion on whether the current application of ACL in the customary marriage legal regime in Kenya reflects a proper understanding of ACL. It will ultimately conclude that Kenya does not apply ACL properly

understood, expounding on how the current practice of ACL could be argued to reflect a seemingly inauthentic version of ACL. This is what the study refers to an ‘Africanized’ version of common law dressed as ACL.

Chapter four will propose solutions, expounding on mechanisms that can be employed in the customary marriage legal regime that best appreciate the nature of ACL.

Chapter five, being the final chapter, will conclude the study and provide recommendations.



2. Chapter 2: An Overview of the Judicial Approaches to ACL in the Customary Marriage Legal Regime from 1897 to Date

2.1 Introduction

This chapter explores the litigation of custom within the customary marriage legal regime in Kenya. It places focus on the judicial approaches towards ACL matters, specifically the approaches adopted in the ascertainment of the content of ACL in customary marriage disputes. The chapter seeks to provide a comprehensive picture of how these approaches have diffused through the colonial and post-colonial eras to the period after the promulgation of the 2010 Constitution. In doing so, it aims to demonstrate that Kenyan courts continue to employ the inherited legal techniques of precedent, reliance on written sources and formalism when determining the content of ACL in the customary marriage legal regime.

2.2 Judicial Approaches to ACL before the Promulgation of the 2010 Constitution of Kenya

2.2.1 The Colonial Period (1897- 1962)

Cotran notes that the judicial attitudes and legal techniques employed in the colonial administration of ACL reflected the statutory provisions of colonial laws.⁷⁹ For this reason, this sub-section will first delve into a discussion of colonial laws. It will then flesh out the conceptual templates that emanated from these laws, which were employed by colonial courts in resolving customary marriage matters.

The colonial period in Kenya was characterized by the forceful transplantation of foreign British laws and the subordination of ACL.⁸⁰ The pace was set by the 1897 East Africa Order in Council, which put in force the Indian Acts, Common Law, doctrines of Equity and statutes of general application applicable in England on 12 August 1897 as law in Kenya.⁸¹ This general reception clause had a proviso which stipulated that the laws introduced in Kenya would apply in Kenya so long as ‘the local circumstances of the colony and its inhabitants permit’,⁸² though this had little influence on the state of affairs.⁸³

⁷⁹ Cotran E, ‘The development and reform of the law in Kenya’, 43.

⁸⁰ Allot A, ‘What is to be done with African customary law?’ 56-57.

⁸¹ *East Africa Order in Council* (1897).

⁸² *East Africa Order in Council* (1897).

⁸³ *Nyali Limited v Attorney General* (1955) The United Kingdom Court of Appeal.

The East Africa Order in Council was supplemented by the 1897 Native Courts Regulations which formed the basis for the creation of the dual system of Courts.⁸⁴ On one side of the spectrum, we had the traditional Native Tribunals created by the Regulations. These were to administer justice to the natives.⁸⁵ The idea was that the indigenous systems of justice should be maintained, but be supervised by local administrative officers who understood the natives better.⁸⁶ Furthermore, the creation of the Native Court System came with the recognition of ACL. As per Section 13(a) of the Native Tribunals Ordinance, the Native Tribunals were to administer the ‘native law and custom prevailing in the area of the jurisdiction of the Tribunal’.⁸⁷

On the other side of the spectrum was the professional English-type courts which administered the transplanted English laws.⁸⁸ Its contact with the native system of justice was limited.⁸⁹ A Supreme Court, manned by professional lawyers, and Subordinate Courts, manned by administrative officers acting as magistrates ex-officio, were introduced.⁹⁰

Despite the separateness maintained between the two systems, the alien system did have some effects on the native one. This resulted in the increased westernisation of the native system, which impacted judicial approaches to ACL.⁹¹ Initially, this was through the judicial control exerted by the administrative officers.⁹² The nature of the judicial control transformed in 1951 with the introduction of the African Courts Ordinance. Appeals that lay to the Provincial Commissioner now lay with the Court of Review consisting of a ‘Chairman of high judicial standing,’ who was a European.⁹³ This was the first time a professional lawyer became involved in the affairs of the Native Court System.⁹⁴ Another factor that diminished separateness was that the other English courts had the power to administer African Customary Law pursuant to Article 4(2) of the Kenya Order in Council 1921.⁹⁵

⁸⁴ *Native Courts Regulations* (1897).

⁸⁵ Cotran E, ‘The development and reform of the law in Kenya’, 42.

⁸⁶ Cotran E, ‘The development and reform of the law in Kenya’, 43.

⁸⁷ Section 13(a), *Native Tribunal’s Ordinance* (1930).

⁸⁸ Cotran E, ‘The development and reform of the law in Kenya’, 43.

⁸⁹ Allot A, ‘Customary Law in East Africa’ 4(3) *African Spectrum*, 1969, 13.

⁹⁰ Cotran E, ‘The development and reform of the law in Kenya’, 43.

⁹¹ Cotran E, ‘The development and reform of the law in Kenya’, 43.

⁹² Allot A, ‘Customary Law in East Africa’, 14.

⁹³ *The African Courts Ordinance* (1951).

⁹⁴ Cotran E, ‘The development and reform of the law in Kenya’, 43.

⁹⁵ Article 4(2), *Kenya Order in Council* (1921)

Important to the application of ACL was the repugnancy clause, which also blurred the lines between the native and foreign system. Section 13(a) of the Native Tribunals Ordinance and Article 4(2) of the Kenya Order in Council 1921 further provided that the laws of the natives would not be applied so far as they were repugnant to justice or morality, or inconsistent with the provisions of any Order-in-Council or any other law in force in the Colony.⁹⁶ Section 52(c) of the 1897 East Africa Order in Council also provided the same, and allowed for the Commissioner to alter or modify native law so long as it is deemed fit in the interests of justice and morality.⁹⁷ When it came to repugnancy, the standard to be applied was expressly stated by the court in *Gwao Bin Kilimo v Kisunda Bin Ifuti* to be the British one.⁹⁸

With regard to the written law regarding marriage, which informed the application of ACL, the Marriage Ordinance was enacted in 1902.⁹⁹ It was a statute applicable to all persons regardless of race, and provided for the Christian, monogamous version of marriage. It prohibited parties in a customary marriage from contracting a marriage under the Act.¹⁰⁰ Then came the Native Christian Marriage Ordinance of 1904, which only applied to Africans that professed the Christian faith. This was replaced by the 1931 African Christian Marriage and Divorce Act.¹⁰¹ In no place were African customary marriages recognized as valid.

There are some reasoning techniques that can be inferred from the laws discussed, which can be said to be characteristic of colonial judicial administration of customary marriages. The first is the application of the common law and its doctrines, with emphasis on precedent. This conclusion is justified by the fact that 'Common Law' was transplanted by virtue of the general reception clause,¹⁰² and on that basis would form part of the foundation of colonial judicial decisions. Common Law here refers to the body of governing principles, mainly substantive, expounded by the Common-Law courts of England in deciding cases between them.¹⁰³

⁹⁶ Section 13(a), *Native Tribunal's Ordinance* (1930); Article 4(2), *Kenya Order in Council* (1921).

⁹⁷ Section 52(c), *East Africa Order in Council* (1897).

⁹⁸ (1938) 1 T.L.R 403.

⁹⁹ *Marriage Ordinance* (1902). Commission on the Law of Marriage and Divorce, *Report of the Commission on the law of marriage and divorce*, 1968, 9.

¹⁰⁰ Commission on the Law of Marriage and Divorce, *Report of the Commission on the law of marriage and divorce*, 1968, 8.

¹⁰¹ Commission on the Law of Marriage and Divorce, *Report of the Commission on the law of marriage and divorce*, 1968, 9-10.

¹⁰² *East Africa Order in Council* (1897).

¹⁰³ Stoebuck W, 'Reception of English Common Law in the American colonies' 10(2) *William & Mary Law Review*, 1968, 393.

The second judicial normative commitment made during the colonial period in dealing with ACL is the preference for written law. This was evidenced in those statutes that subjected the enforcement of unwritten ACL to consistency with any Order-in-Council or any other written law.

The third intellectual tool demonstrated, which is related to the prior point, is that of 'Otherness'. It came to exclude any rule or institution not based on the British model.¹⁰⁴ Local laws and institutions were labelled 'the other' and resultantly marginalized.¹⁰⁵ This is exemplified by the fact that 1) in cases of inconsistency between ACL and English Law, English law was preferred, 2) English courts could alter the content of ACL, 3) ACL was subject to the repugnancy clause which was based on the British version of justice and morality and 4) ACL marriages were denied statutory recognition.

The fourth and final judicial approach evidenced is formalism. Customary laws or institutions (such as marriage) were considered invalid not because of their substance *per se*, but because of their inconsistency with their corresponding English models.

A colonial case that demonstrates the existence of these judicial approaches in the realm of customary marriage law is *Rex v Amkeyo*.¹⁰⁶ It should be noted that only one ACL case is discussed in this sub-section as East Africa has very few reported cases on customary marriages due to the non-interference of English-oriented courts in the Native Court System up until 1951 (for Kenya).¹⁰⁷ Even the issue of marriage in the case of *Rex v Amkeyo* was a peripheral question in the determination of the case.¹⁰⁸

The court in *Rex v Amkeyo* was called to determine the admissibility of a testimony given by the customary wife of the accused in a criminal trial. This led the court to the question of whether a wife married under ACL could be considered a wife for the exercise of spousal privilege as provided for in Section 122 of the Indian Evidence Act. The court began by referring to English law (the 'Common Law'), particularly to the English model of marriage. This is the marriage they found was subject to the protections provided in Section 122.¹⁰⁹

¹⁰⁴ Roy A, 'Post-colonial theory and law', 320.

¹⁰⁵ Merry S, 'Law and colonialism', 898.

¹⁰⁶ (1917) East Africa Law Reports.

¹⁰⁷ Allot A, 'Customary Law in East Africa', 14.

¹⁰⁸ *Rex v Amkeyo* (1917) East Africa Law Reports.

¹⁰⁹ *Rex v Amkeyo* (1917) East Africa Law Reports.

The English marriage was found to be that of Hyde-esque form,¹¹⁰ with the essentials being free contract and a monogamous union for life. Based on this understanding, the court employed the tool of ‘otherness’ in finding that the customary union of a man and woman did ‘not approximate in any way the legal idea of marriage’. In the words of Hamilton CJ, this was due to the existence of bride price which removed the consent element, viewing a woman as a chattel available for purchase. The court went further to remark that such ‘marriages’ were not protected under Article 35 of the East Africa Marriage Ordinance 1902, which apparently recognised customary marriages, but did not aim to deal with them as legal marriages.¹¹¹ Formalism was also demonstrated here as the customary marriage was considered invalid simply because it did not fit into the English model of marriage.¹¹²

2.2.2 Post- Independence Era (1963- 2009)

The gain of independence in Kenya in 1963 did not herald any drastic legal revolution. The new independent government inherited the colonial legal system, including its tools of judicial reasoning discussed in the preceding sub-section.¹¹³ However, before discussing the diffusion of the inherited judicial approaches, it is prudent to acknowledge that the legal system did not stagnate.

First, there were positive improvements in judicial attitudes towards ACL. Despite the fact that customary marriages were yet to be statutorily recognized (although this was a work in progress),¹¹⁴ the judiciary began to recognise that customary marriages were equal in status to statutorily recognized ones.¹¹⁵ Courts also became more sensitive to the contextual situation of Kenya when applying foreign case law, endorsed in *New Great Insurance Co. of India Ltd. v Lilian Evelyn Cross and another*.¹¹⁶ Courts were also more unlikely to hold custom repugnant or inconsistent to written law as was seen in the case of *Karuru v Njeri*.¹¹⁷ In this case, the High Court at Nakuru held the Kikuyu custom of granting custody of children to the father in cases

¹¹⁰ The model of marriage endorsed in *Hyde v Hyde* (1866) English Court of Probate and Divorce. See also Kang’ara S, ‘Beyond bed and bread’, 359.

¹¹¹ *Rex v Amkeyo* (1917) East Africa Law Reports.

¹¹² Kang’ara S, ‘Beyond bed and bread’, 351.

¹¹³ Cotran E, ‘The development and reform of the law in Kenya’, 47;50.

¹¹⁴ In 1967, the Commission on the Law of Marriage and Divorce was appointed to, *inter alia*, make recommendations for a new, comprehensive and uniform law on marriage and divorce applicable to all persons in Kenya. See Commission on the Law of Marriage and Divorce, *Report of the Commission on the law of marriage and divorce*, 1968; Cotran E, ‘Marriage, Divorce and Succession Laws in Kenya’, 1966.

¹¹⁵ *Muli v Kithuka* (1969) Unreported.

¹¹⁶ (1966) East Africa Law Reports.

¹¹⁷ (1968) East Africa Law Reports.

of divorce consistent with written law and not repugnant. This was despite the fact that the judge acknowledged that the custom would be inconsiderate of the welfare of the child.¹¹⁸

Second, there were government efforts to put ACL in a form and language intelligible to judicial actors. The customary laws of some Kenyan communities were published in two volumes by virtue of the Restatement of African Law Project in 1968. The two volumes (Restatement of African Law Volume 1 and 2, hereinafter referred to as the Restatements) codified the living African Customary Law that existed upon. It has been recognized by the author of the Restatements (Eugene Cotran) that the two volumes were not a one-time exercise. They were intended to serve as a guide to courts and a basis for future research on customary law.¹¹⁹ However, as will be demonstrated later, these Restatements transformed into the primary source for customary law, even up to 30 years after their publication.

Turning to the judicial approaches that were preserved, it is important to take note of the Kenya (Jurisdiction of Courts and Pending Proceedings) Regulations of 1963¹²⁰ and the Judicature Act of 1967.¹²¹ The Regulations and the Act somewhat maintained the language of the 1897 General Reception Clause, recognising English laws and subjecting customary law to the repugnancy clause and consistence with written laws. This perpetuated ‘othernes’s and a preference to written sources of law. In cases where customary and written law co-existed, written law was preferred.

The phenomenon described in the preceding paragraph was especially demonstrated in the cases of *I v I*¹²² and *K v K*¹²³ which dealt with matrimonial property. The Courts in these cases found that the Married Women’s Property Act of 1882 formed a statute of general application as per Section 3(1) of the Judicature Act. For this reason, they concluded that any customary law on matrimonial property is subject the statute. This was despite the proviso which stated that local circumstances should be taken into consideration, and the Section 3(2) provision on customary law.¹²⁴ The 1970 case of *Wambwa v Okumu*¹²⁵ is also worth mentioning here. The Court in this case found the custom of granting child custody to the father irreconcilable with

¹¹⁸ *Karuru v Njeri* (1968) East Africa Law Reports.

¹¹⁹ Cotran E, ‘The development and reform of the law in Kenya’, 49-48.

¹²⁰ *Kenya (Jurisdiction of Courts and Pending Proceedings) Regulations* (1963).

¹²¹ *Judicature Act* (Act No. 16 of 1967).

¹²² (1971) East Africa Law Reports.

¹²³ (1976) eKLR.

¹²⁴ Section 3(2), *Judicature Act* (Act No. 16 of 1967).

¹²⁵ (1970) East Africa Law Reports.

Section 17 of the Guardianship of Infants Act. The custody of the four-year-old child who was the subject of the case was thus granted to the mother, reversing the decision of the trial court. This is contrary to what was held in the case of *Karuru v Njeri*.¹²⁶

In the post-colonial era, it should be noted that the inherited reasoning techniques began being employed beyond issues of inconsistency with written law and choice of law. The techniques found their way into the ascertainment of the content of ACL in the customary marriage legal regime. The case of *Kinyanjui Kimani v Muiru Gikanga and Another* of 1965 (hereinafter *Kimani v Gikanga*)¹²⁷ is an appropriate starting point in this discussion. The case did not touch on customary marriage, but it is considered to be the *locus classicus* in cases dealing with the ascertainment of customary law.¹²⁸

The case of *Kimani v Gikanga* concerned a land dispute under Kikuyu customary law. One of the issues that arose in the case was the ascertainment of the rules of customary law. The court stated that in establishing ACL accurately and definitively (which was found to be a matter of fact not law), courts may refer to a book or document, which would include a judicial decision. It was then added that only where customary law is neither documented or notorious will parties be required to adduce oral evidence on the existence of a particular customary law.¹²⁹ Here it can be inferred that the inherited technique of preference to written law was extended to written sources. Written sources were preferred and considered more authoritative than unwritten sources such as oral witness evidence. Formalism is also evidenced here. From the reasoning of the court, evidence would be considered authoritative because of its sources rather than its accuracy.

After *Kimani v Gikanga* and before the publication and widespread use of authoritative texts on ACL in Kenya (such as the 1968 Restatements), courts preferred the route of oral witness evidence to ascertain the content of ACL. This was done in the 1967 case of *Mwagiru v Mumbi*¹³⁰ to ascertain the essentials of a Kikuyu customary marriage and the 1968 case of *Karuru v Njeri*¹³¹ to determine Kikuyu customary laws concerning custody of children of divorced spouses. The inherited legal techniques were not evidently applied in these cases.

¹²⁶ (1968) East Africa Law Reports.

¹²⁷ *Kinyanjui Kimani v Muiru Gikanga and Another* (1965) East Africa Law Reports.

¹²⁸ *Joyce Atemo v Mary Ipali Imujaro* (2003) eKLR.

¹²⁹ *Kinyanjui Kimani v Muiru Gikanga and Another* (1965) East Africa Law Reports.

¹³⁰ *Mwagiru v Mumbi* (1967) East Africa Law Reports.

¹³¹ *Karuru v Njeri* (1968) East Africa Law Reports.

However, after the two volumes of the Restatements were published in 1968, the situation changed. Courts began to place heavy reliance on the Restatements and other authoritative sources in the ascertainment of ACL, demonstrating formalism and a preference for written sources.

The first notable case is the 1976 case of *Hortensia Wanjiku Yawe v Public Trustee*.¹³² This was a succession matter that called the court to determine whether the appellant was truly married to the deceased (Paul Makumbi Yawe), hence entitled to his estate. In establishing that long cohabitation could give rise to the presumption of marriage, the Court found that there is ‘nothing in the Restatement of African Law to suggest that Kikuyu customary law’ is opposed to such a presumption.¹³³ Cotran’s publication formed the benchmark in the ascertainment of ACL in the case. Similar to this is the 1984 case of *Anna Munini & Another v Margaret Nzambi*.¹³⁴ Here the court was called to examine whether the third wife of the deceased (John Kunga Kituu) was a lawful wife, hence determine whether she was entitled to any share of his estate. A.A Kenneller J relied on the essentials of a Kamba marriage stated in the first volume of the Restatements to decide the case.¹³⁵

The 2003 case of *Joyce Atemo v Mary Ipali Imujaro*,¹³⁶ decided 35 years after the publication of the restatements, is also significant. This case also concerned entitlement to the estate of the deceased (Alfred Imujaro Ipara), with the first wife claiming that the second wife was not a lawful wife under Teso customary law. The case boiled down to the issue of time of payment of dowry, as dowry had been paid by the deceased’s family to the second wife before his body was buried but after his death. The trial judge failed to hold the presence of a customary marriage between the deceased and the second wife, even though she believed that a marriage could be solemnised by the elders after death but before burial. This is because she could not find that position in Cotran’s Restatements.¹³⁷ In the appellate court, witness evidence was relied on. However, this was based on the rationale in *Kimani v Gikanga*, that is, where there is lack of authoritative guidance on ACL witness evidence is relied upon.¹³⁸

¹³² (1976) eKLR.

¹³³ *Hortensia Wanjiku Yawe v Public Trustee* (1976) eKLR.

¹³⁴ (1984) eKLR.

¹³⁵ *Anna Munini & Another v Margaret Nzambi* (1984) eKLR.

¹³⁶ *Joyce Atemo v Mary Ipali Imujaro* (2003) eKLR.

¹³⁷ As reported in *Joyce Atemo v Mary Ipali Imujaro* (2003) eKLR.

¹³⁸ *Joyce Atemo v Mary Ipali Imujaro* (2003) eKLR.

It is worth noting that in the post-colonial era, there were other techniques employed to discern ACL. For instance, in *Case v Ruguru*,¹³⁹ the court resorted to ‘common knowledge’ of Kikuyu customary law and ‘admittance’ by the witnesses to establish the elements of Kikuyu customary marriages. Furthermore, in the case of *TSO v SO*,¹⁴⁰ Cotran in his capacity as a judge relied on his own personal knowledge on the grounds and procedure of a Luo customary divorce to decide the case.

However, as demonstrated throughout this sub-section, reliance on authoritative texts such as books was the primary method employed to ascertain ACL in the customary marriage legal regime in the post-colonial era. Furthermore, there was a preference to written laws over customary laws and elements of formalism.

2.3 Judicial Approaches to ACL after the Promulgation of the 2010 Constitution of Kenya

Kenya’s lengthy journey in search for a new constitutional dispensation following the historical abuse of the rule of law culminated on 27 August 2010 with the enactment of a new constitution.¹⁴¹ The 2010 Constitution recognised new rights and freedoms. Of particular importance to this study is the right to culture.¹⁴² Additionally, the contentious integration of the five¹⁴³ different regimes of Marriage Law, prompted by Article 45(4)(a) of the Constitution,¹⁴⁴ was finally actualized with the enactment of the Marriage Act, 2014.¹⁴⁵ Furthermore, customary marriages are now statutorily recognized for the first time in Kenyan history under Part V of the Marriage Act 2014,¹⁴⁶ and their equal status to other marriage regimes has been emphasized in the Marriage Act itself¹⁴⁷ and by the Kenyan Judiciary.¹⁴⁸

The various changes to the legal system post-2010 are not an end in themselves. Their success is premised on their enforcement. This sub-section places key emphasis on how the courts handle matters pertaining to African customary marriages, specifically how the inherited judicial approaches have found themselves in the ascertainment of ACL in the new legal order.

¹³⁹ (1970) East Africa Law Reports.

¹⁴⁰ (1979) eKLR.

¹⁴¹ Lumumba P, ‘Chapter one: A journey through time in search for a new constitution’ in Mbondenyi M, Lumumba P and Odero S (eds) *The Constitution of Kenya: Contemporary readings*, 1 ed, Law Africa, Nairobi, 2013, 43.

¹⁴² Article 44, *Constitution of Kenya* (2010).

¹⁴³ Section 6(1), *Marriage Act* (Act No 4 of 2014).

¹⁴⁴ Article 45(4)(a), *Constitution of Kenya* (2010).

¹⁴⁵ Chebii J, ‘Developments in family law in Kenya: reflections on the recent reforms in family law’, 7.

¹⁴⁶ Part V, *Marriage Act* (Act No 4 of 2014).

¹⁴⁷ Section 3(3), *Marriage Act* (Act No 4 of 2014).

¹⁴⁸ *In Re Estate of Joseph Irungu Gichiri (deceased)* (2020) eKLR.

It can be concluded that formalism and a preference for written law and sources remain predominant legal techniques in customary marriage jurisprudence. Furthermore, with the development of customary marriage jurisprudence in the post-colonial era, courts began to apply the doctrine of precedent in the determination of cases.

The 2015 case of *Rosemary Aoko Munjal v Noel Namenya Munjal*¹⁴⁹ is fitting to begin the discussion, given that it was determined after the promulgation of the Constitution and the enactment of the Marriage Act, 2014. The dispute in the case revolved around the estate of Chrispin Munjal Ndege (the Deceased). The second wife of the deceased (Noel Namenya Munjal) objected to the petition for the Grant of Letters of Administration filed by the first wife (Rosemary Aoko Munjal). This is because Rosemary left out Noel in the petition, claiming that the deceased only had one wife. In determining the validity of the Luo customary marriage between the Noel and the deceased which took place in 2004, the court referred to Cotran's Restatements. In support of its position, the court remarked that 'Eugene Cotran's Restatement of African Law has been accepted by our Courts as a recognised treatise dealing with the customary law of succession, marriage and divorce for many communities in Kenya'. It should be noted that this was stated 47 years after the publication of the Restatements. The Court also referred to the case of *Hortensia Wanjiku Yawe v Public Trustee* to conclude that nothing in the restatements is opposed to the concept of presumption of marriage in customary marriages.¹⁵⁰

The 2019 case of *Wilfred Mongare Orina v Askah Mocheche Momanyi*¹⁵¹ is also relevant to this discussion. The case concerned a land dispute, with the appellant claiming that their mother (the deceased) was entitled to beneficial interest in the respondent's estate. The appellant based their claim on the fact that a Gusii woman to woman customary marriage existed between their mother and the respondent. In the determination of the matter, the High Court first turned to Cotran's publication 'The Law of Marriage and Divorce' 1968. The publication described the essentials of a Kikuyu woman-to-woman customary marriage. Reference was also made to case law, particularly *Eunita Anyangi Geko & Another v Philip Obunga Orinds*,¹⁵² to ascertain the nature of Luo woman-to-woman customary marriages. Only after finding that there lacked

¹⁴⁹ (2015) eKLR.

¹⁵⁰ *Rosemary Aoko Munjal v Noel Namenya Munjal* (2015) eKLR.

¹⁵¹ (2019) eKLR.

¹⁵² (2013) eKLR.

authoritative writings on Gusii woman-to-woman customary marriages did the court refer to witness evidence adduced by the parties, applying the *Kimani v Gikanga* logic.¹⁵³

Another noteworthy case in the post-2010 period is *Munyao Ndolo & 3 others v Mary Nduku Mutisya*,¹⁵⁴ decided in 2018, where the court was faced with a question of the existence of a Kamba customary law marriage. In its analysis, the court relied on Eugene Cotran's Restatement on African Law and case law. The courts in *Eva Naima Kaaka & another v Tabitha Waithera Mararo* (2018)¹⁵⁵ and *In re Estate of Joseph Irungu Gichiri (Deceased)* (2020)¹⁵⁶ tasked with a similar question of establishing the essentials of a customary marriage responded in the same way, relying on Eugene Cotran's Restatements and case law.¹⁵⁷ The High Court in *MWK v MWN*¹⁵⁸ even went ahead to list the 'cases which have judicially enumerated the essentials of a valid Kikuyu customary marriage' such as the 2004 case of *Priscilla Waruguru Gathigo v Virginia Kanugu Gathigo*.¹⁵⁹ Furthermore, in the case of *ASA v NA and another*,¹⁶⁰ the court chose to rely on Eugene Cotran's restatements to establish the presence of Luo customary marriage. They preferred this approach even after being presented with expert evidence on Luo customary marriages.

It was acknowledged in the 2013 case of *Eliud Maina Mwangi v Margaret Wanjiru Gachangi*¹⁶¹ that customary law is dynamic and that the 'exact procedures of a customary marriage cannot be said to be codified'. However, only small modifications have been accepted such as the substitution of livestock dowry with its monetary equivalent. Courts are unwilling to depart from those steps and ceremonies articulated in case law and authoritative texts years ago.

It should be noted that the Kenyan Judiciary does have the intention to recognise and safeguard customary law, demonstrated by their willingness to apply ACL to cases. Additionally, the use of precedent, written sources and formalism provides for stability, consistency and

¹⁵³ *Wilfred Mongare Orina v Askah Mocheche Momanyi* (2019) eKLR.

¹⁵⁴ (2018) eKLR.

¹⁵⁵ (2018) eKLR.

¹⁵⁶ (2020) eKLR.

¹⁵⁷ *Gitauanja v Gitauanja* (1983) eKLR.

¹⁵⁸ (2017) eKLR.

¹⁵⁹ (2004) eKLR.

¹⁶⁰ (2020) eKLR.

¹⁶¹ (2013) eKLR.

predictability, which is advantageous for the legal system.¹⁶² Therefore, Kenyan judges are not unjustified in applying such approaches in the post-2010 era. However, this study finds issue with the inconsistency of these approaches with the nature of ACL, which will be expounded on in the next chapter.

2.4 Conclusion

From the preceding discussion, the author concludes that post-2010 courts, despite the reform of laws governing customary marriages in Kenya, employ the inherited legal techniques of precedent, preference of written sources and formalism when addressing ACL matters, particularly when determining the content of ACL. It can be concluded that these reasoning techniques form the contemporary legal culture of the Kenyan Judiciary when presented with questions dealing with customary law marriages. The tools have become the primary go-to for courts, even when presented with other forms of evidence that recognize the living nature of ACL.

The discussion in this chapter forms the foundation for the analysis in chapter 3, which examines whether the current application of ACL in the customary marriage legal regime in Kenya reflects a proper understanding of ACL. Chapter 3 will serve the role of proving the hypothesis of this study, which is that ACL is not applied by the Kenyan Courts within the customary marriage legal regime in Kenya post the 2010 Constitution, but has instead been substituted by an ‘Africanized’ species of common law guised as ACL.

¹⁶² Rigoni A, ‘Common-Law judicial reasoning and analogy’, 136; Gvozdenovic M, ‘Statute, Common Law and analogical reasoning’, 322.

3. Chapter 3: African Customary Law Properly Understood and the Shortcomings of the Current Judicial Approaches in the Customary Marriage Legal Regime

3.1 Introduction

This chapter is divided into two sections. The first section assesses the jurisprudential and anthropological underpinnings of ACL, aimed at revealing the true nature of ACL. This is what the author refers to as ‘ACL properly understood’. The second section discusses whether the current application of ACL in the customary marriage legal regime in Kenya reflects a proper understanding of ACL. This builds up on the discussion in chapter 2.

3.2 The Nature of African Customary Law

This section will break down and sequentially analyse the terms employed in the phrase ‘African Customary Law’ in order to decipher its nature.

First, ‘African’ refers to the locality where these laws are practised, which is Africa. It is important to note that ACL is not one single species of law but a genus with multiple species, reflecting the numerous indigenous societies that practise their own versions of the law.¹⁶³ Due to the varied conditions around Africa,¹⁶⁴ different communities experienced different challenges hence the ACL practised differed from one ethnic group to the next.¹⁶⁵

Second, the word custom connotes a rule or norm that has been recognized as obligatory and been practiced since time immemorial by a particular group of individuals within a particular locality.¹⁶⁶ This issue of custom will be discussed further in depth later in this section in the discussion of the phrase ‘Customary Law’.

Third, in as much as ACL is referred to as a ‘law’, it should not be understood from the positivist conception of law. Law in this conception is generally understood as written pre-established rules. ACL does not fit into the positivist conception, which understands law to be written pre-established rules.¹⁶⁷ Bwire notes that African people know only of custom

¹⁶³ Allot A, ‘Customary Law in East Africa’, 12.

¹⁶⁴ Buttner T, ‘The economic and social character of pre-colonial states in tropical Africa’ 5(2) *Journal of the Historical Society of Nigeria*, 1970, 275.

¹⁶⁵ Kariuki F, ‘Customary law jurisprudence from Kenyan courts: implications for traditional African justice systems’ Strathmore University, 2015, 1; Ndulo M, ‘African customary law, customs and women’s rights’ 18(1) *Indiana Journal of Global Legal Studies*, 2011, 88.

¹⁶⁶ Mwangi C, ‘Traditional knowledge and the inclusive subordination of African customary law in Kenya’, 49.

¹⁶⁷ Bennet T, ‘Reintroducing African customary law to the South African legal system’, 3.

understood as customary law, not law.¹⁶⁸ However, it is just as rational and purposeful as any positivist law.¹⁶⁹

Customary law, being the law composed of custom, refers to that body of rules, morality and religion that are practiced by a specific group of people within a particular locality, viewed as obligatory and enforceable through institutions such as a central political authority or social units.¹⁷⁰ The element of key importance here is the obligatory or enforceability quality. Stemming from this, it should be noted that not all customs attain the force of law. Distinction must be drawn between custom *simpliciter*, which has no force of law, and customary law under which ACL falls.¹⁷¹

In distinguishing custom *simpliciter* from customary law, and resultantly understanding ACL, reliance should similarly not be placed on the positivist methodology.¹⁷² The central claim of this methodology, which is not a purely jurisprudential approach, assumes that the only genuine knowledge is scientific knowledge. This knowledge emerges through confirmation of a scientific theory with the application of rigorous scientific method grounded on empirical observation.¹⁷³ For this reason, positivism limits the scope of reality only to what is empirically observable or external.¹⁷⁴ It locks itself out from the actual realities of human life and interaction, as it fails to recognize the underlying or internal factors that influence observable human behaviour.¹⁷⁵ A great disservice is done to the dignity of man as it disregards the possibility of any culture or subculture that inform and form the reality of his behaviour. Man is simply viewed as a cultureless being who follows almost mindlessly based on functionality.¹⁷⁶ When applied to law, it rejects any idea of an uncertain, vague, likely unwritten law which fails to provide a reliable standard to guide human behaviour.¹⁷⁷ From the discussion

¹⁶⁸ Bwire B, 'Integration of African customary legal concepts into modern law', 2.

¹⁶⁹ Bennet T, 'Reintroducing African customary law to the South African legal system', 9.

¹⁷⁰ Ambani J and Ahaya O, 'The wretched African traditionalist in Kenya: The challenges and prospects of customary law in the new constitutional order' 1(1) *Strathmore Law Journal*, 2015, 43.

¹⁷¹ Hund J, "'Customary law is what the people say it is": H.L.A Hart's contribution to legal anthropology' 84(3) *Archives of Philosophy of Law and Social Philosophy*, 1998, 423.

¹⁷² Hund J, "'Customary law is what the people say it is'", 423.

¹⁷³ Wacks R, *Understanding jurisprudence: An introduction to legal theory*, 6th ed, Oxford University Press, Oxford, 2020, 57.

¹⁷⁴ His Holiness Benedict XVI, 'Address of His Holiness Benedict XVI' Apostolic journey to Germany, Berlin, 22 September 2011, 4.

¹⁷⁵ Hund J, "'Customary law is what the people say it is'", 423.

¹⁷⁶ His Holiness Benedict XVI, *Apostolic journey to Germany: Visit to the Bundestag*, Address, 22 September 2011.

¹⁷⁷ Wacks R, *Understanding jurisprudence: An introduction to legal theory*, 62.

in chapter 2, it can be argued that the colonial jurisprudential approaches were based on this positivist methodology.

If human behaviour is perceived from a positivist angle, there is no apparent difference between custom *simpliciter* and customary law. The practice of both can be observed externally hence it is likely custom and customary law will be grouped together. However, they are different. Custom *simpliciter* is composed of only an external aspect which is observable, connotating the way members of a group usually behave. Customary law on the other hand, imputes both an internal and external aspect, in which the former is not observable. Certain patterns of behaviour are perceived by the actor as a common standard, from which deviation is prohibited, shunned and even punished in society. This common standard is what is referred to as a rule, which creates an obligation or duty to follow.¹⁷⁸ ACL is not a habitual, unthinking routine observed by individuals of a society (custom *simpliciter*). It is customary law; a rule viewed as obligatory.¹⁷⁹

Turning to other elements of ACL, there was no requirement to adhere strictly to pre-established rules in dispute resolution processes in African societies. Customary law, though viewed as binding and obligatory, guided the processes of dispute resolution based on arbitration and conciliation.¹⁸⁰ Such processes focused on restoring and building harmonious relationships in society,¹⁸¹ rather than objectively determining 'a right and a wrong' based on objective rules.¹⁸² Given this role ACL played among African peoples, it developed and evolved organically out of the practice of the people in response to the challenges faced in a particular period in time.¹⁸³ It was integrated into the fabric of life of the community.¹⁸⁴ For this reason, it is flexible and temporal, with the law actively recognizing the social reality. In this way, ACL derives legitimacy and compliance from its practitioners.¹⁸⁵

ACL is also an oral system or tradition. It originates from the people with rules passed on from one generation to another by word of mouth since time immemorial. Onyango mentions that the oral aspect could be linked to the mysticism surrounding customs. For instance,

¹⁷⁸ Hund J, "'Customary law is what the people say it is'", 423- 424.

¹⁷⁹ Roberts S, 'Introduction: Some notes of 'African customary law'', 2.

¹⁸⁰ Allot A, 'Customary Law in East Africa', 13.

¹⁸¹ Bennet T, 'Reintroducing African customary law to the South African legal system', 3.

¹⁸² Ibhawoh B, 'Historical globalization and colonial legal culture', 444.

¹⁸³ Ndulo M, 'African customary law, customs and women's rights', 88.

¹⁸⁴ Allot A, 'Customary Law in East Africa', 13; Onyango P, *African customary law: An introduction*, 18.

¹⁸⁵ Bennet T, 'Reintroducing African customary law to the South African legal system', 3.

enforceability is partly based on the fear of offsetting the balance of nature or the community.¹⁸⁶ This oral nature of ACL enhances the element of flexibility and allows it to evolve freely.¹⁸⁷

From this discussion, it can be concluded that ACL comprehensively refers to the unwritten, flexible and temporal body of rules, morality and religion that have been practiced by African peoples in their different communities since time immemorial, perceived as obligatory and enforceable through institutions such as a central political authority or social units. Its nature is oral, evolutionary, living and obligatory. This is what is meant by ACL properly understood. Customary marriage law, forming part of ACL, shares in this nature.

3.3 Assessing the Conformity of Contemporary Judicial Approaches with the Nature of ACL in the Customary Marriage Legal Regime

The judicial tools used to deal with matters of ACL in the contemporary customary marriage regime in Kenya, particularly in determining the content of ACL, are precedent, preference for written sources and formalism. This section will argue that these tools are inconsistent with the nature of ACL, and in fact transform ACL into an 'Africanised' version of common law that cannot be properly called ACL.

The use of precedent, written sources and formalism, as was stated earlier, provides for stability, consistency and predictability, which is advantageous for the legal system.¹⁸⁸ Precedent could also be considered to offer additional advantages. It demystifies law by applying it to practical experience and reduces errors, partiality and biases associated with individual judges. It could even be argued to be consistent with ACL to some extent as precedent possesses the potential to develop law. This is because it is more flexible than written law.¹⁸⁹ It therefore comes as no surprise that Kenyan judges continue to employ the tools of precedent, written sources and formalism.

However, the use of these legal tools also runs the risk of creating a static version of law, which is incompatible with the nature of ACL. The capacity to invent, change or advance law is limited by reference to pre-established rules and principles that have been historically maintained, hence are likely dated.¹⁹⁰ It creates a system where the living are ruled by the dead.

¹⁸⁶ Onyango P, *African customary law: An introduction*, 18.

¹⁸⁷ Roberts S, 'Introduction: Some notes of 'African customary law'', 2.

¹⁸⁸ Rigoni A, 'Common-Law judicial reasoning and analogy', 136; Gvozdenovic M, 'Statute, Common Law and analogical reasoning', 322.

¹⁸⁹ Hanna J, 'The role of precedent in judicial decision' 2(3) *Villanova Law Review*, 1957, 367.

¹⁹⁰ Gvozdenovic M, 'Statute, Common Law and analogical reasoning', 323.

The type of ACL that possibly flows out of such a system is not oral, evolutionary or living. Rather, it is a large body of written rules out of touch with the contemporary social order.¹⁹¹

By the application of the colonial judicial approaches, Kenyan jurisprudence has distorted the nature of ACL to the extent where the version of customary law applied in the courts cannot be truly referred to as ACL. Despite the best intentions of the courts to apply ACL, a hybrid system of judicial customary law or official customary law has developed in Kenya composed of codes, textbooks and case law, which are written, static and outdated. This official customary law is opposed to the very nature of ACL which is unwritten, living, evolutionary and obligatory. This is because: 1) it is possible that the official customary law does not reflect the living customary law practiced today, as it is sourced from authoritative texts generated in the 1960s and largely pre-2010 case law, 2) sourcing ACL primarily from these written judicial decisions and texts robs ACL of its flexibility and dynamism and¹⁹² 3) the obligatory nature of ACL is undermined as it appears that customary law only becomes binding after the court has pronounced itself on the matter (becoming judge-made law), not before. It can be argued that the courts play a constitutive rather than declaratory role when it comes to ACL.¹⁹³

Based on this discussion, the author concludes that the Kenyan Courts are not applying ACL properly understood, but an 'Africanised' version of common law dressed as ACL. 'Africanisation,' from which the term 'Africanised' is derived, refers to the process of imputing aspects of African customs, into modern laws and institutions.¹⁹⁴ Post-2010 courts have taken heed of the advice of Lord Denning in *Nyali Limited v Attorney General*¹⁹⁵ to contextualise the law in accordance with local circumstances (Africanise the law). However, they have done so using colonial reasoning templates, undermining the nature of ACL.

3.4 Conclusion

This chapter has formed the bridge between the preceding chapter and the core thesis. By exploring the definition of ACL and its nature, it has outlined the species of law that can truly be referred to as ACL. Additionally, building on the analysis in chapter 2, this chapter has demonstrated that this true ACL is not applied by the Kenyan courts within the customary

¹⁹¹ Bennet T, 'Reintroducing African customary law to the South African legal system', 9.

¹⁹² Tebbe N, 'Inheritance and disinheritance: African customary law and constitutional rights', 488-489.

¹⁹³ Bennet T, 'Reintroducing African customary law to the South African legal system', 2.

¹⁹⁴ Allot A, 'The Codification of the law of civil wrongs in Common-Law in African countries' 16(2) *Sociologus*, 1966, 103.

¹⁹⁵ *Nyali Limited v Attorney General* (1955) The United Kingdom Court of Appeal.

marriage legal regime. This is attributed to the use of precedent, appeal to written sources and formalism in the determination of the content of ACL. In the place of ACL is an ‘Africanised’ species of common law dressed as ACL.¹⁹⁶

The contribution of the author does not end here. The author acknowledges that the situation in Kenya ought to be resolved. For this reason, the next chapter proposes two solutions to the diminished use of ACL in the customary legal regime in Kenya. These solutions particularly address alternative mechanisms that can be adopted by the Kenya judiciary when dealing with matters pertaining to the content or sources of ACL in the customary marriage legal regime. These solutions appreciate and reflect the true nature of ACL.



¹⁹⁶ This echoes the sentiments of Juma who acknowledged that ‘African Customary Law and African customary practices, beliefs or value systems are not synonymous’. See Juma L, ‘Reconciling African customary law and human rights in Kenya, 464.

4. Chapter 4: Solutions to the Contemporary Judicial Approaches to ACL

4.1 Introduction

So far, this project has established the contemporary judicial approaches to ACL within the customary marriage legal regime and demonstrated how these judicial approaches are inconsistent with the nature of ACL. This chapter aims to propose solutions to this inconsistency of judicial approaches and the resultant inauthentic species of ACL that has arisen. Two alternative mechanisms in the resolution of customary marriage disputes are recommended in this chapter. These are aimed at reducing the influence of the colonial tools of legal reasoning in resolving customary marriage disputes and promoting the nature of ACL.

4.2 Use of TDRMs in the Determination of Customary Marriage Disputes at First Instance

The definition of TDRMs remains largely elusive in ACL discourse. Kariuki refers to TDRMs as those customary justice structures that exist within different ethnic groups that are governed by their customary laws. He adds that these customary justice structures were the primary modes of dispute resolution before the establishment of formal judicial institutions during colonialism.¹⁹⁷ Ngira adopts a more indirect approach, locating TDRMs within the framework of informal or non-state or popular or alternative justice systems. These are defined as structures of justice that may or may not derive their authority from the state, employ modes and procedures of dispute resolution that are not guided by formal rules and fall outside the formal judicial system.¹⁹⁸

TDRMs, which can be inferred by the definitions provided above, possess some characteristics that would make them an appropriate solution to the application of an inauthentic form of ACL in customary marriage disputes. The first of these characteristics, identifiable from Kariuki's definition, is that they are dominantly governed by the customary law of the community concerned. Therefore, just as judges in common law courts are well versed in common law issues, third parties who preside over disputes such as elders in these customary courts are well versed in customary law matters. They possess a special and deep understanding of their unique

¹⁹⁷ Kariuki F, 'African Traditional Justice Systems,' Strathmore University, 2015, 1; Kariuki F, 'Traditional dispute resolution mechanisms in the administration of Justice in Kenya' in Nwauche E (ed) *Citizenship and customary law in Africa*, Centre For African Legal Studies, 2020, 33-34.

¹⁹⁸ Ngira D, 'Re-examining burial disputes in Kenyan courts through the lenses of legal pluralism' 8(7) *Oñati Socio-Legal Series*, 2018, 1023.

species of customary law.¹⁹⁹ Moreover, the third parties live in the social settings where the customary rules they apply emerge. For this reason, not only do they have an expert-level understanding but also a timely account of the customary laws.²⁰⁰

The second characteristic, sourced from the definition of Ngira, is that these justice systems exist outside the formal justice system. As a result of this, they are insulated from the procedure, rules of evidence and legal reasoning templates of formal court systems. Cases are decided on a case-by-case basis with no predetermined procedure or obligation to abide by pre-ordained rules.²⁰¹ In fact, it is possible to blend different approaches in order to reach the most restorative outcome.²⁰² For instance, when disputes arise, parties often initially resort to negotiations. When these fail, a neutral third party is introduced, be it at the household level, extended family level or community level (through the intervention of a council of elders). All relevant stakeholders, including members of the community, the victim and the wrongdoer are involved in the process, ensuring that a solution acceptable to all is reached.²⁰³

Turning to how these characteristics shape TDRMs into an appropriate solution, first, the separateness of TDRMs from the formal court systems cushions them from the application of methodological approaches incompatible with the nature of ACL. These approaches include precedent, formalism and appeal to written sources which transform fluid and dynamic ACL into a static creature as evidenced in chapter 3. With the use of TDRMS, traditional principles such as conciliation and restorative justice²⁰⁴ are alternatively adopted which affords ACL space to evolve. This is in line with the dynamic nature of ACL.

Second, the separateness maintained between the formal system and TDRMs coupled with the fact that third parties in the customary law courts are well versed in customary law matters prevents jurisprudential uncertainty in the determination of the content of customary laws. Matters of evidence of customary law are done away with as ACL is produced directly from

¹⁹⁹ Kariuki F, 'Traditional dispute resolution mechanisms in the administration of Justice in Kenya', 35.

²⁰⁰ Bennet T, 'Reintroducing African customary law to the South African legal system', 9.

²⁰¹ Bennet T, 'Reintroducing African customary law to the South African legal system', 3.

²⁰² Ngira D, 'Re-examining burial disputes in Kenyan courts through the lenses of legal pluralism', 1034.

²⁰³ Kariuki F, 'Traditional dispute resolution mechanisms in the administration of Justice in Kenya', 34.

²⁰⁴ Restorative justice refers to a process whereby the parties with stake to a particular dispute collectively decide how to deal with the aftermath of the dispute and its implications in the future. By the involvement of all relevant stakeholders in the resolution of a dispute, restorative justice is promoted. It works to restore balance and heal relationships. See Kinyanjui S, 'Restorative justice in traditional pre-colonial criminal justice systems in Kenya' 10(10) *Tribal Law Journal*, 2009; Bwire B, 'Integration of African customary legal concepts into modern law', 2.

the source, being the members of the community that participate in its creation.²⁰⁵ This promotes the application of a (unwritten) living law, which are the rules that the community observes in real time. The dichotomy created between the living customary law and its official or judicial counterpart is done away with.²⁰⁶ The oral and living nature of ACL is safeguarded.

Having determined what TDRMs are, their characteristics and how these characteristics shape them into an appropriate solution to the issue of ‘Africanised common law,’ it is important to test the feasibility of the application of TDRMs within the customary marriage legal regime in Kenya. Feasibility will be assessed by the author by first, determining the pre-existing legal basis that will support the use of TDRMs within the customary legal regime and second, outlining the ways these TDRMs will be realistically employed in practice in the regime.

By virtue of Section 7(3) of the Magistrates’ Court Act²⁰⁷ and Section 3(2) of the Judicature Act,²⁰⁸ Kenya has adopted a unified system where both state law and ACL are subject to interpretation by formal courts.²⁰⁹ However, despite the absence of special customary courts,²¹⁰ the existence or role of TDRMs has been acknowledged in the country. This reflects the lived reality as TDRMs have remained resilient in most parts of the country and continue to play a key role in access to justice.²¹¹ In fact, about 90% of the population continue to rely on them.²¹²

Recognition of TDRMs has been done in Article 159(2)(c) of the Constitution, which obliges the judiciary to promote the use of TDRMs.²¹³ Furthermore, in relation to the customary marriage legal regime, Section 68(1) of the Marriage Act provides for the use of conciliation or customary dispute resolution before a court may determine a petition for the dissolution of a customary marriage.²¹⁴ These two provisions form the legal basis for the application of TDRMs in the customary marriage legal regime in Kenya.

Proceeding on the ways TDRMs will be realistically employed, this can be done within the framework of two already existing Alternative Justice Systems (AJS) models. These models

²⁰⁵ Bennet T, ‘Reintroducing African customary law to the South African legal system’, 3.

²⁰⁶ Juma L, ‘Reconciling African customary law and human rights in Kenya’, 464.

²⁰⁷ Section 7(3), *Magistrates’ Court Act* (Act No. 26 of 2015).

²⁰⁸ Section 3(2), *Judicature Act* (Act No. 16 of 1967).

²⁰⁹ Kariuki F, ‘Traditional dispute resolution mechanisms in the administration of Justice in Kenya’, 34.

²¹⁰ Ngira D, ‘Re-examining burial disputes in Kenyan courts through the lenses of legal pluralism’, 1034.

²¹¹ Onyango P, *African customary law: An introduction*, 159.

²¹² Judiciary of Kenya, ‘Promoting alternative justice systems (AJS),’ - <<https://judiciary.go.ke/promoting-alternative-justice-systems-ajs/>> on 8 January 2024.

²¹³ Article 159(2)(c), *Constitution of Kenya* (2010).

²¹⁴ Section 68(1), *Marriage Act* (Act No 4 of 2014).

can be applied to TDRMs given that they are AJS. The author of this piece argues that these two models should be the first avenue of dispute resolution in matters pertaining to customary marriages, with emphasis on matters where the ascertainment of the content of ACL is in question. In both models, courts will be required to: 1) play a supervisory role by reviewing previous AJS proceedings and awards for procedural correctness and proportionality only, 2) recognise awards of AJS, 3) treat AJS mechanisms as tribunals of first instance with the award subject to appeal at the High Court and 4) use AJS awards or processes as evidence in ongoing court processes.²¹⁵

The first model is the Autonomous AJS Institutions which are customary justice systems entirely run by the community. The third parties involved in resolving disputes are selected by the community and they apply the customary laws of the community in determining the dispute.²¹⁶ An example of this is the Njuri-Ncheke (Council of elders) of the Meru community.²¹⁷ To promote the use of this model, the Judiciary could create awareness about the use of TDRMs in the resolution of customary marriage disputes.

The second AJS model is the Court-Annexed AJS Institutions. These can be likened to the court-annexed mediation mechanism where disputes are resolved outside the formal courts, but under the guidance and partial involvement of the courts. This is done through a referral system between the Court, the Court Users Committees (CuCs), the AJS processes and relevant government stakeholders. The court refers matters to the AJS mechanisms and the AJS mechanisms can refer the matters to court based on a mutual and consensual referral system. This model has already been employed in Isiolo with the Isiolo Court-annexed AJS mechanism.²¹⁸ On this basis, when courts are presented with customary law issues, the author of this work argues that they should automatically refer them to AJS *in cases where the content of ACL is at issue*. Only where AJS dispute resolution fails will disputes be referred back to the courts. Courts will therefore lack original jurisdiction in matters pertaining to ACL marriages, unlike the current state of affairs.²¹⁹

²¹⁵ Judiciary of Kenya, *Alternative Justice Systems: Framework Policy*, 1st ed, Judiciary of Kenya, Nairobi, 2020, 9.

²¹⁶ Judiciary of Kenya, *Alternative Justice Systems: Baseline Policy*, 1st ed, Judiciary of Kenya, Nairobi, 2020, 51.

²¹⁷ Kariuki F, 'African Traditional Justice Systems' Strathmore University, 2015, 6-7.

²¹⁸ Kariuki F, 'Traditional dispute resolution mechanisms in the administration of Justice in Kenya', 52.

²¹⁹ Ngira D, 'Re-examining burial disputes in Kenyan courts through the lenses of legal pluralism', 1024.

There are a variety of challenges associated with the use of TDRMs that have been highlighted in literature surrounding the issue and which ought to be addressed here. These include the subjection of ACL and TDRMs to the repugnancy clause,²²⁰ human rights related difficulties such as discrimination of women,²²¹ and jurisdictional dilemmas between formal courts and TDRMs with both custom and statute being subject to interpretation by the Judiciary.²²² However, it is important to note that some of these challenges were either clarified or resolved by the AJS Baseline Policy and AJS Framework Policy of 2020, from which the models discussed above have been sourced.²²³ For instance, a key finding in the Policy is that AJS expands human rights through the promotion of access to justice, the right to dignity and the right to culture.²²⁴ Moreover, the Policy notes that the view of AJS as repugnant and incompatible with human rights is an unsupported conclusion based on narratives disseminated during colonialism.²²⁵ The Policy also highlights the use of the agency theory of jurisdiction of AJS to avoid conflicts in jurisdiction between formal courts and TDRMs (an appropriate doctrine of interaction).²²⁶ TDRMs can therefore further be considered a suitable and realistic mechanism for dealing with disputes in the customary marriage legal regime.

4.3 Introduction of a Guiding Criterion to the Ascertainment of ACL in the Formal Court System

The previous sub-section has argued for the bestowal of original jurisdiction of customary marriage disputes pertaining to the ascertainment of ACL on TDRMs. However, it is important to note that TDRM awards can be subject to appeal. Such appeals will require the court to reconsider evidence, evaluate it and draw its own conclusions.²²⁷ For this reason, it is possible that customary law matters may find their way into the formal court system. In response to this, the author proposes the introduction of a guiding criterion in the ascertainment of ACL in the formal court system. This approach focuses on bridging the disconnect between the official judicial customary law and living customary law.

²²⁰ Kamau W, 'Law, pluralism and the family in Kenya: Beyond bifurcation of formal law and custom' 23(2) *International Journal of Law, Policy and the Family*, 2009, 138.

²²¹ Kamau W, 'Judicial approaches to the applicability to customary law to succession disputes in Kenya', 51.

²²² Kariuki F, 'Traditional dispute resolution mechanisms in the administration of Justice in Kenya', 48-49.

²²³ This policy was a result of the work of the Taskforce on Alternative Justice Systems appointed in 2016 to examine the legal, policy and institutional framework in relation to AJS. Judiciary of Kenya, *Alternative Justice Systems: Framework Policy*, XIV.

²²⁴ Judiciary of Kenya, *Alternative Justice Systems: Framework Policy*, 17.

²²⁵ Judiciary of Kenya, *Alternative Justice Systems: Framework Policy*, 18.

²²⁶ Judiciary of Kenya, *Alternative Justice Systems: Framework Policy*, 23-24;55.

²²⁷ *Selle v Associated Motor Boat Company* (1968) East Africa Law Reports.

When presented with a matter concerning the ascertainment of living customary law, it is the position in this project that reference can be first made to textual authority that has been captured in codes, textbooks and precedents. This will serve as a useful starting point with regard to the ascertainment of the customary law at issue. However, reliance on textual authority is subject to the caveat that it ought to reflect the living law.²²⁸ It would be imprudent to set an objective standard that would be used to determine ‘congruence’ due to the fluid nature of ACL. However, the court could be guided by some factors such as the consistency between the law stated in the written sources and the ACL possibly detailed in the report or agreement resulting from the TDRM process filed in the court.²²⁹ The court could also call experts based on Section 51 of the Evidence Act.²³⁰ This section recognises the role of experts in adducing evidence regarding custom and rights. The role of the court in referring to textual authority and the TDRM agreement or report is simply declaratory rather than constitutive.²³¹

The role of the court in the appeal process does not stop with reference to textual authority. As noted above, the role of the appellate court is to reevaluate the evidence and reach its own conclusions. On this basis, it is possible for the judge to evaluate the validity of a particular custom. However, it is the recommendation of the author of this project this should only be done based on four characteristics, which reflect the features characteristic of customary law. This can be juxtaposed with the *Kimani v Gikanga* method.

The first criterion for evaluation is that the customary rule should be *obligatory*. This means that observation of the rule is considered mandatory or binding²³² and deviation is perceived as prohibited.²³³ This conforms with the obligatory aspect of customary law expounded on in chapter 3. Second, the obligatory customary law ought to be *uniformly observed*. This means that regular and consistent observance of the customary rule amongst the group it governs ought to be shown. This represents the living element of customary law which recognises that

²²⁸ Bennet T, ‘Reintroducing African customary law to the South African legal system’, 20-21.

²²⁹ In the case of *R v Abdulahi Noor Mohammed (alias Arab)*(2016) eKLR, the settlement that the parties reached outside of court was in the form of an agreement that was filed in the court. By assessing the terms of such agreements, courts are likely to imply the ACL applicable in a case. Also see *R v Mohamed Abdow Mohamed* (2014) eKLR.

²³⁰ Section 51, *Evidence Act* (Act No 19 of 2014).

²³¹ Bennet T, ‘Reintroducing African customary law to the South African legal system’, 2.

²³² Bennet T, ‘Reintroducing African customary law to the South African legal system’, 23.

²³³ Hund J, “‘Customary law is what the people say it is’”, 423-424.

customary normative orders are not primitive but lived realities in the communities governed by them.²³⁴

Third, it must be demonstrated that the customary rule is *well established* within the practice of the community. This can be demonstrated in two ways. It can be demonstrated by illustrating the existence and observance of the rule over a long period of time which continues to have authoritative force in contemporary times. Based on this, it is assumed that the rule that has been in existence for generations has normative weight in the community involved.²³⁵ The ‘well-established’ element can also be demonstrated by showing that the customary rule has come to be an identifying element of the community. This recognises the evolutionary capacity of ACL, such that it can be amended and expanded to ‘keep pace with shifts in social behaviour.’²³⁶ Lastly, the customary rule ought to be *certain*, meaning that there should be no variance with regard to the details of the rule such as subject, time and place of performance.²³⁷ The criterion expounded on should be conjunctive, meaning that all elements ought to be satisfied.

4.4 Conclusion

This chapter has demonstrated that TDRMs possess characteristics that are aligned with the nature of ACL, that there exists legal justification for the application of TDRMs in the customary marriage legal regime and their application can be realistically implemented in practice. Furthermore, the chapter has acknowledged the possibility of the determination of ACL questions in formal courts, and has proposed a criterion that can be adopted by them that reflects the true nature of ACL. This supplements the use of TDRMs in the customary marriage legal regime in Kenya.

It should be noted here that consistency of ACL with the Constitution,²³⁸ written law and justice and morality²³⁹ should be taken into consideration both at the formal and informal courts. It is possible that this will not undermine ACL. This is because it is possible that ACL, which is

²³⁴ Juma L, ‘Reconciling African customary law and human rights in Kenya’, 46; Ngira D, ‘Re-examining burial disputes in Kenyan courts through the lenses of legal pluralism’, 1025.

²³⁵ Bennet T, ‘Reintroducing African customary law to the South African legal system’, 26.

²³⁶ Bennet T, ‘Reintroducing African customary law to the South African legal system’, 25-26.

²³⁷ Bennet T, ‘Reintroducing African customary law to the South African legal system’, 23.

²³⁸ Article 2(4), *Constitution of Kenya* (2010)

²³⁹ Article 3(2) Judicature Act (Act No. 16 of 1967)

receptive to change, has adapted to fit modern practice by doing away with some derogatory practices. Notions of ACL as ancient and immutable ought to be done away with.²⁴⁰



²⁴⁰ Juma L, 'Reconciling African customary law and human rights in Kenya: Making case for institutional reformation and revitalization of customary adjudication processes', 455-456.

Chapter 5: Conclusion

This project set out to investigate whether ACL is applied by the Kenyan Courts within the customary marriage legal regime in Kenya post the 2010 Constitution. In interrogating the matter, the project began by examining the judicial approaches to ACL in the customary marriage legal regime in Kenya before and after the promulgation of the 2010 Constitution. Thereafter, the influences that the past regime (pre-2010) has on the contemporary one (post-2010) were identified. The conclusion reached here was that post-2010 courts, despite the reform of laws governing customary marriages in Kenya, employ the inherited legal techniques of precedent, preference of written sources, and formalism when addressing ACL matters. This particularly applies when determining the content of ACL. It was further established, in line with the conceptual framework, that these colonial reasoning techniques form the contemporary legal culture of the Kenyan Judiciary when presented with questions dealing with customary law marriages.

After establishing the judicial approaches to ACL matters within the customary marriage legal regime, the study proceeded to explore the nature of ACL with a particular focus on customary marriage laws in Kenya. It also assessed whether Kenya's post-2010 judicial approaches to ACL in the customary marriage legal regime can be characterised as practice of ACL properly understood. Here, the hypothesis of the study was proved. It was found that the Kenyan Courts are not applying ACL properly understood, but an 'Africanised' version of common law dressed as ACL.

After establishing the hypothesis, in order to provide a complete analysis of the issue, the project proceeded to propose solutions to the application of the inauthentic species of ACL. Two alternative mechanisms in the resolution of customary marriage disputes were proposed. These are first, the use of TDRMs in the determination of customary marriage disputes at first instance and second, the introduction of a guiding criterion in the ascertainment of ACL in the formal court system. The author of this study recommends that these two solutions be implemented in the determination of customary marriage issues in Kenya to restore the practice of true ACL in the customary marriage legal regime.

It is the hope of the author that this dissertation serves as a guide to Kenyan judges and advocates when presented with matters pertaining to customary marriages. It is also hoped that the study inspires other critical investigations into the application of ACL in other customary legal realms in Kenya such as in the law of succession.

Bibliography

UN Documents

CESCR General Comment No. 21, Right of Everyone to Take Part in Cultural Life, 21 November 2009.

Books

Judiciary of Kenya, *Alternative Justice Systems: Baseline Policy*, 1st ed, Judiciary of Kenya, Nairobi, 2020.

Judiciary of Kenya, *Alternative Justice Systems: Framework Policy*, 1st ed, Judiciary of Kenya, Nairobi, 2020.

Onyango P, *African customary law: an introduction*, 1st ed, Law Africa, Nairobi, 2013.

Wacks R, *Understanding jurisprudence: An introduction to legal theory*, 6th ed, Oxford University Press, Oxford, 2020.

Chapters in Books

Lumumba P, 'Chapter one: A journey through time in search for a new constitution' in Mbondenyei M, Lumumba P and Odero S (eds) *The Constitution of Kenya: Contemporary readings*, 1 ed, Law Africa, Nairobi, 2013, 43.

Kariuki F, 'Traditional dispute resolution mechanisms in the administration of Justice in Kenya' in Nwauche E (ed) *Citizenship and customary law in Africa*, Centre For African Legal Studies, 2020, 33.

Articles

Ambani J and Ahaya O, 'The wretched African traditionalist in Kenya: The challenges and prospects of customary law in the new constitutional order' 1(1) *Strathmore Law Journal*, 2015.

Allot A, 'The Codification of the law of civil wrongs in Common-Law in African Countries' 16(2) *Sociologus*, 1966.

Allot A, 'Customary Law in East Africa' 4(3) *African Spectrum*, 1969.

Allot A, 'What is to be done with African customary law? The experience of problems and reforms in anglophone Africa' 28(1/2) *Journal of African Law*, 1984.

Atiyah P, 'Justice and predictability in the Common Law' 15(2) *University of New South Wales Law Journal*, 1992.

Bennet T, 'Reintroducing African customary law to the South African legal system' 57(1) *The American Journal of Comparative Law*, 2009.

Buttner T, 'The economic and social character of pre-colonial states in tropical Africa' 5(2) *Journal of the Historical Society of Nigeria*, 1970.

Bwire B, 'Integration of African customary legal concepts into modern law: Restorative justice: A Kenyan example' 9(1) *Societies*, 2019

Chebii J, 'Developments in family law in Kenya: reflections on the recent reforms in family law' 12(1) *The Law Society Journal of Kenya*, 2016.

Cotran E, 'Marriage, Divorce and Succession Laws in Kenya: Is integration or unification possible?' 40(2) *Journal of African Law*, 1966.

Cotran E, 'The development and reform of the law in Kenya' 27(1) *Journal of African Law*, 1983.

Daniels R, Trebilcock M and Carson L, 'The legacy of empire: the common law inheritance and commitments to legality in former British colonies' 59(1) *The American Journal of Comparative Law*, 2011.

Gvozdenovic M, 'Statute, Common Law and analogical reasoning: Pouring oil on troubled waters' 43(3) *Statute Law Review*, 2022.

Hanna J, 'The role of precedent in judicial decision' 2(3) *Villanova Law Review*, 1957.

Hund J, "'Customary law is what the people say it is": H.L.A Hart's contribution to legal anthropology' 84(3) *Archives of Philosophy of Law and Social Philosophy*, 1998.

Ibhawoh B, 'Historical globalization and colonial legal culture: African assessors, customary law and criminal justice in British Africa' 4(3) *Journal of Global History*, 2009.

Juma L, 'Reconciling African customary law and human rights in Kenya: Making case for institutional reformation and revitalization of customary adjudication processes' 14(3) *St. Thomas Law Review*, 2002.

Kamau W, 'Law, pluralism and the family in Kenya: Beyond bifurcation of formal law and custom' 23(2) *International Journal of Law, Policy and the Family*, 2009,

Kamau W, 'Judicial approaches to the applicability to customary law to succession disputes in Kenya,' 1(1) *East Africa Law Journal*, 2015.

Kang'ara S, 'Beyond bed and bread: Making the African state through marriage law reform- Constitutive and transformative influences of Anglo-American legal thought' 9(2) *Hastings Race and Poverty Law Journal*, 2012.

Klare K, 'Legal culture and transformative constitutionalism' 14(1) *South African Journal on Human Rights*, 1998.

Kinyanjui S, 'Restorative justice in traditional pre-colonial criminal justice systems in Kenya' 10(10) *Tribal Law Journal*, 2009.

Merry S, 'Law and colonialism,' 25(4) *Law and Society Review*, 1991.

Merry S, 'Law, jurisprudence and social thought: Colonialism, post-colonialism and legal theory' 17(1) *Political and Legal Anthropology Review*, 1994.

Mwangi C, 'Traditional knowledge and the inclusive subordination of African customary law in Kenya: lessons from personal law' 16(1) *Journal of African Law*, 2022.

Ndlovu-Gatsheni S, 'Fifteenth anniversary of decolonization in Africa: a moment of celebration or critical reflection?' 33(1) *Third World Quarterly*, 2012.

Ndulo M, 'African customary law, customs and women's rights' 18(1) *Indiana Journal of Global Legal Studies*, 2011.

Ngira D, 'Re-examining burial disputes in Kenyan courts through the lenses of legal pluralism' 8(7) *Oñati Socio-Legal Series*, 2018.

Owino L, 'Application of African customary law: Tracing its degradation and analysing the challenges it confronts' 1(1) *Strathmore Law Review*, 2016.

Posner R, 'Legal formalism, legal realism and the interpretation of statutes and the constitution' 37(2) *Cape Western Reserve Law Review*, 1986.

Read J, 'Marriage and divorce: A new look for the law in Kenya' 5(1/2) *East African Law Journal*, 1969.

Rheinstein M, 'Law and social changes in Africa' 1962(4) *Washington University Law Quarterly*, 1962.

Rigoni A, 'Common-Law judicial reasoning and analogy' 20(2) *Legal Theory*, 2004.

Roberts S, 'Introduction: Some notes of 'African customary law' 28(1/2) *Journal of African Law*, 1984.

Roy A, 'Post-colonial theory and law: A critical introduction' 29(2) *Adelaide Law Review*, 2008.

Stoebuck W, 'Reception of English Common Law in the American colonies' 10(2) *William & Mary Law Review*, 1968

Stone H, 'The Common Law in the United States' 50(1) *Harvard Law Review*, 1936.

Sunstein C, 'On analogical reasoning' 106(3) *Harvard Law Review*, 1993.

Tebbe N, 'Inheritance and disinheritance: African customary law and constitutional rights' 88(4) *The Journal of Religion*, 2008.

Self-published articles

Kariuki F, 'Customary law jurisprudence from Kenyan courts: implications for traditional African justice systems' Strathmore University, 2015.

Kariuki F, 'African Traditional Justice Systems' Strathmore University, 2015.

Reports

Commission on the law of marriage and divorce, *Report of the Commission on the law of marriage and divorce*, 1968.

Dissertation and thesis

Musau D, 'The application of African Customary Law in Kenya' Unpublished, University of Nairobi, Nairobi, 1984.

Conference papers

His Holiness Benedict XVI, 'Address of His Holiness Benedict XVI' Apostolic journey to Germany, Berlin, 22 September 2011.

Online sources

Kamau W, 'Customary law and women's rights in Kenya' *Equality Effect*, 2014 -< <http://theequalityeffect.org/wp-content/uploads/2014/12/CustomaryLawAndWomensRightsInKenya.pdf>>.

Faciolince M, 'Decolonization, decoloniality and the future of African studies,' FP2P, 17 January 2020 -< <https://frompoverty.oxfam.org.uk/decolonization-decoloniality-and-the-future-of-african-studies/>> .

Judiciary of Kenya, 'Promoting alternative justice systems (AJS),' -< <https://judiciary.go.ke/promoting-alternative-justice-systems-ajs/>>.