

**A HISTORICAL-LEGAL ANALYSIS OF WOMAN-TO-WOMAN MARRIAGE IN
KENYA**

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SUMMARY

A HISTORICAL-LEGAL ANALYSIS OF WOMAN-TO-WOMAN MARRIAGE IN KENYA

This thesis sets out, against a historical background, to establish the legal status of woman-to-woman marriages in contemporary Kenya. The phenomenon of woman-to-woman marriage is a form of African customary marriage between two women. Woman-to-woman marriages are distinctly African and clearly distinguishable from the modern-day phenomenon of same-sex marriages, as understood and practiced especially in the global West. They are customary marriages that are conducted by Kenyan communities, such as the Kamba, Kisii, Nandi, Kikuyu and Kuria, for a variety of reasons. The thesis sets out the rationales for woman-to-woman marriage and expounds on the nature of the African family and marriage customs in pre-colonial Kenya. Due to the erroneous conflation of the phenomenon of African woman-to-woman marriages and same-sex marriages of the West, the provisions in the Constitution of Kenya 2010 and the Marriage Act of 2014 stipulated that adults have the right to marry only persons of the opposite sex. This led to uncertainty about the legal status of woman-to-woman marriage under Kenyan law. This thesis argues that a purposive reading of the Constitution, taking into consideration the Constitution's recognition of culture as an important value of the Kenyan society and the historical context within which the provisions proscribing same-sex marriages were included in the Constitution and the Marriage Act, leads to the conclusion that these provisions were not intended to proscribe the cultural practice of woman-to-woman marriage in Kenya.

LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
AHRLR	African Human Rights Law Reports
AU	African Union
BBC	British Broadcasting Corporation
BCLR	Butterworth Constitutional Law Reports (South Africa)
CAL	Coalition of African Lesbians
CC	Constitutional Court (South Africa)
CEDAW	CEDAW Committee on the Elimination of Discrimination against Women
CKRC	Constitution of Kenya Review Commission
COE	Council of Europe
CRC	Committee on rights of the child
EALR	East Africa Law Reports
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms

ECtHR	European Court of Human Rights
EU	European Union
HIV	Human Immunodeficiency Virus
HRC	Human Rights Council
IAC	Inter-American Convention
IACHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
IDAHO	International Day Against Homophobia
IPPG	Inter-Parties Parliamentary Group
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KECKRC	Constitution of Kenya Review Commission
KHRC	Kenya Human Rights Commission
KNCHR	Kenya National Commission on Human Rights
LGBT	lesbian, gay, bi-sexual, transgender

LPELR	Law Pavilion Electronic Law Reports (Nigeria)
NCC	National Constitutional Conference
NCKK	National Council of Churches Kenya
NGO	non-governmental organization
NWLR	Nigerian Weekly Law Reports
OAS	Organization of American States
OSCE	Organization for Security and Cooperation in Europe
PCEA	Pentecostal Church of East Africa
PM	Prime Minister
PSC	Parliamentary Select Committee
SAPS	South African Police Service
SCR	Supreme Court Reports (Canada)
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
US	United States

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CHAPTER 1: INTRODUCTION

1.1 Background

Kenya is a multi-ethnic and diverse country with a plural legal system, which is a result of the colonization.¹ The sources of law in Kenya, as set out in the Judicature Act,² take the following hierarchical order:³ (i) The Constitution of Kenya is the supreme law of the land.⁴ (ii) All other written laws in Kenya, including the Acts of Parliament of England, provided for in the Act,⁵ the substance of the common law, doctrines of equity and statutes of general application in force in England on 12 August 1897,⁶ form the second tier of applicable law. (iii) African customary law, making up the third tier, is only applicable in civil cases in which one or more of the parties is subject to it or affected by it.⁷ African customary law is only applicable in so far as it is not inconsistent with any written law and is not repugnant to justice and morality.⁸

In Kenya, the family has been established as a natural and fundamental unit of society.⁹ The right to marry a person of the opposite sex has been specified in the Constitution of Kenya 2010.¹⁰ The Marriage Act¹¹ also defines marriage as a voluntary monogamous or polygamous union between a man and a woman.¹² Under the Marriage Act, a marriage may be registered if

¹ E Cotran 'The development and reform of the law in Kenya' (1983) 27 *Journal of African Law* 42.

² Judicature Act 16 of 1967.

³ Judicature Act (n 2 above), sec 3(1)(a).

⁴ Constitution of Kenya 2010 adopted on 27 August 2010, Art 2(1).

⁵ Judicature Act (n 2 above), sec 3(1)(b).

⁶ As above, sec 3(1)(c).

⁷ As above, sec 3(2).

⁸ As above.

⁹ Constitution of Kenya (n 4 above), Art 45(1).

¹⁰ As above, Art 45(2).

¹¹ Marriage Act 4 of 2014.

¹² Marriage Act (n 11 above), sec 3(1).

it is celebrated, *inter alia* in accordance with the customary rites relating to any of the communities in Kenya.¹³ Section 6(1)(c) of the Marriage Act is extremely important as it creates an impetus to ensure the registration of all marriages that are performed according to customary law in Kenya. This requires that there has to be legislation that supports the registration of customary marriages. In an ideal situation, the registration of woman-to-woman marriages would be done under the Marriage Act 2014. However, because of the provisions of section 3(1) that define marriage as being between a man and a woman, there exists an inconsistency. Woman-to-woman marriage as a form of customary marriage is seemingly inconsistent with the provisions of the Constitution of Kenya 2010 and the Marriage Act.

Woman-to-woman marriage is performed in accordance with the customary rites of at least five communities in Kenya, including the Nandi, Kisii, Kamba, Kuria and the Kikuyu, and has been recognised by the courts in Kenya.¹⁴ These communities use various terms to describe woman-to-woman marriage. These terms have been reported in various texts as well as conversations with authors who have discussed the phenomenon of woman-to-woman marriage. These terms are reflections of either the type of union between two parties or the standing of the parties in the community. For example, among the Nandi, woman-to-woman marriage is referred to as *Kitum Chi tolah*. The term *kitum* means ‘celebration’, indicating the

¹³ As above, sec 6(1)(c).

¹⁴ See generally *Maria Gisese w/o v Angoi v Marcella Nyomenda* (1981) Civil Appeal 1 of 1981; *Esther Chepkuaui v Chepngeno Kobot Chebet and Johanah Kipsang* (1981) Divorce Cause 16 of 1980; *Re the Estate of Priscilla Nduta Gitwande* (deceased) (2006) Succession Cause 616 of 1997; *Millicent Njeri Mbugua v Alice Wambui Wainana* (2008) Civil Appeal 50 of 2003; *Re matter of the Estate of Musau Ngau* (Deceased) (2008) Prob & Admin Cause 137 of 1992; *Monica Jesang Katam v Jackson Chepkwony and Selina Jemaiyo Tirop* (2011) Succession Cause 212 of 2010; *Maroa Wambura Gatimwa v Sabina Nyanokwe Gatimwa & 5 others* (2010) Civil Appeal 331 of 2003; *Eunita Anyango Geko & Another v Philip Obungu Orinda* (2013) Miscellaneous Civil Application 1 of 2013; *Agnes Kwamboka Ombuna v Birisila Kerubo Ombuna* (2008) Kisii High Court Civil Appeal 132 of 2008; *Eliud Maina Mwangi v Margaret Wanjiru Gachangi* (2013) Civil Appeal 281 (A) of 2003.

fact that the marriage was considered a celebratory event. The term is used when a woman, who has no sons and is past child-bearing age, marries another woman for the purpose of bearing male children.¹⁵ Amongst the Luo, woman-to-woman marriage is referred to as *Chi Mwandu*, where *Chi* translates to the word ‘wife’ and *mwandu* translates to mean ‘property’ of the clan. *Chi mwandu*, thus, translates to ‘the wife of our property’, symbolising a recognition that that the widow belongs to the clan of her husband but the wife of the widow belongs to the widow and her clan. According to Luo customary law, woman-to-woman marriage takes place between a childless widow and another woman.¹⁶ While there is no formally recognized term for woman-to-woman marriage among the Kikuyu, it is generally referred to as an *uhiki*, meaning a marriage between a wealthy *muhikania* (*female husband*),¹⁷ and *muhiki* (wife).¹⁸ Among the Kikuyu, when an older woman is either barren or her husband dies before they had any children, the *muhikania* pays *ruracio* (dowry) in order to get *irathimo* (blessings) from the elders. Among the Kuria, these marriages have different names, depending on the rationale for the marriage. Further the wife, after the payment of the dowry, is not referred to as the ‘wife’ but rather as the ‘daughter-in-law’. The term *Nyumba*, denoting a homestead is a prefix to all the various forms of Kuria woman-woman marriages. Woman-to-woman marriage is known as *Nyumba mboke* where the woman was barren and needed to marry another woman to bear her children. It is known as *Nyumba ntobhu*, where a woman who had only given birth to female children married another woman bear male heirs. It is known as *Nyumba ntune* where the

¹⁵ J Sitati ‘Customary law; woman to woman marriage and constitutionality of return of dowry’ August 2016 http://www.judiciary.go.ke/portal/assets/filemanager_uploads/Speeches%202016/Sitati%20J.%20-%20Woman-Woman%20Marriage.pdf (accessed 9 March 2016).

¹⁶ *Eunita Anyango Geko & Another v Philip Obungu Orinda* (2013) Miscellaneous Civil Application 1 of 2013.

¹⁷ The *female husband* had various traditional titles. Amongst the Lovedu, a Southern African community of the Northern Sotho, the *female husband* was referred to as ‘grandmother’ (*rakhadi*).

¹⁸ WN Njambi & WE O’Brien ‘Revisiting woman-woman marriage: Notes on Gikuyu women’ (2000) 12 *National Women’s Studies Association Journal* 3.

woman bears a male child who died in his infancy and she did not bear another male child. She therefore marries another woman to beget her another male heir.¹⁹ Amongst the Kamba, the women who married other women to bear children is termed *lweto*. The marriage is therefore, known as a *lweto marriage* to signify the parties to the marriage.

The use of these traditional terms is a clear indication that woman-to-woman marriages in pre-colonial Kenya existed and were considered as an important institution in these communities. Further, the fact that in some communities, such as the Kikuyu, the traditional term directly translated to the word ‘marriage’ clearly illustrates that woman-to-woman marriages were not just formalised unions, but were recognised as a form of African customary marriage.

For there to be a valid customary marriage, there must be at least four essential elements. These are: capacity, consent, payment of marriage consideration, and cohabitation.²⁰ In most communities, these elements are also required for valid woman-to-woman marriage. However, Article 45(2) of the Constitution of Kenya, as well as section 3(1) of the Marriage Act, which provide that marriage shall be solely contracted between persons of the opposite sex, have led to uncertainty about the legal recognition of the institution of woman-to-woman marriage in Kenya as these provisions suggest an apparent prohibition on all forms of same-sex marriage in Kenya.

With this background in mind, this thesis examines the development of woman-to-woman marriage in Kenya, from the pre-colonial era to the current dispensation, and investigates how the current regime of marriage law, as enshrined in the 2010 Constitution and Marriage Act of 2014, affects the institution of woman-to-woman marriage in Kenya.

¹⁹ D Lubanga ‘officer evicts woman married to another from her land’ (June 2016) Daily Nation <https://www.nation.co.ke/counties/nandi/Woman-married-to-another-evicted-from-her-land/3444806-3231168-101efpb/index.html> (accessed 23 December 2017).

²⁰ See generally the essentials of marriage in E Cotran *Casebook on Kenya customary law* (1987) 30.

1.1.1 Purpose of study

The issue of same-sex marriage is very contentious in Africa. On the other hand, woman-to-woman marriage has always existed in many African cultures for many reasons including reproduction and companionship. This custom is sometimes erroneously compared to the homoerotic same-sex marriages of the West. This thesis sets out to establish that woman-to-woman marriages cannot be equated with same-sex marriages in the West. This distinction is clear from the different rationales and functional contexts of the two forms of marriage.

Due to colonization by the West, the societal norms and legal backgrounds in post-colonial Africa greatly mirror Western legal structures.²¹ This replication has caused clear challenges with particular aspects of customary law as these laws undergo a slower change.²² Various debates and discourses, and particularly those in the United States and Europe, have influenced the discourse on same-sex marriage in Africa. In Kenya, the drafting of legislation by legal scholars and social moralists alike borrows heavily from legal systems in South Africa and the West.²³

This thesis does not focus on only one community but rather presents a general overview of the practice of woman-to-woman marriages in Kenya. The purpose of this approach ensures that the institution of woman-to-woman is exemplified as a form of customary marriage that was practiced extensively across Africa and particularly by at least five major tribes in Kenya. It is important to reiterate the purpose of the research is to ensure that the institution of woman-to-woman marriages enjoy legal recognition and the illustration

²¹ K Roberts-Wray *Commonwealth and colonial law* (1966) 792.

²² See generally RE Robinson 'The administration of African Customary Law' (1949) 1 *Journal of African Administration* 158; B Ibhawoh *Imperialism and human rights: colonial discourses of rights and liberties in African history* (2007) 60; T Elias *the nature of African customary law* (1956) 2; A Okoth *a history of Africa: African societies and the establishment of colonial rule, 1800-1915* (2006) 158; HJ Sharkey 'African colonial states' in J Parker & R Reid (eds) *the Oxford handbook of modern African history* (2013) 151 170.

²³ See generally (n 16 above).

of its rationale and benefits in various communities expresses this idea in a more succinct manner.

The purpose of this research is first to examine the concept of the family and marriage as understood in the West and in Africa. The research assesses the elements of marriage in both settings to understand the rationale for entering into these unions. This forms a basis for differentiation between woman-to-woman marriages, on the one hand, and same-sex marriages as understood predominantly in the global West, on the other. The research also sets out the background of the institution of woman-to-woman marriage in Africa to illustrate its importance to the African customary family. The research evaluates the existence of woman-to-woman marriages in some cultures in pre-colonial Africa, the recognition of these marriages by other communities and the impact of colonization on woman-to-woman marriages. With the introduction of formalized legal systems, there was a concerted effort to minimize the application of customary law and to emphasize the dominance of the newly introduced codified laws. Subsequently, customary law practices became less accepted as the formalized systems eroded the application and acceptance of the customs. The subsequent Chapters will analyse the impact of this erosion and the influence of colonization on the institution of marriage and customary practices. In narrowing the approaches to a single jurisdiction, the research will discuss the legal structures in Kenya and particularly in the development and application of customary law and common law application and the Constitution. The later Chapters of the research offer a summary analysis of the impact of the global sex discourse in the West on the regulation of marriages in Kenya and its impact on the recognition of woman-to-woman marriages in Kenya. It will also seek to determine the influence that the discourse had on legislation on marriages in Kenya. In the concluding Chapters, the research undertakes to analyse the motivation of the provisions in legislation on marriage in Kenya and the (un)intended consequence of prohibiting woman-to-woman marriages. The research also

attempts to offer recommendations for the legal recognition of woman-to-woman marriages in Kenya.

1.1.2 Problem statement

The problem facing woman-to-woman marriage in Kenya is the apparent prohibition created by Article 45(2) of the Constitution of Kenya, which provides that a legally recognized marriage can only be concluded between a man and a woman. This position is reiterated in the Marriage Act, which regulates all forms of marriages in Kenya.

Woman-to-woman marriage is a form of customary marriage between two women that occurs in Africa, including in Kenya. It was a widely recognized custom in pre-colonial Kenya practised by at least five communities in Kenya.²⁴ Due to its prevalence, it enjoyed recognition by almost all the other communities in Kenya.²⁵ With the advent of colonialism and codification of law, customary law was severely limited in its application.²⁶ Subsequently, woman-to-woman marriages have become an issue that is dealt with predominantly by the courts. After independence and with the introduction of the Independence Constitution of Kenya 1963, the increasing integration of global discourses began to shape the construction of laws in Kenya. The global discourse on same-sex marriages thus affected the conception of legislation on

²⁴ See generally E Cotran *Casebook on Kenya customary law* (1987) 30; RS Oboler 'Is the female-husband a man? Woman/woman marriage among the Nandi of Kenya' (1980) 19 *Ethnology* 69; WN Njambi & WE O'Brien 'Revisiting woman-woman marriage: Notes on Gikuyu women' (2000) 12 *National Women's Studies Association Journal* 1 23.

²⁵ JR Cardigan 'Woman-to-woman marriages: practices and benefits in Sub-Saharan Africa' (1998) 29 *Journal of Comparative Family Studies* 90.

²⁶ Judicature Act (n 2 above), sec 3(2). Application of customary law was limited to civil cases in which one or more of the parties is subject to it or affected by it and matters where it is not inconsistent with any written law and is not repugnant to justice and morality.

marriage in Kenya. As a result, provisions in the Constitution²⁷ and Marriage Act²⁸ purport to prohibit the recognition of woman-to-woman marriages in Kenya. Ojwang and Kinama²⁹ comprehensively discuss the institution of woman-to-woman marriage, traversing various themes on the African family, the consideration of African customary law and its application on woman-to-woman marriage as well as the challenges posed by Article 45(2) of the Constitution of Kenya and the implications of interpretive approaches towards the recognition of woman-to-woman marriages. This thesis builds on these discussions and considerations with a view to further enumerating on the scope and nature of woman-to-woman marriages and the challenges posed by Article 45(2).

To contextualize woman-to-woman marriage as a form of African customary marriage, it is important to understand the context of the family and marriage as well as the role of the state in the regulation of the institution in the West and in Africa. ‘The institution of marriage binds a couple together both symbolically and legally’.³⁰ In theory, in the West, there are two prominent and competing views on marriage.

²⁷ Constitution of Kenya (n 4 above), Art 45(2) defines marriage as between persons of the opposite sex and was assumedly drafted in this manner as a reaction to the discourse in Kenya on same-sex marriage. See generally newspaper articles illustrating the discourse in Kenya during the Constitution review process. See generally ‘Two Kenyan men wed in London’ *The Nation* 17 October 2009. <http://www.nation.co.ke/news/1056-673614-jkpmrsz/index.html> (accessed 9 August 2017); M Karanja ‘A family scarred by homophobia’ *The Nation* 22 October 2009 <http://www.nation.co.ke/news/1056-675940-jko6pjz/index.html> (accessed 9 August 2017); X Rice ‘Kenya launches gay survey while homosexuality remains illegal’ *The Guardian* 29 October 2009 <https://www.theguardian.com/world/2009/oct/29/kenya-launches-gay-survey> (accessed 9 August 2017); Darian ‘Marriage of Kenyan gay couple in the UK spark controversy’ 21 October 2009 <http://oldarian.blogspot.co.za/2009/10/marriage-of-kenyan-gay-couple-in-uk.html> (accessed 9 August 2017).

²⁸ Marriage Act (n 11 above), sec 3(1).

²⁹ JB Ojwang and E Kinama ‘Woman-to-woman marriage: a cultural paradox in contemporary Africa’s constitutional profile’ (2014) 4 *Verfassung Und Recht in Ubersee* 427.

³⁰ RL Cordell ‘Same-sex marriage: The fundamental right of marriage and an examination of conflict of laws and the full faith and credit clause’ (1995) 26 *Columbia Human Rights Law Review* 247.

The first considers the conjugal view defines the state of marriage as a ‘union of a man and a woman who make a permanent and exclusive commitment to each other of the type that is naturally (inherently) fulfilled by bearing and rearing children together’.³¹ This union enjoys particular preference within the moralist, traditionalist and religious view. Social theories on the reasons for the existence of a state further support this view and provide that society exists for two fundamental reasons: ‘for the purpose of reproduction and self-preservation’.³²

The other view of marriage, known as the revisionist view, provides that marriage is a ‘union of two people (whether of the same-sex or opposite sexes) who commit to romantically loving and caring for each other and to sharing the burdens and benefits of domestic life’.³³ While the traditionalist view focuses on procreation, the revisionist view takes into consideration the personal feelings of the two individual persons who want to share their lives together. The purpose of marriage in the revisionist view does not necessarily focus on any form of propagation or the benefit of the marriage to the society. Rather, its focus is the personal satisfaction of the couple who choose to come together in the marriage. Thus, while the traditionalist view is more focused on society, the revisionist view applies a more personal approach considering the feelings of the parties to the union.

Heteronormative forms of marriage enjoy legal recognition in most countries; however, there are many arguments against same-sex marriage.³⁴ The traditional Western concept of family adopts the conjugal view of marriage and bases its construction on different-sex interaction for the higher purpose of reproduction. The opponents of same-sex marriage attempt

³¹ RP George et al. ‘What is marriage’ (2011) 34 *Harvard Journal of Law & Public Policy* 245.

³² See generally Jowett B & HWC Davis *Aristotle's politics* (1920).

³³ George (n 31 above) 245.

³⁴ See generally AL Wax ‘Traditionalism, pluralism, and same-sex marriage’ (2006-2007) 59 *Rutgers Law Review* 377 380; RO Blood *Marriage* (1969) 3; D Bethmann, & M Kvasnicka ‘The institution of marriage’ (2010) 24 *Journal of Population Economics* 1005.

‘to show that defining marriage to include only different-sex couples is justified morally, to preserve family values and traditional ethical notions’³⁵ and uphold the reason and purpose of the existence of a state and society.³⁶ The proponents of same-sex marriage, however, place more emphasis on the companionship and mutual benefit that marriage provides to the couple as well as to society.³⁷

Customary practices on marriage in some settings in pre-colonial East and Southern African societies support both the conjugal and revisionist view.³⁸ There is evidence of the socialization and acceptance of different sex and same-sex marriages, predominantly for procreation and also, in some instances,³⁹ for companionship and romantic commitment.⁴⁰ These were commonly in the form of woman-to-woman marriages. The co-existence of these relationships suggests that the two views - the conjugal and the revisionist, subsisted peacefully and marriages conducted between different sex and same-sex couples were considered accepted by society.

With the advent of colonization and the introduction of formalized legal systems, there was a concerted effort to minimize the application of customary law and to emphasize the dominance of the newly introduced codified laws. Subsequently, customary law practices became less accepted which had a negative impact on the recognition of woman-to-woman marriage. In narrowing the approaches to a single jurisdiction, the research discusses the impact of colonisation on the legal structures in Kenya and in particular the development and application of customary law, statute and the Constitution of Kenya.

³⁵ WN Eskridge ‘A history of same-sex marriage’ (1993) 79 *Virginia Law Review* 1429.

³⁶ Blood (n 34 above).

³⁷ George (n 31 above) 245.

³⁸ Cotran (n 1 above) 42.

³⁹ See generally Cardigan (n 25 above) 89 90.

⁴⁰ See generally Njambi (n 24 above) 1 23.

1.1.3 Significance of study

The main aim of this thesis is to offer insight into the institution of woman-to-woman marriage through illustrating its prevalence in the African continent. In focussing on the prevalence, through the number of communities in Africa that observe this practise, it is possible to understand the institution of woman-to-woman marriage in Africa by outlining the rationale of the institution within the numerous communities that practised this form of marriage. The thesis establishes the validity of the woman-to-woman marriage as a recognized African institution. In narrowing the focus of the thesis to Kenya, this research seeks to establish that woman-to-woman marriages were and are still practiced by a number of Kenyan communities. The research does not delve into an in-depth analysis of the nature of the institution in these Kenyan communities, but rather seeks to establish the legal recognition of woman-to-woman marriage in terms of the provisions of the Constitution of Kenya 2010.

The scope of this thesis encapsulates the nature of the institution of woman-to-woman marriage in Africa and in Kenya, the prevalence of the institution through the number of communities that practised the institution throughout Africa, and its recognition through case precedents in the Kenyan courts. It also seeks to interrogate a variety of issues in the social and legal construct of Kenya, detailing the challenges in the plurality of law and the effect of this on the recognition of African customary law. It illustrates the denigrated role of culture, custom and customary law as a result of colonization. The introduction of formal legal systems led to the limited application of customary law, particularly on issues of personal law, and even then, only to the extent that the relevant custom was not deemed ‘repugnant’.

Socially important customs such as woman-to-woman marriage are forgotten or receive little consideration despite the gains that the institution realises for the feminist movement. In the traditional customary society, however, the importance of role women played in society was clearly identifiable in such instances as matrilineal ascendancy and succession.

This research plays an important role in highlighting the importance of customs such as woman-to-woman marriage in the revolution of the autonomy of women in society and ease of succession and ownership of property in matrimonial and other causes as well as considerations of heredity. The comparative analysis and recommendations of this thesis will contribute to the formulation of legislation that acknowledges the importance of the organic development of laws as well as inclusive consideration of positive international soft law.

The most important significance of the study is to provide clarity on the legal recognition of woman-to-woman marriage in Kenya due to the explicit recognition of heteronormative marriages in Article 45(2) of the Constitution of Kenya.

1.1.4 Research questions

Woman-to-woman marriages have been affected by societal socialization and the emerging global discourses. As these considerations exist in the study of anthropology, sociology and legal theory, the questions the research set out and framed in the contextual analyses of these approaches, provided a framework for the comprehensive examination of the legal recognition of woman-to-woman marriage from pre-colonial Africa to present-day Kenya.

Consequently, the main research question for this study is whether *woman-to-woman marriage is still a legally valid form of customary marriage in Kenya, in the face of constitutional and legislative provisions restricting marriage to unions between persons of the opposite sex*. In answering this question, the following sub-questions are addressed:

1. To what extent are woman-to-woman marriages aligned with the elements of the institution of marriage and what is the relevance of arguments of same-sex marriage to woman-to-woman marriages?

2. In the pre-colonial setting of Kenya and against the background of East and Southern Africa, was there evidence of woman-to-woman marriages in certain communities and to what extent did these marriages receive recognition by other communities?
3. What is the impact of colonialism on customary law regulation of woman-to-woman marriages?
4. What is the impact of statutory law and constitutional provisions in post-colonial Kenya on woman-to-woman marriage?
5. What is the impact of the global discourse on same-sex marriage on the recognition of woman-to-woman marriage?

1.2 Literature review

1.2.1 Theoretical framework

This thesis approached the research from the perspective of feminist legal theory. Early feminist legal theory originated from an equality-based strategy born from the exclusion of women from law and other positions of public power.⁴¹ The woman's position in society was based on the assumption of women's biological role in reproduction. However, feminist legal theory has undergone rigorous debates with points of departure for feminist theorists being the overarching goal of feminism and the approach to adopt when arguing feminist legal theory.

There are a number of definitions of feminist legal theory. One of the positions that this research adopts is the definition that feminist legal theory is a 'subset of ideas involving women and the law that is concerned with improving the condition or status of women.'⁴² Lawson who postulates this definition offers criticism to this definition and contends that this definition raises questions about context, terminology and the general categorization of

⁴¹ MLA Fineman 'Feminist theory and law' (1995) 18 *Harvard Journal of Law and Public Policy* 349.

⁴² G Lawson 'Feminist legal theories' (1995) 18 *Harvard Journal of Law and Public Policy* 323.

women.⁴³ There are four definitions through which feminist legal theory can be applied in trying to answer the question; who is a feminist legal theorist? Lawson argues that the application of feminist legal theory is entirely subjective to the subject matter on which a researcher is writing. He contends that trying to address subjectivity would be too lengthy an undertaking before carrying out research.

The view that feminist legal theory is too subjective is also contemplated by Epstein.⁴⁴ Epstein raises challenges to all definitions of feminist theory stating that these challenges face any writers who apply feminist theory with the intention of reaching both those in the feminist movement and those beyond the fold.⁴⁵ He focuses on two classes of issues in the application of feminist theory that he identifies as positive and normative. The positive classification concerns itself with the sex differentiation, male and female, understood within the context of biological, cultural or social terms. The second classification is normative and relates to the linkage between the understanding of the nature of men and women and the 'substantive belief about the correct choice of political philosophy and political institutions'.⁴⁶ He contends that feminist theorists rely on the position that the differences between men and women are social constructs and ignore the biological imperative.⁴⁷

Epstein engages the sociobiological theory that individuals, whether male or female, are biologically and sociologically driven by the need to protect and propagate themselves

⁴³ Lawson states that this definition raises challenges on the motivation of feminists whose aim is to improve the condition of the status of women and gives the example of a pro-life activist who holds that pro-life policies are good for women. Lawson also ponders how issues such as condition or status of women would be measures as well as the definition of women and whether it denotes an individual woman, subsets of women or women as a class. Lawson (n 42 above) 327.

⁴⁴ R Epstein 'Two challenges for feminist thought' (1995) 18 *Harvard Journal of Law and Public Policy* 331.

⁴⁵ Epstein (n 44 above), para 10.

⁴⁶ As above.

⁴⁷ As above, para 12.

manifested in their ability to pass on their genes to the next generation.⁴⁸ He states that this theory supports the idea of inclusive fitness which assumes that all human-beings consider not only their own wellbeing but also the well-being of their children and other relations such as cousins or nephews.⁴⁹ The contention, however, that the sociobiological theory identifies a fundamental difference between men and women. Whereas men are able to reproduce multiple times reducing their direct investment in offspring, women have a limited capacity to reproduce and are therefore more attached to their offspring.⁵⁰ The relation of the sociobiological theory with feminist approaches stating that feminist theory's narrow conception of the roles of men and women in a society based on gender roles, does not take into consideration the biological imperative of men to form bonds with his individual offspring and the woman to offer nurturing environments for their children.

On the issue of normative challenges as to the feminist consideration of the natural instincts in men and women, Epstein states that the solution is the observation of the form of human behaviour that advances social welfare.⁵¹ To this end, he engages the social contract theory posed by Hobbes, Locke and Rousseau.⁵² Voluntary arrangements in marriage and family are positive as they increase the welfare of the individuals undertaking these agreements. He suggests that the society has a duty to supervise voluntary agreements such as marriage and family but that the society also has a duty to enforce laws that promote these

⁴⁸ As above, para 14.

⁴⁹ As above.

⁵⁰ As above, para 16.

⁵¹ As above, para 29.

⁵² The social contract theory is defined based on the voluntary contract between individuals whether implicit or explicit, to surrender individual freedoms to an authority the societal need for the mutual protection and welfare of the individuals. See generally JJ Rousseau *the social contract* trans JDH Cole (1762).

https://www.ucc.ie/archive/hdsp/Rousseau_contrat-social.pdf (accessed 28 August 2017).

arrangements.⁵³ Epstein contends that the feminist criticism of gender roles has a negative connotation within the social arrangements of the family and suggests that modern technology has eased the need for the traditional sex roles in the family. He notes that early feminism was geared towards the realisation of the rights to suffrage, own property and enter into contracts,⁵⁴ a view shared by libertarians. He concludes that feminist theory should focus on universal liberty rather than a narrow and subjective view of the theory's advantages to women and discourages the notion that equal rights for men and women must be engendered in the social gender roles.⁵⁵

Fineman theorises, however, that feminist legal theory has evolved from the presumption of exclusion based on biological imperatives and gender roles. It is reflected that law 'as an institution-its procedure, structures, dominant concepts, and norms-[were] constructed at a time when women were systematically excluded from participation'.⁵⁶ Fineman contends that the evolved feminist legal theory encompasses the early equality based feminist approach with newly formulated strategies for change including a broader gamut of ideas such as accommodation and assumption of the special needs of women.⁵⁷ Although the scope was narrow, the adoption of equality feminism was necessary to develop an avenue for access to male dominated institutions. The departure in the approaches in feminist legal theory became evident when feminists began to interrogate the concept of "equality in treatment" and "equality in result".⁵⁸

⁵³ Epstein (n 44 above) para 30.

⁵⁴ As above, para 43.

⁵⁵ As above, para 46.

⁵⁶ Fineman (n 41 above) para 4.

⁵⁷ As above, para 8.

⁵⁸ As above, para 11.

In illustrating the legal feminists' fragmentation in feminist legal theory approaches, Fineman identifies different legal feminists such as post-egalitarian feminists who focus on affirmative theories of differences in treatment rather than equal treatment. She identifies legal feminists who focus exclusively on accommodation while others focus on the consideration of specific differences. Finemore also identifies post-modern feminists who focus on hyper-individualism subdividing women into increasingly smaller categories.⁵⁹

In Africa, there have been a number of theorists who have discussed feminism and feminist ideology. Feminism in Africa takes into consideration a multitude of issues such as the effect of colonization on the rights of women and the traditional perspectives on choice of reproductive rights.⁶⁰ The feminist movement in Africa has also been characterized by the considerations of lineage and kinship, cultural and traditional roles in the family and autonomy or lack thereof in reproduction.⁶¹ In some instances, as observed by the views of the Kenyan feminist legal scholars discussed, the patriarchal views, such as the barring of women from owning property. However, institutions such as woman-to-woman marriage, as illustrated in the rationales of the institution discussed in the thesis, provided an avenue by which women could not only own property, but also recognition as the heads of homesteads in matrilineal communities. Women also had autonomy in the usurpation of the traditionally masculine roles, such as the ability to pass down property through the kinship ties created in customary marriages and the ability to take up roles of leadership in the community.

Legal scholars such as Baraza and Kabira argue that most feminist approaches have been developed as a result of the experiences of women in the global West and argue that these

⁵⁹ As above, para 17-19.

⁶⁰ L Adawo et al 'history of feminism in Kenya' (2011) <http://www.nawey.net/wp-content/uploads/downloads/2012/05/History-of-Feminism-in-Kenya.pdf>. (accessed 22 December 2017).

⁶¹ Adawo (n 60 above) 9.

are not a true reflection of the idiosyncrasies of the Kenyan woman's experience.⁶² Feminist theorists and legal scholars in Kenya have discussed the role of feminism as it related to women and women's agency. Nzomo illustrates that the theory of feminism takes into consideration the contributions made through women's agency that challenge patriarchal institutional and societal frameworks and processes.⁶³ Nzomo discusses that the marginalization of women should be the main concern of feminist ideology. Feminism in Kenya has also been approached from the perspective of the right to information to ensure that women in Kenya are able to make informed choices on their engagements in various social, cultural, political and economic spaces.⁶⁴

Feminist ideology in Kenya has influenced the manner through which women engage in political and cultural spaces. There have been numerous women who had made positive contributions to the feminist movement in Kenya. In 1977, Wangari Maathai, a prominent environmentalist and political activist, formed the green-belt movement to tackle issues of conservation of the environment and promotion of women's rights. Other notable women in the feminist movement in Africa include Charity Ngilu, who advocated for the implementation of the Beijing Platform in Kenya in the early 1990's, Phoebe Asiyo and Martha Karua, who advocated for affirmative action in the legislature and parliament and many more.

Woman-to-woman marriages considered under feminist legal theory enumerates certain issues discussed by the theorists above. The rationales of woman-to-woman marriage confront the social construct of biological and gender roles for women posited by Epstein and

⁶² N Baraza & N Kabira 'reflections on feminism and development in Africa: the case of Kenya' (2015) journals.uonbi.ac.ke/index.php/aws/article/download/1341/1124 (accessed 15 December 2017).

⁶³ M Nzomo 'women and political governance in Africa: a feminist perspective' (2015) journals.uonbi.ac.ke/index.php/aws/article/download/1336/1119 (accessed 15 December 2017).

⁶⁴ L Adawo et al 'history of feminism in Kenya' (2011) <http://www.nawey.net/wp-content/uploads/downloads/2012/05/History-of-Feminism-in-Kenya.pdf>. (accessed 22 December 2017).

Lawson. The traditional African marriage was based on the concept of patriarchy, polygamy and the propagation of lineage and relegated women to the roles of reproduction and nurturing. However, woman-to-woman marriages challenged the role of women in these traditional marriages and allowed women to appropriate male gendered roles breaking away from the sociological construction.

Historically, women in Kenya have been unable to fully enjoy their rights to property and land.⁶⁵ In certain communities, women organized in groups to ensure representation of women's issues in councils in the respective communities indicating an early illustration of a conscious feminist ideology.⁶⁶ Among the Kikuyu, *ngwatio* were welfare groups formed by women to participate in the clan and community council meetings to ensure that the rights of the woman in relation to property were heard.⁶⁷ Among the Kamba, these women's groups were known as *mwethya*.⁶⁸ Incidentally, these are communities that embraced the practice of woman-to-woman marriage.

Women's ownership of land is governed by statutory, customary and religious law which is often negatively biased towards women and their status in the society.⁶⁹ Although historically women may have access to the land, they seldom ever owned it. The access to the land was determined by the relationship that the woman had to the legal owner and therefore

⁶⁵ Federation of women lawyers, Kenya 'women's land and property rights in Kenya: a training handbook' (2017) <http://fidakenya.org/wp-content/uploads/2017/04/Women-Land-rights-Handbook.pdf> (accessed 15 December 2017).

⁶⁶ P Musangi 'women land and property rights in Kenya' (March 2017) Paper prepared for presentation at the 2017 world bank conference on land and poverty.

⁶⁷ Adawo (n 60 above) 10.

⁶⁸ As above.

⁶⁹ See generally P Kameri-Mbote 'women, land rights and the environment: the Kenyan experience' (2006) 49 *Development* 44. See also F Kariuki et al *Property law* (2016) on the challenges of succession and women property and ownership in Kenya.

unmarried females were often unable to even have access to land.⁷⁰ Woman-to-woman marriages were a platform where women were able to legitimately and legally own property within to the customary and statutory laws in the Kenya.

This is important in the theoretical engagement on the justification of woman-to-woman marriages as a platform where women, who have been historically oppressed in African communities are able to rise above their sanctioned status in communities, but also engender change on the power dynamics in the imbalances occasioned by patriarchy. The institution of woman-to-woman marriages allows for women to better participate in various political, economic and social spheres of the community. The institution provides an avenue where women are able to take up political positions reserved for men, own property and pass it on to their lineage, a preserve of men in the community and acquire social status based on their economic empowerment and their ability to take on the gender status of men in some communities, in the ability to marry another woman. African feminists, discussed above, have lauded the ability of African and particularly Kenyan women, to rise above the confines of patriarchy and embrace an equal status to men in the society and woman-to-woman marriages engenders the ability to do this.

Woman-to-woman marriages still conform to the reimagined feminist legal theory discussed by Finnemore. Woman-to-woman marriages challenge the construct of the marriage and the purpose of the woman in the society, requiring the accommodation of the acquired status the *female husband* and allowing her to engage actively in more political roles in society.

Feminist legal theory reflects on and considers feminist concerns including the experiences and views of women in society, family, marriage and particularly their motivations in woman-to-woman marriages. It considers the imbalances of power and gender inequalities perpetuated through patriarchy and gender roles in the traditional institution of marriage and

⁷⁰ Kameri-Mbote (n 69 above) 44.

pre-colonial cultural communities. The goal of this approach is to establish the institution of woman-to-woman marriage as an avenue where social inequality and gender biases can be critiqued and women can realise equal representation in the family.

1.2.2 Literature overview of the structure of family and marriage in Africa

The concept of the family is best understood within the context of the society and the state. Philosophers such as Aristotle expound on the importance of the state and the correlation between man and the existence of the state.⁷¹ Political, economic and social theories developed by Marx and Engels, illustrate that the state is the foundation through which man can rationalize the basic instincts of procreation and self-preservation.⁷² Both the philosophers and social theorists agree with the notion that the concept of family is best represented in the construction of the state. For there to be continuation of humanity, there has to be reproduction between a man and a woman as well as propagation through work to get sustenance. Marx and Engels theorise that this relationship creates the nuclear, monogamous and natural form of the family. The state is formed when families come together for the collective benefit of a society.

More recently, authors such as Coontz have discussed the evolution of the institution of marriage.⁷³ Coontz observes that there has been an evolution of the institution from middle ages, where the focus of marriage was based on its benefits to society to the more modern notion of intimacy in marriage. In the West, marriage has taken many forms. It was considered an economic and political transaction among the lower strata of society and amongst the higher classes as a way of bringing wealth and forming alliances. In the 18th century, there was a progressive move towards individualism stemming from what Coontz terms the ‘two seismic

⁷¹ J Zarri ‘Aristotle’s theory of the origin of the state’ (1948) *Philosophy* 107.

⁷² F Engels *the origin of family, private property and the state* (1884) 734; Marx’s notes on the American anthropologist Lewis H Morgan’s work in ‘Ancient societies researches the lines of human progress from savagery through barbarism to civilization’ (1877).

⁷³ S Coontz ‘What’s love got to do with it: A brief history of marriage’ (2005) 29 *Psychotherapy Networker* 2.

revolutions,⁷⁴ the first being the revolution in the labour economy where it was possible for young people to be less dependent on their parents; and the revolution of the market economy, where the new focus was individual rights and the right to happiness. Further, the economic revolution of women in the society decreased the patriarchal conventions of what women could do in society, granting them further autonomy over their decisions, such as the decision to marry for love rather than economic and social considerations.

However, in Africa, although the conception of the family was similar to that of the West with regard to the early notions of the rationales for marriage such as propagation of lineage and kinship, families were not based on monogamous and nuclear relationships.⁷⁵ The traditional African family was polygamous and either patrilineal or matrilineal. The survival of the communities was based on the propagation of lineage rather than the economic and social benefit of coming together under a political organization.⁷⁶ A further distinction between the marriages in Africa from those of the West was the concept of social obedience rather than individualism where the structure of African marriages took into consideration the benefit that the marriage would provide in society.

Marriages in the West were based on monogamy, succession of direct nuclear progeny and the acquisition of economic wealth.⁷⁷ In Africa, however, marriages were conducted for

⁷⁴ Coontz (n 73 above) 3.

⁷⁵ S Marks & R Rathbourne 'The history of the family in Africa: Introduction' (1983) *Journal of African History* 149.

⁷⁶ See generally GP Murdock *Africa: Its Peoples and Their Culture History* (1959).

⁷⁷ See generally GJ Ikenberry & CA Kupchan 'Socialization and hegemonic power' (1990) 44 *International Organization* 283 315; EB Leacock 'Introduction' in F Engels (ed) *The Origin of the Family, Private Property and the State* (1972); M Finnemore 'International organizations as teachers of norms: The United Nations educational, scientific, and cultural organization and science policy' (1993) 47 *International Organization* 565 597.

the purpose of establishing new lineages and forms of kinship. Wealth in pre-colonial traditional African communities was collective within identifiable ancestry and lineage.⁷⁸

Woman-to-woman marriage as a form of African marriage, fulfils the need of societal obedience to the need for marriage to benefit the society. It is a form of traditional African customary marriage where a woman marries another woman and assumes control over her and her offspring.⁷⁹ Culturally, women-to-women marriages were allowed in different contexts. For example, barren women and widows took wives to obtain rights over children produced⁸⁰ and rich women accumulated wives to gain prestige and wealth in the same way men do through polygyny.⁸¹ In other societies women who had no sons married daughters-in-law for a non-existent son with the aim of procuring male progeny.⁸² In pre-colonial Africa, these types of marriages were documented in West Africa, amongst the Igbo and Kalabari communities of southern Nigeria⁸³ among others. In Kenya, woman-to-woman marriages are found in the Nandi, Kamba, Kikuyu, Kisii and Kuria communities.

⁷⁸ Murdock (n 76 above).

⁷⁹ Cardigan (n 25 above) 89. Cardigan states that ‘Despite the fact that woman-to-woman marriage has existed or exists in many societies, this institution has often been overlooked by researchers studying such topics as marriage, the family, gender relations, and the position of women in African societies’.

⁸⁰ UK Essays ‘Marriage Culture In African Societies English Literature Essay’ November 2013 <https://www.ukessays.com/essays/english-literature/marriage-culture-in-african-societies-english-literature-essay.php?cref=1> (accessed 22 August 2017).

⁸¹ Cardigan (n 25 above) 89.

⁸² See generally Cardigan (n 25 above) 89 90; Oboler (n 24 above) 69; EJ Krige ‘Woman-marriage, with special reference to the Lovedu-its significance for the definition of marriage’ (1974) 44 *Africa* 11; B Greene ‘The institution of woman-to-woman marriage in Africa: a cross-sectional analysis’ (1998) 37 *Ethnology* 399; Also see generally Njambi (n 24 above) 1 23.

⁸³ See generally Cardigan (n 25 above) 89 90; Oboler (n 24 above) 69; EJ Krige ‘Woman-marriage, with special reference to the Lovedu-its significance for the definition of marriage’ (1974) 44 *Africa* 11; Greene (n 46 above) 399; Also see generally Njambi (n 18 above) 1 23.

Although woman-to-woman marriages were between two women, usually for reasons other than sexual relations, there are a few instances of documented sexual relations between the women. There are ethnographers and anthropologists like Amadiume⁸⁴ and Krige,⁸⁵ who theorise that there were no sexual relationships between the two women, whereas other anthropologists such as Herskovits,⁸⁶ Wieringa,⁸⁷ Evans-Pritchard,⁸⁸ Karsch-Haack⁸⁹ and Njambi⁹⁰ contend that there were some instances of sexual relationships between women in traditional societies. These assertions about sexual relationships between women led to the inevitable and erroneous comparison of woman-to-woman marriages with the same-sex marriages of the West.

As a result of colonization,⁹¹ Kenya is plagued with the issue of plurality of systems of law. Codification of African customary law and the introduction of British systems of law led to a conflict in the application of African customary law.⁹² The introduction of the repugnancy clause further complicated the application of customary law. The evolution of statutes regulating the institution of marriage in post-colonial Kenya was silent on the legal status of

⁸⁴ I Amadiume *Male daughters, female-husbands: Gender and sex in an African society* (1987) 7.

⁸⁵ Krige (n 82 above) 11.

⁸⁶ MJ Herskovits 'A note on woman marriage in Dahomey' (1937) 10 *Journal of International African Institute* 335 341.

⁸⁷ S Wieringa 'Women marriages and other same-sex practices: historical reflections on African women's same-sex relations' in R Morgan & S Wieringa (eds) *Tommy boys, lesbian men and Ancestral wives: Female same-sex practices in Africa* (2005) 281.

⁸⁸ EE Evans-Pritchard *Some aspects of marriage and the family among the Nuer* (1945) 1.

⁸⁹ K Haack cited in Wieringa (n 87 above) 281.

⁹⁰ Njambi (n 24 above) 1 23.

⁹¹ FD Lugard *the dual mandate of the British in Tropical Africa* (1926) 547 550.

⁹² BL Shadle 'Changing traditions to meet current altering conditions: customary law, African courts and the rejection of codification in Kenya 1930–60' (1999) 40 *Journal of African History* 411 431.

woman-to-woman marriage.⁹³ The various attempts to consolidate the legislations dealing with marriage did not seem to consider this institution.⁹⁴

The impact of globalisation⁹⁵ and the global discourse on same-sex marriages in Kenya came to the fore during the constitutional review process.⁹⁶ Influential religious groups lobbied against the acceptance of sex-sex relations.

Case precedent set out in the West and in the European and Inter-American human rights systems have developed a wider conceptualization the family and the institution of marriage which can be referenced when motivating for the legal recognition of woman-to-woman marriages.

This thesis contributes to legal scholarship by providing a justified position to the legal recognition of woman-to-woman marriages in Kenya. It is a comprehensive approach to the study of the institution of woman-to-woman marriage as well as its legal recognition in Kenya. Researchers such as O'Brian and Njambi,⁹⁷ who approach the study of woman-to-woman

⁹³ See generally East African Marriage Ordinance 30 of 1902; Native Christian Marriage Ordinance 9 of 1904; African Christian Marriage and Divorce Act 51 of 1931.

⁹⁴ School of oriental African Studies 'Commissions on the laws of marriage and succession in Kenya' (1967) 11 *Journal of African Law* 1.

⁹⁵ See generally B Santos & CA Rodriguez-Garavito (eds) *Law, politics and the subaltern in counter-hegemonic globalization* (2005).

⁹⁶ See generally The world social Forum 2007: A Kenyan perspective <http://www.cadtm.org/The-World-Social-Forum-2007-A>; Kenya Human Rights Commission 'Outlawed amongst us' <http://www.khrc.or.ke/mobile-publications/equality-and-anti-discrimination/70-the-outlawed-amongst-us/file.html> (accessed 14 July 2016); M Karanja 'A family scarred by homophobia' *The Nation* <http://www.nation.co.ke/News/-/1056/675940/-/uo2gna/-/index.html> (accessed 15 August 2017); M Ringa 'Kenya: law review experts rule out rights for homosexuals' *Daily Nation* 18 October 2009 <http://allafrica.com/stories/200910190050.html> (accessed 15 August 2017); L Barasa 'PM Orders arrest of gay couples' *Daily Nation* 28 November 2010 <http://allafrica.com/stories/201011290110.html> (accessed 15 August 2017); P Benja 'Bishop: gays more dangerous than terrorists' *The Standard* 23 July 2012 <https://www.standardmedia.co.ke/?articleID=2000062448> (accessed 15 August 2017).

⁹⁷ See generally Njambi (n 24 above) 1 23.

marriage from an anthropological perspective, as well as legal scholars like Cotran, Elias, Kayongo-Male and Onyango,⁹⁸ have not come to a conclusion on its current legal status after the Constitution of Kenya 2010 and the Marriage Act 2014. This thesis presents an in-depth historical and legal analysis of the institution of woman-to-woman marriage and offers a legal position to its recognition in Kenya.

1.3 Research methodology

1.3.1 Approaches

This thesis is a textual analysis of the institution of woman-to-woman marriage. Although it adopts a multi-disciplinary approach considering anthropological and sociological texts. The research adopts an analytical approach; it analyses primary and secondary texts. In its analysis of texts, it adopts an interdisciplinary approach, by including beyond legal texts (primary sources such as statutes and case law, as well as secondary sources), also secondary texts written by anthropologists, sociologist and other non-lawyers.

It this sense, the thesis engages an anthropological approach in highlighting – on the basis of existing secondary literature -- the significance of the institution of woman-to-woman marriage in pre-colonial Kenya. In analysing the development of the plural legal systems in Kenya, the research relies on ethnological factors and the impact of evolutionary forces in the colonial and post-colonial era. The thesis also adopts a sociological approach in analysing and determining – on the basis of the relevant secondary literature -- the evolution of family and the factors affecting the development of the institution of marriage such as the women’s liberation movement, the gay rights movement and globalisation.⁹⁹ A legal approach is adopted

⁹⁸ See generally E Cotran *Casebook on Kenya customary law* (1987) 30; T Elias the nature of African customary law (1956) 2; D Kayongo-Male & P Onyango *the sociology of the African family* (1984) 4; P Onyango *African Customary Law: an introduction* (2014) 46.

⁹⁹ T Hutchinson ‘The doctrinal method: Incorporating interdisciplinary methods in reforming the law’ (2015) 3 *Erasmus Law Review* 1.

in analysing the legal scholarship that is the foundation of law-making and legal reform. This approach also observes the impact of the law and legal systems on specific categories of people.

The thesis further engages in the analytical examination of pre-colonial, colonial and post-colonial marriage customs and the application of customary law and considers the impact of external factors such as globalisation on the legal recognition of institution of woman-to-woman marriage in Kenya.

1.3.2 Research design

The research focuses on anthropological and ethnographic texts, research on law, legislation and legal drafting, case study analysis and consideration of reported empirical data.

The study adopts a comparative approach in assessing the difference between the concept of marriage in the West as compared to Africa. Similarly, the research engages in exploratory comparison to establish the existence of woman-to-woman marriages in other African societies¹⁰⁰ before engaging in the effect of colonization, and post-colonial legal regimes on the institution of woman-to-woman marriages in Kenya. Due to the impact of aspects such as colonisation, social movements and globalization, the thesis also conducts comparative analyses on the impact of the West¹⁰¹ in the development of legislation in Kenya.

1.4 Limitations

One of the major limitation of this study is that the researcher did not have the opportunity to conduct interviews with women in women-to-women marriages, or persons

¹⁰⁰ Identified sub-Saharan countries include West Africa (Nigeria, Senegal, Niger) East Africa (Uganda, Tanzania, South Sudan, Zimbabwe) and South Africa.

¹⁰¹ The West is made up of Europe, United States of America, North America, Australia and New Zealand. See generally W Cunningham *an essay on Western civilization and its economic aspects* (1911) 40; CJH Hayas *Christianity and Western civilization* (1953) 2; C Quigley *the evolution of civilization-a introduction to historical analysis* (1979) 84; J Kurth 'Global triumph or Western twilight?' (2001) 45 *Orbis* 333 341; J Kurth 'Western civilization, our tradition' (2004) *The Intercollegiate Review* 5; P Beyer *Religions in global society* (2006) 146.

living in communities who has first-hand experience of these marriages in their communities. No doubt, this research would have benefited from empirical evidence, for example through in-depth interviews of the importance of woman-to-woman marriages in the communities that practice them in Kenya. However, there were a number of reasons why I decided that this was not ideal for this research.

The first reason was the contemplation of the nature of the research. This study was an investigation into woman-to-woman marriage as a multi-disciplinary phenomenon. This required research into the history and nature of the phenomenon through anthropological and legal texts. Therefore, as stated, I adopted a textual approach involving analysis of anthropological and legal texts outlining various aspects of woman-to-woman marriage.

The second reason was that, in acknowledgement of my background as a lawyer, my main focus was on the legal impact of the phenomenon of woman-to-woman marriage. Conducting interviews would have detracted me from the main focus of my research objective of understanding the marriage from a legal perspective. Further, I did not have the resources to undertake a study of this magnitude and after careful consideration, decided that the research can be used as a basis for further empirical and in-depth study, which could possibly, in the near future, be undertaken as an area of further research.¹⁰²

I concluded that my research would be a legal contribution, and an introduction to the phenomenon of woman-to-woman marriage, and would hopefully pave the way to further research into an institution that is little understood.

¹⁰² Upon consultation with other academics undertaking similar research projects on woman-to-woman marriages in Kenya, I came across other research being conducted by Professor Anne Stewart and her very capacitated team from the University of Warwick, who are carrying out in-depth empirical research on the institution and had already conducted over 200 interviews with women who were in woman-to-woman marriages. By the completion of this thesis, that research was still on-going and it is anticipated that the more qualitative research will offer more insight into this institution.

1.4 Overview of Chapters

Chapter 1 offers an overview of the thesis and introduces the challenges confronting the legal recognition of woman-to-woman marriage in Kenya, the research questions that are addressed by the thesis, the methodology and theoretical framework adopted in answering the research questions.

In identifying the similarities and differences between different forms of marriage in Africa and in the West, Chapter 2 examines the motivations for the institution of marriage in the West and situates customary pre-colonial woman-to-woman marriages as having similar motivations to the traditional marriages of the West. Chapter 3 goes a step further and undertakes an in-depth analysis of the institution of woman-to-woman marriage, considering the rationales for the institution and the incidence of the marriages in East, West and Southern Africa.

Whereas Chapter 4 considers the impact of colonization on customary marriages in Kenya and analyses this impact on the constitutional and statutory provisions on woman-to-woman marriage in post-colonial Kenya, Chapter 5 narrows the approach and considers the plurality of laws in Kenya and the effect of these systems of law on the legal recognition of woman-to-woman marriage.

Chapter 6 offers a different perspective by discussing the impact of globalization and the global discourse on same-sex marriage on the formulation of Article 45(2) of the Constitution of Kenya 2010 and the progressive recognition of the evolved family in the regional human rights systems.

Chapter 7 wraps up the thesis by setting out the main conclusion of the thesis on the legal position of woman-to-woman marriage and offers perspective of the intention of Article 45(2). It also offers recommendations for the legal recognition of woman-to-woman marriages as well as identifying areas for further research.

CHAPTER 2: INSTITUTION OF MARRIAGE IN AFRICA AND THE FOUNDATIONS OF WOMAN -TO-WOMAN MARRIAGE

2.1 Introduction

This Chapter analyses the institution of marriage in an attempt to distinguish African customary woman-to-woman marriages from the institution of marriages of the West. It delves into the background of the concepts family and marriage in Africa, with a view of establishing the foundations of the institution of woman-to-woman marriage.

It is important to differentiate the concept of family in Africa and that of the West, to illustrate the significant differences in the formulation of the family that may have led to the ideological departure between woman-to-woman marriage and same-sex marriages in the West. The fundamental difference is that woman-to-woman marriage is an institution in which the parties primarily enter into a marriage to ensure the propagation of kinship and lineage, whereas a same-sex marriage between women is the formalization of a bond based on emotional attachments and romantic love between the two women. It is also important to state that there is no homogeneous definition of the West or pre-colonial Africa. The West can be contextualised by historical developments and other antecedent considerations such as culture, tradition, religion, imperialism and colonialism.¹ There is also a level of generality utilized in the definition and concept of pre-colonial Africa in this thesis. Pre-colonial Africa is complex,

¹ See generally W Cunningham *an essay on Western civilization and its economic aspects* (1911) 40; CJH Hayas *Christianity and Western civilization* (1953) 2; C Quigley *the evolution of civilization: An introduction to historical analysis* (1979) 84; J Kurth *Global triumph or Western twilight?* (2001) 45 *Orbis* 333 341; P Beyer *Religions in global society* (2006) 146.

varied and diverse due to its peoples and civilizations. This thesis admittedly adopts an overly generalized conception of pre-colonial Africa, as it does the West.

The aim of this thesis is not to analyse the constitutive concept of the West, but rather to indicate an overarching impression of the countries that have had an impact on Africa. For the purpose of this thesis, the research considers the definition of the West as Europe, United States of America, North America.² The comparative analysis undertaken in this Chapter is in consideration of the concept of family and marriage in the West on the organic evolution and development of the concept of family and the institution of marriage in Africa.³

Woman-to-woman marriage is an institution practised predominantly in Africa. As referred to in the preceding Chapter, its assumption of its definition of a marriage stems from the fulfilment of the criteria of an African customary marriage which is analysed critically in Chapter 3. It is a form of marriage under customary law where two women enter into marriage under the customs and traditions of their community. According to African custom, unions between two persons, whether of the same sex or opposite sex must satisfy four main criteria. These are capacity, consent, payment of marriage consideration (bride price) and cohabitation.⁴ Woman-to-woman marriage is a form of marriage between two women predominantly for the propagation of kinship and lineage, whereas same-sex marriages is idealised as the formal recognition of loving relationships between persons of the same sex, whether male or female. The global sex discourse on same-sex marriages of the West and its impact on the recognition of woman-to-woman marriages in Africa is discussed in detail in Chapter 6. This Chapter,

² J Kurth 'Western civilization, our tradition' (2004) *The Intercollegiate Review* 5.

³ See generally S Ocheni & BC Nwankwo 'Analysis of Colonialism and Its Impact in Africa' (2012) 8 *Cross-Cultural Communication* 46 54; W Arens (ed) *A century of change in Eastern Africa* (1976) 260; P Duignan & LH Gann (eds) *Volume 4: The economics of colonialism* (1975) 33.

⁴ See generally E Cotran *the Law of marriage and divorce* (1968) 141 142.

however, elaborates some similarities between the two institutions but by no means implies that the institutions are the same.

This Chapter analyses the institution of marriage by determining the rationales for marriage. It also seeks to understand the justification for the institution by analysing the concept of the family as the basic unit of a society. The Chapter further elaborates on the evolution of the institution of marriage, from the traditional conceptualization of the family to its modern-day representation.

The Chapter starts off by examining the evolution of the concept of family in the West, on the one hand, and in pre-colonial Africa, on the other. In analysing the institution of marriage, it considers the theoretical approaches to the institution of marriage in the West and offers a comparative analysis of the evolution of the family and customary marriage, and particularly woman-to-woman marriages, in pre-colonial Africa.

The Chapter also explores the influence of the organization of the state in the West and political communities of pre-colonial Africa on the institution of marriage. Further, it considers the impact of the formation of the modern state in Africa on regulation of customary marriages in Africa. In conclusion, the Chapter analyses this impact on the regulation of the institution of marriage in Africa and, particularly, the legal recognition of woman-to-woman marriage in Kenya.

2.2 Evolution of the concept of family in the West and Africa

The discussion on the concept of family in this Chapter is not a comprehensive study into the origin and development of family, but rather a general overview of the theoretical basis of family. This study offers a comparative critique of the formulation of family in the West and in pre-colonial Africa and situates the families formed in woman-to-woman marriage in the context of the institution of marriage and its role in society.

The analysis of the development of the family in the West illustrates that there are some similarities with the concept of family in Africa. Insight into the similarities and differences of the concept of family may lead to the better understanding of the motivations of woman-to-woman marriages. The departure in ideology between the formulation of family in the West and the family in Africa is demonstrated by concepts such as monogamy and polygamy. Some of the differentiated forms of family established are clearly identifiable in the institution of woman-to-woman marriage.

The concept of the family in the West has evolved in history as a reflection of the needs of society. The state was constructed as a way of regulating human interaction.⁵ The family is fundamental in the formation of the state. Engels posits that the concept of family in prehistoric times began with the creation of units of people who came together to form a community. In time, the exclusion of close relatives and subsequently remote relatives reduced the number of members into a social unit.⁶ Ancient human society was nomadic and matrilineal comprising ‘mothers, their brothers and the children of mothers’.⁷ The organization of society was traced through the maternal kinship bonds which eventually evolved to the formation of social groups identifiable by the man the woman procreated with and the subsequent children in that kinship line.⁸ With the evolution and development of human behaviour and socialization, men began to want to know their direct offspring and began to form partnerships with a single woman. This led to the introduction of the notion of one man and one woman in a partnership.⁹ In time,

⁵ See generally J Zarri *Aristotle's theory of the origin of the state* Philosophy (1948) 1.
<http://www.scholarparity.com/wp-content/uploads/2012/10/Aristotles-Theory-of-the-Origin-of-the-State-DRAFT-2-PDF.pdf> (accessed 15 March 2016).

⁶ F Engels (ed) *The origin of family, private property and the state* (2004) 734.

⁷ P Brewer ‘Introduction’ in Engels, F (ed) *The origin of family, private property and the state* (2004) 10.

⁸ Brewer (n 7 above)10.

⁹ Brewer (n 7 above) 11.

with the increase in wealth, men wanted to ensure that the inheritance of wealth favoured his direct progeny initiating the formation of the patriarchal family.¹⁰ These developing families were polygamous as the man had established his role in the village and homestead as the provider and the women were relegated to the role of reproduction.¹¹ The word *family* originated in ancient Rome.¹² There was no reference made to paired couples or their children, only to the household slaves that the man owned known as *famulus* (singular) and *familia* (plural) to exhibit the total number of slaves owned.¹³ However, Marx notes that the origin of family was not based on slavery but in the agricultural exercises of the nomadic ancient society.¹⁴

Engels defined family as comprising the ‘social organisation of reproduction and production of daily life at all stages of human society’.¹⁵ He theorised that the family was a natural phenomenon in a society signifying the human need for pairing and bonding.¹⁶ Brewster¹⁷ faults the use of the term family, stating that Engels’s use of the word confuses the ‘family institution of class society in its varieties of forms and functions with a very different type of social organisation, better expressed in kinship terms as tribe, clans, horde, gens’.¹⁸ Brewster also expressed the view that Engels’s description that the family was a natural

¹⁰ Engels (n 6 above) 737.

¹¹ As above.

¹² Marx discussed the genesis of the word family and this discussion was referenced in Engels (n 6 above) 736.

¹³ As above.

¹⁴ Engels wrote the origin of family, private property and the state extrapolating from Marx’s notes on the American anthropologist Lewis H Morgan’s work in *Ancient societies ore researches in the lines of human progress from savagery through barbarism to civilization* (1877).

¹⁵ Brewer (n 7 above) 12.

¹⁶ As above.

¹⁷ Pat Brewer writes the introduction to the re-print of F Engels *the origin of family, private property and the state* (n 7 above) and is referenced as a long-time feminist activist.

¹⁸ Brewer (n 7 above) 12.

phenomenon was incorrect, stating that defining the family as a natural unit of society portrayed the concept of family as being ‘fixed and unchanging and biologically determined’.¹⁹ The family is governed by two instincts that bring people together, the reproductive instinct and self-preservation²⁰ indicating that it is an evolving concept and these two instincts evolve with time.

There is no ‘single history of the “family” in Africa’.²¹ Anthropologists concur that documenting pre-colonial Africa and particularly African societies and families is challenging due to the undocumented nature of the continent’s history.²² However, this was not the only challenge. The definition of the term family was particularly problematic due to the parallels are drawn by anthropologists and ethnographers between the concept of the family in Africa and the Western definition of the term.²³ As a solution to the challenge posed by the comparison, Marks and Rathbourne propose that the family can be defined by the functions that the family performs in society, namely, ‘production, reproduction, child care and socialization’,²⁴ to determine the differences in the construction of the family in Africa from the West.

The structure of the family in pre-colonial Africa did not radically differ from the definitions theorised by Marx and Engels. The definition of the term family in Africa was often problematic as African societies did not have a word to describe the term family in the same

¹⁹ As above.

²⁰ Zarri (n 5 above) 1.

²¹ S Marks & R Rathbourne ‘The history of the family in Africa: Introduction’ (1983) *Journal of African History* 149.

²² Marks & Rathbourne (n 21 above) 149.

²³ As above.

²⁴ Marks & Rathbourne (n 21 above) 150.

ways as it was conceptualised in the West.²⁵ The African family was understood against the backdrop of the ‘home, household or homestead’.²⁶ The traditional pre-colonial African household was viewed as being ‘rural, patriarchal and hierarchical, polygamous and open to kinship networks, and finally, they attached substantial importance to lineage continuation’.²⁷ The concept of the African family pivoted around lineage and propagation of kinship in the community.²⁸

In the traditional African community, members from the same lineage often lived in the same home or homestead. The head of the family considered ‘descendants and their spouses as a single family and did not easily tolerate distinctions being made among them’.²⁹ There was no distinction between siblings and cousins as they were all considered to have the ‘same rights of accommodation and support as biological offspring’,³⁰ and as coming from the same lineage. The concept of the African family was based on the idea of a large social group bound by lineage and this was best achieved through polygamous marriages. Monogamous families based on conjugal commitment between a man and a woman were considered small and weak and therefore did not appeal to traditional African communities.³¹

²⁵ DW Sabean ‘The history of the family in Africa and Europe: some comparative perspectives’ (1983) 24 *Journal of African History* 164.

²⁶ Sabean (n 25 above) 164.

²⁷ P Makinwa-Adebusoye ‘Sociocultural factors affecting fertility in sub Saharan Africa’ UN Department of Economics and Social Affairs (18 June 2001) UN/POP/PFD/2001/2.

²⁸ C Caldwell & P Caldwell ‘The cultural context of high fertility in sub-Saharan Africa’ (1987) 13 *Population and Development Review* 419.

²⁹ Caldwell & Caldwell (n 28 above) 419.

³⁰ As above.

³¹ As above.

The concept of the homestead based on lineage of the ancestor created a wider group in the community called a clan.³² The patrilineal clans comprised the founding ancestor and all his progeny. Ancestors were still considered to make up part of the family as death did not affect the size or lineage of a family. Therefore, clan structure included ancestors, a number of generations of sons, their brothers and their wives and children. In matrilineal clans, the founding ancestor was female and the clan comprised daughters, sisters, their husbands and their children.³³ All these members were considered to be part of one family. This formed the basis of the social organization of the African society.

The foundation of family in society was fundamental to the conceptualization of marriage in Africa. Further, the construction of a nuclear, monogamous family where a man passed down his wealth to his children was not a consideration as property was owned collectively by some clans in the community.³⁴

It is evident that although the term family signified an elemental form of a social unit, the motivation of the construction of family fundamentally affected the socialization of the community. This difference in construction was further accentuated by formalization through marriage.

2.3 Development of the institution of marriage in the West and Africa

A comparative analysis of the evolution and rationales of marriage in the West and customary marriages in Africa illustrates the differences in the conception of the institution and offers insight into the misconception of the foundation of woman-to-woman marriages as being similar to the same-sex marriages in the West.

³² Introduction to Africa -Family, kinship and domestic groupings <http://www.everyculture.com/Africa-Middle-East/Introduction-to-Africa-Family-Kinship-and-Domestic-Groupings.html> (accessed 16 March 2016).

³³ Introduction to Africa -Family, kinship and domestic groupings (n 32 above).

³⁴ As above.

The conception of the institution of marriage in the West has been thoroughly discussed by various scholars in the past such as Marx and Engels³⁵ and more recently Anderson, Girgis and George,³⁶ Feinberg³⁷ and Blood.³⁸ This Chapter offers a general overview of the theories these scholars and others posit on the rationales for the institution of marriage to understand the similarities and differences in the institution in the West compared to Africa.

The development of family in the ancient times, as theorised by Engels, introduced the concept of monogamy which originated from the Greeks. Women were often bound to chastity and conjugal fidelity to a partner considered as the spouse and these women often bore the legitimate offspring of their spouse.³⁹ In Rome, however, the family structure was polygamous although this was eliminated when the Roman Empire introduced laws prohibiting fornication and adultery.⁴⁰ Marriages were observed in ancient times by Marx and Engels to have little to do with love but rather the emphasis was based on the production of heirs.⁴¹ The ancient Roman and Greek civilization defined marriage as a private agreement between the couple and their families for the purposes of reproduction and economic benefit.⁴²

³⁵ See generally Engels (n 6 above).

³⁶ S Girgis, RP George, & RT Anderson 'What is marriage' (2010) 34 *Harvard Journal of Law & Public Policy* 248.

³⁷ J Feinberg 'Exposing the traditional marriage agenda' (2012) 7 *NorthWestern Journal of Law & Social Policy* 301 302.

³⁸ RO Blood *Marriage* (1969) 3.

³⁹ Engels (n 6 above) 738.

⁴⁰ As above, 739.

⁴¹ See generally (n 6 above) on Marx and Engels.

⁴² ME Adshade et al 'The Origins of the Institutions of Marriage' (2008) Queen's Economics Department Working Paper No 1180 2.

Authors such as Reynolds⁴³ chronicle the Christianisation of the institution of marriage. In ancient Rome, after the changes made by the Roman Empire, marriage was a monogamous civil ceremony until the first century.⁴⁴ As Christianity is presumed to have some of its origins in Greek and Roman culture,⁴⁵ early Christian scholars such as Augustine,⁴⁶ an early Christian theologian, began to consider the institution of marriages in his work. Augustine focused on the construct of Christian marriage and in particular, ‘the development of distinctly Christian forms of and rituals for betrothal ... nuptial blessing [and] the equivocal place that consummation occupied in Christian marriage doctrine’.⁴⁷ This led to the modern institution of marriage in the West being widely documented as having its origins in Judeo-Christian theology.⁴⁸ In the third century, Jewish texts from the Talmud gave indications of a Jewish form of marriage.⁴⁹ From the fifth to the 14th century, religion and religious institutions began dictating on matters of marriage by conducting spiritual ceremonies uniting Christian couples.⁵⁰ In England, although the Norman conquest of England in the 11th century created the common

⁴³ See generally PL Reynolds *Marriage in the Western church: the Christianization of marriage during the patristic and early medieval periods* (1994).

⁴⁴ BW Frier & AJ McGinn (eds) *A casebook on Roman family law* (2003) 20.

⁴⁵ AF Segal *Rebecca's Children: Judaism and Christianity in the Roman World* (1986) 101.

⁴⁶ Aurelius Augustinus (Augustine) was a philosopher and theologian and was considered the leading authority on Christian philosophy and theology up to the 13th century. <http://www.ptta.pl/pef/haslaen/a/augustine.pdf> (accessed 12 August 2017).

⁴⁷ AF Segal ‘Part four: the nuptial process’ in Segal (n 45 above) 315.

⁴⁸ CP Kindregan ‘Same-sex marriage: the cultural wars and the lessons of legal history’ (2004) 38 *Family Law Quarterly* 427 428.

⁴⁹ Report to the 78th General Convention ‘Essay 3: A history of Christian Marriage’ (2014) 46 http://s3.amazonaws.com/dfc_attachments/public/documents/3223195/Marriage_Report_Essay_3.pdf (15 March 2016).

⁵⁰ LR Peterson ‘The History of Marriage as an Institution’ (1997) <https://1215.org/lawnotes/misc/marriage/history-of-marriage-chronology.pdf> (accessed 15 March 2016).

law Civil Court system, marriage remained in the purview of the English ecclesiastical Courts.⁵¹ In the early centuries in Europe, marriage could only be conducted under canon law.⁵² According to the canon law, marriage was considered to be a lifelong matrimonial covenant between a man and a woman for the purposes of procreation and education of the offspring.⁵³ Although there was a widespread belief that marriage was a Christian preserve, there existed some communities such as the Puritans, where marriage remained a civil ceremony.⁵⁴ Some countries like Bavaria and Austria also required local political authorities to sanction the marriages of commoners.⁵⁵

In the 18th century, the concept of love began to take precedence in the conduct of marriage rites.⁵⁶ Coontz contends that the evolution of marriage as being licensed by the state or sanctified by church was a recent development in the construction of marriage. She noted that although the church played a role in the formalization of the union, it accepted an agreement between two parties to marry as a binding marriage without the need of a formalization rite or ritual.⁵⁷ She states that before the 18th century, the concept of marriage was considered as an ‘economic and political institution to be left entirely to the free choice of the individuals’.⁵⁸ Coontz, however, notes that this led to unstable marriages. In the late 18th century there was a revolution that love should be the central reason for marriage coinciding

⁵¹ Peterson (n 50 above) 1.

⁵² As above.

⁵³ Code of Canon Law Can 1055

⁵⁴ Peterson (n 50 above) 1.

⁵⁵ As above.

⁵⁶ S Coontz *Marriage, a history: from obedience to intimacy or how love conquered marriage* (2005) 4.

⁵⁷ Coontz (n 56 above) 2.

⁵⁸ As above 4.

with societal perceptions, social organization and personal life. The idea was that love would increase people's satisfaction with the institution of marriage.⁵⁹

In the late 19th and 20th century, there was a revolution in the view of the institution creating a notable debate on the separation of the marriage as a religious institution to one that is primarily governed by the laws of the state.⁶⁰ England passed the Clandestine Marriage Act in 1753,⁶¹ which is alleged to be 'the beginning of the state's involvement in marriage'.⁶² In 1836, the Marriage Act was passed in England providing that non-religious civil marriages be officiated in registered offices.⁶³

The difference between the evolution of family and the institution of marriage in the West and in Africa is apparent in the motivations of the institution of marriage in Africa. Although the concept of family was not considerably affected by the introduction of religion by the missionaries, there was a significant impact on the institution of the African customary marriage.

Marriage in Africa has been defined as 'as an alliance of kin groups materially and ritually symbolized by bride wealth laws; each society had acceptable standards and particular rituals to guide the kin groups involved'.⁶⁴ Marriage in African societies led to the formation of families that were not based on kinship and lineage leading to the rearrangement of social

⁵⁹ As above.

⁶⁰ Peterson (n 50 above) 2.

⁶¹ ET Bannet 'The Marriage Act of 1753: A most cruel law for the fair sex' (1997) 30 *Eighteenth-century studies* 233 254.

⁶² L Everitt 'ten key moments in the history of marriage' *BBC news* 14 March 2012 <http://www.bbc.com/news/magazine-17351133> (accessed 16 March 2016).

⁶³ Everitt (n 62 above).

⁶⁴ B Greene 'The institution of woman-to-woman marriage in Africa: a cross-sectional analysis' (1998) 37 *Ethology* 396.

structure.⁶⁵ The concept of ‘romantic love’⁶⁶ was never a consideration by the couples although ‘beauty, as well as character and health,’⁶⁷ were sought out traits of the prospective wife. The family formed out of the marriage was not just that of the man and the woman who was marrying, but included the formation of bonds between the man and his wife’s family and relatives. The children of the marriage also held a different lineage from those created through kinship.⁶⁸ The African customary marriage has to be understood from the creation and perpetuation of kinship and residence to establish issues of succession and inheritance.⁶⁹ Like the marriages of the West, marriage in pre-colonial Africa was recognized by the political authority in the community.⁷⁰ Matters relating to marriage were dealt with by the clan representative, the council of elders of the clan and the recognized heads of the families.⁷¹

As discussed in detail in Chapter 3, one of the most recognized and culturally represented requirements of the African marriage was the payment of bride price.⁷² Amongst the Yoruba, a community in West Africa, for example, marriage was considered as an agreement between two families where bride price was paid ‘transferring reproductive rights to the husband’s family’.⁷³ In Southern Africa, the transfer of cattle was considered adequate bride price, whereas, in Congo, the custom was the exchange of marriage gifts such as copper

⁶⁵ AA Radcliff-Brown & D Forde *African systems of kinship and marriage* (1950) 43.

⁶⁶ Radcliff-Brown & Forde (n 65 above) 46.

⁶⁷ As above.

⁶⁸ Radcliff-Brown & Forde (n 65 above) 43.

⁶⁹ Greene (n 64 above) 396.

⁷⁰ Radcliff-Brown & Forde (n 65 above) 44.

⁷¹ As above.

⁷² The essential requirement in the customary marriage was the payment of bride price. The institution of the African customary marriage is discussed in detail in Chapter 3 of the thesis.

⁷³ Caldwell & Caldwell (n 28 above) 422.

rings and knives.⁷⁴ African marriages were conducted in formalization ceremonies, not unlike the formalization requirements in the West. However, there were a number of ceremonies completed before the actual marriage was recognized by the community.⁷⁵ There were three ceremonies that were required although the manner in which these ceremonies were conducted differs from community to community. The first ceremony indicated the breaking of the kinship bond between the woman and her family; the second was the marriage payment in form of the bride price, and the third was the actual move of the woman to the man's property.⁷⁶

In pre-colonial Africa, there were various forms of unions that were recognized as marriage. In the Maasai community in East Africa, there was a form of group-marriage between a number of men who lived with women. Children born in these group marriages considered all men their fathers and all women their mothers.⁷⁷ Children born into African marriages in pre-colonial Africa did not require any form of legitimization through a formal process. Their legitimacy was established through lineage, and where there were issues of contention concerning child lineage, the matter was referred to the clan elders to determine.⁷⁸

Woman-to-woman marriage, which is the focus of this research, arose from 'creative kinship practices'⁷⁹ and was also considered as a recognized union. Unlike the same-sex marriages of the West, which were formed out of homoerotic relationships, woman-to-woman marriages were predominantly to 'create kinship or to augment kinship structure'.⁸⁰

⁷⁴ Radcliff-Brown & Forde (n 65 above) 47.

⁷⁵ Radcliff-Brown & Forde (n 65 above) 49.

⁷⁶ As above, 50.

⁷⁷ As above, 41.

⁷⁸ As above, 46.

⁷⁹ Greene (n 64 above) 396.

⁸⁰ As above, 398.

Other forms of marriage included sororate and levirate marriages and ghost marriages.⁸¹ In sororate unions, the man married his wife's sister; in levirate unions, the man inherited his deceased brother's wife; and in ghost marriages, the woman married a deceased man who had no children.⁸² Although these forms of marriage are not widely documented, the practice still persists in many African cultures.

It is evident that there were some identifiable differences in the developments of the institution of marriage between pre-colonial Africa and the West. The development of marriages in Africa was characterised by requirements such as the payment of bride price and the propagation of lineage, whereas the marriages of the West were predominantly regulated by the church or regarded as civil unions regulated by the state. The families formed in the marriages of the West were predominantly monogamous, whereas those of pre-colonial Africa were predominantly polygamous. African marriages also had various constructions such as levirate, sororate and woman-to-woman marriages, whereas the construction of the marriages of the West was essentially the traditional marriages between one man and one woman.

2.4 Overview of comparative analysis between marriages in the West and woman-to-woman marriage in Africa

Despite the differences enumerated in the development of marriages between the West and pre-colonial Africa, some rationales offered for the marriages in the West are similar to those of woman-to-woman marriages.

The institution of the traditional marriage⁸³ in the West has been conceptually framed as being between a man and a woman. Traditional marriages have also been defined as 'monogamous; [where] children were automatic, essential, and central; [and] husbands earned

⁸¹ AJ Njoh *Tradition, culture and development in Africa* (2016).

⁸² Njoh (n 81 above).

⁸³ AL Wax 'Traditionalism, pluralism, and same-sex marriage' (2006-2007) 59 *Rutgers Law Review* 377 380.

money and made decisions;[whereas] wives stayed home taking care of house, children, and husband'.⁸⁴ The ideas of gender roles, procreation, permanence and monogamy have been a recurring theme in the discussions of the institution,⁸⁵ and form the motivations for the institution of marriage in the West.

In pre-colonial Africa, marriage was predominantly for the propagation of kinship as lineage.⁸⁶ Most marriages in pre-colonial Africa were polygamous as polygamy was not only a type of marriage but also a value system.⁸⁷ Polygamous marriage enabled the husband to secure more progeny or the perpetuation of his lineage.⁸⁸ Woman-to-woman marriages were also principally for the purpose of the propagation of children to perpetuate lineage. However, other considerations such as the legitimacy of children, retention of wealth and economic empowerment and desire for companionship were also made, drawing some parallels with the traditional marriages of the West.⁸⁹

The analysis below on the rationales of the traditional and same-sex marriages of the West illustrates that although woman-to-woman marriages had some similarities to these institutions, they remained distinctly different due to the overarching motivations for woman-to-woman marriage.

⁸⁴ MM Shultz 'Contractual Ordering of Marriage: A New Model for State Policy' (1982) 70 *California Law Review* 204 207.

⁸⁵ Feinberg (n 37 above) 302.

⁸⁶ Radcliff-Brown & Forde (n 65 above) 46.

⁸⁷ Y Hayase & K Liaw 'Factors on polygamy in sub-Saharan Africa: findings based on the demographic and health surveys' (1997) 33 *The Developing Economies* 293.

⁸⁸ Hayase & Liaw (n 87 above) 293.

⁸⁹ The rationales of woman-to-woman marriage are discussed in Chapter 3.

2.4.1 Rationales for the traditional marriages of the West and woman-to-woman marriage

Procreation and permanence

The overarching purpose of procreation and permanence has been identified and supported in both the traditional marriages of the West and the customary woman-to-woman marriages in Africa.

On the traditional marriages of the West, Strong, Devault and Sayad define marriage as a 'legally recognized union between two people, generally, a man and a woman, in which they are united sexually, cooperate economically, and may give birth to, adopt, or rear children'.⁹⁰ Other traditionalist theorists hold the view that a 'biological, heterosexual nuclear family is the ideal model for the society'.⁹¹ The traditional institution of marriage is based on the concept of one husband and one wife. The heteronormative aspect has been heralded as the most important element to the sanctity of the institution. Feinberg states that the traditional marriage agenda is shrouded in a protective frame to defend the institution.⁹² Proponents of the traditional marriage agenda such as Blood, Buchanan and George⁹³ emphasise the heteronormative structure of the institution and state that any other form of a union that does not conform to this threatens the fundamental fabric of society.⁹⁴ The theory of heteronormativity of marriage underscores that the ultimate purpose of marriage is the

⁹⁰ B Strong, C DeVault, & BW Sayad *the marriage and family experience: intimate relationships in a changing society* (1998) 9.

⁹¹ Wax (n 83 above) 377.

⁹² Feinberg (n 37 above) 304.

⁹³ See generally GS Buchanan 'Same-sex marriage: the linchpin issue' (2984) 10 *University of Dayton Law Review* 541 560. Buchanan states that heterosexual marriages advance perception that traditional marriages fulfil individual and community values; See also RP George 'Same-sex marriage' and 'moral neutrality' in C Wolfe (ed) *Homosexuality and American public life* 1. George advances the notion of marriage as a union of one man and one woman for the purpose of reproduction.

⁹⁴ Feinberg (n 37 above) 304.

continuity of the human race through procreation which can only occur between a man and a woman.⁹⁵ Traditional theorists engage the morality argument and convey to married couples and unmarried persons in a society that any other union would fundamentally alter the state and the productive structures within it.⁹⁶

The institution of marriage has been documented widely in almost all fields of study. Bethmann and Kvasnicka theorise that it is the oldest institutions documented since the formation of the state.⁹⁷ They discuss that the evolution of the institution of marriage occurred due to the need for men to definitively identify their progeny or ascertain their claim over their offspring.⁹⁸ On the role of marriage in society, Blood writes that life is a ‘combination of roles played in various institutional settings-religious in the church, political in the community, economic in the corporation [and] marital in the family’.⁹⁹ Blood sets the stage for the institution of marriage in the paradigm of the family. The concept of family is significant as it provides a basis from which marriage can be defined. The temptation often is to define marriage within only the parameters of family, overlooking that the institution of marriage and the role of state. However, ‘whatever the preferences of intimate partners, society ... the law retain[s] a stake in intimate relationships’.¹⁰⁰ Blood defines marriage through three distinctive elements. He suggests it consists of a sexual, a comprehensive and permanent aspect.¹⁰¹ In the institution of marriage, the sexual relationship is regarded as ‘legitimate’¹⁰² with the presumption being that sexual relationships outside of marriage are not legitimate personal relationships. This

⁹⁵ As above.

⁹⁶ As above.

⁹⁷ D Bethmann, & M Kvasnicka ‘The institution of marriage’ (2010) 24 *Journal of Population Economics* 1005.

⁹⁸ Bethmann and Kvasnicka (n 97 above) 1005.

⁹⁹ Blood (n 38 above) 3.

¹⁰⁰ Shultz (n 84 above) 208.

¹⁰¹ Blood (n 38 above) 3.

¹⁰² Shultz (n 84 above) 208.

gives rise to the element of child rearing in marriage. On the comprehensive nature of the relationship in marriage, the idea is that once conception and reproduction have taken place, the marriage unit enables the parents to raise the child in an environment that is geared towards providing the child with all that it needs in a stable environment.¹⁰³

Blood, Buchanan and George and other traditional theorists commend the institution of the traditional marriage. They assert that the society must have principles and guidelines that create what they perceive to be an orderly and rational society. They state that the institution of marriage is crucial in society as families offer defined roles that can be used to regularize the system.¹⁰⁴ Marriage provides social order as it emphasizes the rearing of children in a stable environment and thus perpetuating orderly societies once they are old enough to set out on their own.

Further, the concept of permanence is grounded on the definition that marriage is the ‘union of a man and a woman who make a permanent and exclusive commitment to each other of the type that is naturally (inherently) fulfilled by bearing and rearing children together’.¹⁰⁵ This view is the most popular about the definition of marriage and proposes that the marriage is sealed by the act of consummation and the purpose is reproduction. The traditional conceptualization of permanence in marriage is based on the natural institution of human nature and the commitment to the common good of society.

In Blood’s categorisation of the first element of marriage, he asserts that a complete union requires mutual consent between the man and the woman who enter into the institution of marriage. For the union to be valid, Blood contends that there has to be consummation

¹⁰³ As above.

¹⁰⁴ As above.

¹⁰⁵ As above.

through conjugal relations which must be ‘organic’.¹⁰⁶ The assertion of the organic union requires that there be the possibility of biological sexual reproduction. The biological sexual process should ideally give rise to potential conception, if this is not possible, then the union is not said to be complete. The second element is a special link to children. The argument presented here is that the generative act of having children, followed by the rearing of the children in a stable environment, can best be served in a traditional marriage. However, often children can be gotten out of wedlock or adopted; the full cycle of conception, bearing and then subsequently rearing the children creates the special link that fulfils the second purpose of marriage. It has been presented that ‘[t]he advantage[s] of marriage appears to exist primarily when the child is the biological offspring of both parents’.¹⁰⁷ Blood identifies the third element as the permanence and exclusivity of the marriage union.¹⁰⁸ The fact that the biological organic consummation seals the union and that the offspring of the union are raised by the biological parents would be undermined if the union were to disintegrate or involve other parties not part of the union. The essential characteristic that qualifies the union is the ability for the couple to make a lasting and personal commitment to one another by being faithful and provide their offspring with a stable environment for which they can grow and develop.

However, writers such as Shultz¹⁰⁹ pose various challenges to the rationales provided for the traditional institution of marriage proposed by traditional theorists. The concept of divorce and its modern-day prevalence challenge the assertion of permanence, while circumstances around gender roles and especially the role of the woman in society and marriage have clearly changed in modern times. Monogamy has been confronted by widespread

¹⁰⁶ As above, 253.

¹⁰⁷ WD Manning & KA Lamb ‘Adolescent well-being in cohabiting, married, and single-parent families’ (2003) 65 *Marriage and Family Journal of Marriage and Family* 876.

¹⁰⁸ Blood (n 38 above) 3.

¹⁰⁹ Shultz (n 84 above) 207.

instances of polygynous marriages in many cultures and procreation has also been defined by childless marriages and adoption. With these considerations, the traditional institution of marriage has failed in its assertion as the only accepted institution. In fact, Shultz states that '[t]he changes are legion, and their message is clear: the destruction of traditional marriage as the sole model for adult intimacy is irreversible'.¹¹⁰

Further challenges to the traditional view are enumerated through revisionist or pluralist theory proposed by revisionist or plural theorists such as Friedman, Kay, Wedgwood and Gray.¹¹¹ Revisionists suggest the traditional view of marriage is 'too narrow and too hierarchical'.¹¹² Proponents of this theory state that the concept of family is wider than the concept of a nuclear family or biology. While traditional theorists are more concerned with the biological relationship between the parents and their children, plural theorists are more concerned about the relationships in the family and if they are functional and ideal for growth and development. Plural theorists offer that human nature is inherently best illustrated in a social construct. The idea of pluralism is held by persons who are invested in ideologies such as democracy and social liberalization. Plural theorists tend to question long standing ideas that 'customs embody the collective wisdom of mankind'¹¹³ as these tend to be based on the historical reference to eras over time and do not change with the evolution of societies.

¹¹⁰ As above.

¹¹¹ Plural theorists are writers who discuss rights-oriented arguments characteristically for the recognition of same-sex marriages. Such writers include A Friedman 'The necessity for state recognition of same-sex marriage: constitutional requirements and evolving notions of family' (1987) 3 *Berkeley Women's Law Journal* 134; HH Kay 'Private choices and public policy: confronting the limitations of marriage' (1991) 5 *Australian Journal of Family Law* 69; SA Law 'Homosexuality and the social meaning of gender' (1988) *Wisconsin Law Review* 218 233; R Wedgwood 'The fundamental argument for same-sex marriage' (1999) 7 *Journal of Political Philosophy* 229; JS Gray 'Rawls's principle of justice as fairness and its application to the issue of same-sex marriage' (2004) 23 *South African Journal of Philosophy* 15.

¹¹² Wax (n 83 above) 380.

¹¹³ As above, 383.

Another challenge to the gender roles presented in the traditionalist view of marriage was the evolution of the role of women in the marriage. Traditional marriages were based on hierarchy where the wives were considered as their husband's subordinates,¹¹⁴ and the woman's role in the marriage was often relegated to reproduction. However, in modern times, the role of the woman in the marriage began to take precedence in the discourse of marriage. The concept of modern marriage fundamentally changed in the 20th century with the increased prevalence of divorce, cohabitation before marriage, children born out of wed-lock and the greater acceptance of same-sex marriages. Lundberg and Pollack suggest that the 'social and legal significance of marriage has eroded'¹¹⁵ due to the evolution of the institution of marriage. They theorise that the institution had been on the decline due to the liberalization of societal norms and customs.¹¹⁶ An argument presented to explain this decline is that with the rise in middle income and lower income homes, marriage has become less of a consideration in the struggle to keep up with the diminishing economic prospects.¹¹⁷ Other schools of thought theorise that the education of women led to the questioning of traditional institutions such as

¹¹⁴ JW Scott 'Gender: a useful category of historical analysis' (1986) 91 *American Historical Review* 538.

¹¹⁵ S Lundberg & RA Pollak 'The evolving role of marriage: 1950-2010' (2015) 25 *Future of Children* 29 31.

¹¹⁶ Lundberg & Pollak (n 115 above) 29.

¹¹⁷ See generally Lundberg & Pollak (n 115 above) 29. The authors discuss the decline of marriage in low income communities' due to the fact that men, have low education levels, have diminished prospects of getting economic income, while the women are able to rear their children on welfare and other social schemes. They also posit that the poor women aspire to a middle-income life and raise their expectations such that the men are not able to meet these expectations. See also J Biegon (ed) *Gender equality and political processes in Kenya* (2016) 1. He discusses the progressive changes towards women's rights in Kenya due to education and urbanization.

marriage.¹¹⁸ This also led to women questioning the purpose of the rigidity of the institution on the issue of roles and rights such as equality.¹¹⁹

Lundberg, Pollak and Borneman¹²⁰ state that the era of women's empowerment through education and other vocational work affected the formation of families and the institution of marriage.¹²¹ Lundberg and Pollak observe that with the advent of the post-war situation in America in the 1970's women began to seek education and careers, rather than being content with staying home to raise the children. With women working or pursuing their studies, they delayed marriage. This led to increase in the number of divorces being procured and the preference of cohabitation over marriage.¹²² This 'overall retreat from marriage can be observed among all major racial and ethnic groups and across the socioeconomic spectrum'.¹²³ The stigma that had been attached to being unmarried, having a child out of wedlock, cohabitation or being divorced has significantly reduced. Increasingly, issues like education, wealth and other forms of economic stability or the ability to add to the overall economic situation of marriage are being considered in the search for a potential partner. Borneman suggests that while marriage would potentially regulate issues of inheritance and descent it was more likely that marriage was more about the descent and that in turn regulated the children and their care.

¹¹⁸ See generally BM Torr 'The changing relationship between education and marriage in the United States, 1940–2000' (2011) 36 *Journal of Family History* 483–503; A Isen 'Women's education and family behavior: trends in marriage, divorce and fertility' (2010) PARC Working Paper Series 28; L Olah et al 'The new roles of men and women and implications for families and societies' (2014) 11 Family and Society working Paper Series.

¹¹⁹ Lundberg & Pollak (n 115 above) 29.

¹²⁰ J Borneman 'Marriage today' (2005) 32 *American Ethnologist* 30–33. In his work, Borneman discusses the separation between sex and procreation. He writes that this is largely due to 'advances in women's education and in the technologies of birth control even though in most parts of the world, including the United States, many, if not most, people do not want to recognize this fact'.

¹²¹ See generally Lundberg & Pollak (n 115 above) 29 and Borneman (n 120 above) 32.

¹²² Lundberg & Pollak (n 115 above) 30.

¹²³ As above.

¹²⁴ There are various views presented on the decline of the institution of marriage in the West, however, traditionalists¹²⁵ still contend that the greatest threat to the traditional institution of marriage is the legal recognition of same-sex marriages. Social anthropologists, however, still contend that the decrease of couples entering into the institution of marriage is directly attributable to ‘decreasing economic opportunities for many men and increasing economic opportunities for women’.¹²⁶

Although women’s liberation has been regarded as one of the reasons for the decline of the institution of marriage in the West, in some communities in Africa, women in the community were empowered and in some instances allowed to take in a different gender role in the community and marry other women.¹²⁷ This allowed the woman to create a family, acquire progeny and propagate kinship in the community. This is the foundation of the woman-to-woman marriage in Africa. In pre-colonial Africa, the number of children in a homestead from a particular lineage was seldom a matter economy, but rather the ability of the female in the homestead to reproduce.¹²⁸ In some communities, the denigration of the status of women in

¹²⁴ Borneman (n 120 above) 32.

¹²⁵ See generally (n 93 above).

¹²⁶ Lundberg & Pollak (n 115 above) 34.

¹²⁷ See generally SO Murray & W Roscoe *Boy-wives and female-husbands: Studies in African homosexualities* (1998) 2; JR Cardigan ‘Woman-to-woman marriages: practices and benefits in Sub-Saharan Africa’ (1998) 29 *Journal of Comparative Family Studies* 90; Greene (n 65 above) 399; C Obbo ‘Dominant male ideology and female options: three East African case studies’ (1976) 46 *Africa* 371; F White ‘Gender and power (Review of *The Female King of Colonial Nigeria: Achebi Ugabe* by N. Achebe)’ (2012) 29 *The Women's Review of Books* 30; I Amadiume *Male daughters, female-husbands: Gender and sex in an African society* (1987) 91; RS Oboler ‘Is the female-husband a man? Woman/woman marriage among the Nandi of Kenya’ (1980) 19 *Ethnology* 69; MJ Herskovits ‘A note on ‘woman marriage’ in Dahomey’ (1937) 10 *Africa* 335 338; EJ Krige ‘Woman-marriage, with special reference to the Lovedu-its significance for the definition of marriage’ (1974) 44 *Africa* 11; WN Njambi & WE O’Brien ‘Revisiting woman-woman marriage: Notes on Gikuyu women’ (2000) 12 *National Women's Studies Association Journal* 1 23.

¹²⁸ Caldwell & Caldwell (n 28 above) 420.

the community was due to the ‘patriarchal, hierarchical and polygynous organization of the African household’.¹²⁹ Women in the traditional African home were often not allowed to dictate the number of children they had due to the social organization of the community.¹³⁰ The decision of the number of children in the home depended on the social status of the homestead, ‘preservation of lineage and respect for the ancestors’.¹³¹ Although the traditional African society was patrilineal, emphasis was placed on the survival of the lineage of strong groups or homes even from matrilineal lineages.¹³² Traditional African religion and the African ancestors formed a very dominant part of the societies’ foundation as the lineage to the ancestors was keenly observed.¹³³ Children were often named after ancestors creating direct familial linkages in the society.¹³⁴ The occurrence of barrenness in women in the traditional African society was of critical concern as children were often considered as reincarnations of past souls of the ancestors in the community.¹³⁵

The concept of the ‘durability and perpetuity’¹³⁶ was also a consideration on the number of children to have. The propagation of lineage was of crucial importance not only to the house or homestead but also the growth and expansion of the community.¹³⁷ Further, the concept of polygyny reduced the reliance of the emotional bond formed between the woman and her child. Most African communities were polygynous due to the emphasis on lineage and reproduction.

¹²⁹ KO Mason ‘The status of women: a review of its relationships to fertility and mortality’ (1984) referenced in Makinwa-Adebusoye (n 27 above) 12-6.

¹³⁰ Makinwa-Adebusoye (n 27 above) 12-5.

¹³¹ As above, 12-5.

¹³² Caldwell & Caldwell (n 28 above) 416.

¹³³ As above.

¹³⁴ As above.

¹³⁵ Caldwell & Caldwell (n 28 above) 418.

¹³⁶ As above, 413.

¹³⁷ As above.

In the traditional homestead, the rearing of children was communal.¹³⁸ Where a woman was unable to fulfil her social function and propagate the lineage of her husband, she was sometimes allowed to marry another woman. In other instances, where the woman had acquired a substantial amount of wealth, she was allowed to marry another woman to facilitate the bearing of children, often with a genitor, with the aim of bequeathing her wealth to her offspring.

It is evident that there are some similarities in the rationales between the marriages of the West and customary woman-to-woman marriages in pre-colonial Africa. The issue of procreation and permanence come out quite strongly in this comparative analysis indicating that rationale is important in the formation of both institutions.

Assurance of a functional family unit

One of the definitions of marriage is that it is a ‘union of two people (whether of the same sex or opposite sexes) who commit to romantically loving and caring for each other and to sharing the burdens and benefits of domestic life’.¹³⁹ Plural theorists contend that society should not be restricted by predetermined roles that constrain the individual but should instead allow the individual the freedom to emphasize roles that are important to their personal fulfilment. Plural theorists propose that the social well-being of an individual is better served by the freedom to pursue personal goals. ‘Breaking free of customary practices may be necessary for people to achieve their full potential and maximize well-being’.¹⁴⁰

O’Rielly, a traditional theorist, defines the traditional marriage as an institution that ‘did much to embed community values and to provide secure foundations for children as they made their way in life’.¹⁴¹ However, plural theorists contend that the institution of marriage was

¹³⁸ As above.

¹³⁹ Girgis et al (n 36 above) 248.

¹⁴⁰ Wax (n 83 above) 383.

¹⁴¹ E O’Rielly ‘Catholic marriage’ (2012) 63 *The Furrow* 211 212.

more than just the personal relationships that led to the successful rearing of children. They expound that it represents an institution where a range of personal relationships, brought together by personal need, can give rise to numerous benefits to both the individual and society. They believe in a society that is not determined by the nuclear family form, but by associations that form out of various personal choices that need not only culminate in child rearing.

In Africa, it is clear that marriage ‘evolved as a way of binding a male to a female and children, giving him a stake in the family unit’.¹⁴² Wardle also stated that ‘the concept of marriage is founded on the factual reality that the union of two persons of different genders creates something unique, a special relationship of unique potential strengths and inimitable potential value to society’.¹⁴³ In the woman-to-woman marriage, as discussed in more detail in Chapter 3, women entered into the institution as a way of ensuring the propagation of lineage by creating a stable family. The *female husband* was the primary provider, while the wife was the caregiver. In some instances, the women in these marriages share a bond due to either clan or family affiliation. This ensured that the children were considered as part of the clan or family and therefore had a stable home and environment and formed strong family units.¹⁴⁴

Formalization of personal bonds

Marriage is one of the oldest documented institutions in formal society. It is present in virtually every culture and is ‘endorsed by religion, laws and social norms throughout human history’.¹⁴⁵ Despite the assumed generality of the institution of marriage, there are many rules and considerations that vary greatly in the many cultures. These dictates vary from the person one

¹⁴² Kindregan (n 48 above) 428.

¹⁴³ LD Wardle ‘Legal claims for same-sex marriage: efforts to legitimate a retreat from marriage by redefining marriage (1998) 39 *South Texas Law Review* 735 748.

¹⁴⁴ WN Njambi & WE O’Brien ‘Revisiting woman-woman marriage: Notes on Gikuyu women’ (2000) 12 *National Women's Studies Association Journal* 1 23.

¹⁴⁵ Bethmann & Kvasnicka (n 97 above) 1005.

can marry, how many partners one can take to where and with whom the couple can live with amongst numerous other considerations.¹⁴⁶ In some cultures, marriages contain elaborate ceremonies whereas, in others, they are conducted by simple agreement. Blood postulates that ‘the essence of marriage is the personal relationship between the partners’.¹⁴⁷ Personal relationships involve direct, intense and extensive connections between the parties involved. They are also unique as they are dependent on the person’s character and personality.

Personal relationships in marriages have two implications. The first is ‘need-gratification and the second is social control.’¹⁴⁸ The need gratification role of personal relationships is not easily illustrated in the institution of marriage. This is because, in the past, the family structure was the main structure that offered an avenue for which the individual could access biological needs such as food shelter and clothing. It was therefore not considered a personal choice but more comparable to a biological imperative. However, the evolution of the society has broadened the way in which persons can access biological needs such as food. The need to enter into a marriage evolved to a personal choice and better idealised as an institution where it was possible to selectively formalise bonds.¹⁴⁹ The other motivation for need gratification in personal relationships was need of sexual gratification This required the development of unique personal relationships, though arguably, it is not the sole relationship in which one can have their physical needs met. Another aspect of the need gratification in personal relationships that is representative of the rationale for marriage is the need for affiliation. ‘In personal relationships, we achieve a sense of belonging of being accepted for who we are, of being at home in the world’.¹⁵⁰ Personal relationships are based on the rule of

¹⁴⁶ Strong et al (n 90 above) 9.

¹⁴⁷ Blood (n 38 above) 4.

¹⁴⁸ As above, 6.

¹⁴⁹ As above.

¹⁵⁰ As above, 7.

reciprocity and encourage stronger bonds. They encourage a person to look externally for the feelings that they want to receive from the other person. The responsibility of being relatable and caring of the other person is a skill that is reflected in the society and offers a form of social control.

The concept of marriage establishes families that fulfil certain roles in the community. It is evident that the states that favour the institution of the family have a higher chance of achieving the pre-determined requisites of self-preservation. Marriage provides a model by which the state can exercise a form of social control by establishing the rules of engagement that ensure that its citizens adhere to, administrate and manage.

Woman-to-woman marriages formalize bonds between the *female husband* and the wife. However, the regulation of the institution in pre-colonial Africa is not alluded to in texts, making it difficult to assert the aspect of social control. With regard to sexual gratification, there has been much debate on the sexual nature of the relationships of the women in the institution of woman-to-woman marriages in Africa.¹⁵¹ Anthropologists are divided and discuss various situations in pre-colonial African communities that allude to a sexual relationship between the women in such marriages.

Securing economic union and shared prosperity

The economic theory operates on two fundamental principles, 'joint production and joint consumption'.¹⁵² The issue of joint productions looks at the economies of scale and considers whether by combining forces the partners are gaining more from the arrangement. The joint consumption theory in a marriage proffers the notion that the use of goods jointly obtained in

¹⁵¹ See generally Chapter 3 on the rationales of woman-to-woman marriage in pre-colonial Africa.

¹⁵² Lundberg & Pollak (n 115 above) 34.

the marriage offers better economic merit as opposed to when goods are consumed to benefit a single individual.¹⁵³

The economic theory of marriage focuses on the ‘various benefits to individuals from joining their production and consumption to explain the existence of conjugal unions’.¹⁵⁴ ‘Economists view marriage as a choice made by individuals who evaluate the expected gains from a specific marriage compared with other marriages or with living alone’.¹⁵⁵ In fact, Becker proposes that in this theory, the only definition of marriage is that ‘they share the same household’.¹⁵⁶ Bethmann and Kvasnicka discuss various models in the economics theory. When discussing the concept of ‘preferences, endowments, and reproductive technologies’,¹⁵⁷ they consider that the society and the life cycle of the individuals are finite, where only women have the capabilities of reproduction and the men are the only ones capable of bringing about the reproduction.¹⁵⁸

In pre-colonial Africa, woman-to-woman marriages were conducted for the purpose of economic empowerment and the retention of wealth. In some communities, women who had managed to secure wealth in the community had to marry another woman to gain a higher status comparable to that of the man in the community.¹⁵⁹ In other communities, women who inherited the wealth from their deceased husbands married women to bear her male progeny to ensure that the wealth remained in their lineage.

¹⁵³ As above.

¹⁵⁴ Bethmann & Kvasnicka (n 97 above) 1006.

¹⁵⁵ Lundberg & Pollak (n 115 above) 34.

¹⁵⁶ GS Becker ‘A theory of marriage: Part I’ (1973) 81 *Journal of Political Economy* 813.

¹⁵⁷ Bethmann & Kvasnicka (n 97 above) 1011.

¹⁵⁸ As above, 1015.

¹⁵⁹ See generally Chapter 3 on the retention of wealth and economic empowerment in the rationales of woman-to-woman marriage in pre-colonial Africa.

Contractual security of investment

This rationale works in tandem with the economic union and shared prosperity discussed above. The theory of contractual security of investment defines marriage as a ‘contract between spouses that protects them and their relationship-specific investments in case of a breakup’. The marriage contract signed by both parties ‘transfers custodial rights from women to men’.¹⁶⁰

Historically, the Code of Hammurabi of 1780 BC provided that ‘if a man takes a wife and does not arrange with her the proper contracts, that woman is not his legal wife’.¹⁶¹ In the times before the 18th century, England had the common law marriage which was defined as ‘marriage which does not depend on the validity of any religious or civil ceremony but is created by the consent of the parties’.¹⁶² In 1836, marriage was recognized as union entered into by the consent of the two parties.¹⁶³ Towards the end of the 19th century, however, marriages fell under the jurisdiction of the Matrimonial Causes Act and has to be recorded in the civil registry.

Some theorists have been critical of the contractual elements of marriage. However, it is important to note that ‘marriage intersects areas of law and social policy from the rearing of children to taxation to inheritance of property’.¹⁶⁴ The law governing marriage views the institution as a ‘contract of adhesion imposed upon private individuals by the state’.¹⁶⁵ The

¹⁶⁰ Bethmann & Kvasnicka (n 97 above) 1007.

¹⁶¹ Kindregan (n 48 above) 428.

¹⁶² OE Koegel Common law marriage and its development in the United States (1922) 7.

¹⁶³ The Marriage Act, 1836. It established that notice of every marriage in England had to be given in writing, signed by one of the parties, to the registrar of the district within which the marriage is intended to be solemnised. <http://www.perfar.eu/policies/marriage-act-1836> (accessed 12 August 2017).

¹⁶⁴ Shultz (n 84 above) 208.

¹⁶⁵ MA Glendon ‘Marriage and the state: The withering away of marriage’ (1976) 62 *Virginia Law Review* 663 665.

judgment in *Maynard v Hill* (1888)¹⁶⁶ extrapolates the contract theory of marriage holding in part that '[m]arriage is something more than a mere contract, though founded upon the agreement of the parties ... [i]t is an institution of society, regulated and controlled by public authority'.

In the contract theory of marriage, consent by the parties is usually required to enter into a marriage. The parties must also have the capacity to enter into the institution. In this regard, the state placed statutory regulations on matters such as age, blood relationship, sex and legal capacity of the parties. Whereas according to the state, these are issues of public policy, in contractual terms, they are regarded as issues of private control. Another important issue in determining the ability of the parties to enter into marriage is consideration otherwise known as the rule of reciprocity and exchange. This can be viewed in marriage as the obligations that parties must meet for the marriage to take place. In some instances, there is a need to procure medical tests or to make marriage announcements in a public Gazette and others. It is also necessary to perform a search in the marriage registry to establish that none of the parties is still legally married to another person. Finally, acceptance between both parties entering into the contract of marriage is necessary in addition to the 'compulsory formalities for the celebration of marriage'.¹⁶⁷ This would entail the procuring of the license and subsequent registration of the marriage. The formation of marriage in law follows all the legal tenets of the establishment of a contract.

In Africa, customary marriages are considered as a formalization of an agreement between two families, which resembles a contract.¹⁶⁸ The requirements of formalization of the African traditional marriage include capacity and consent. The payment of bride-price is

¹⁶⁶ *Maynard v Hill* 125 U.S. 190 (1888).

¹⁶⁷ Glendon (n 165 above) 680.

¹⁶⁸ See generally Chapter 3 on the requirements of African customary marriages.

equivalent to the consideration envisioned in the contractual theory and the cohabitation once the agreement is complete is the final requirement of the African customary marriage. As woman-to-woman marriages are a form of African customary marriage, these requirements apply to woman-to-woman marriages as well.

The analysis of the rationales of the institution of marriage in the West has clearly identified some similarities between these institutions and the woman-to-woman marriages of pre-colonial Africa. However, there are differences between the institutions as well. This illustrates that although it is possible to identify similarities and differences between these institutions, it is still possible to categorise them as distinct institutions of marriage.

2.4.2 Rationales for same-sex marriages of the West and woman-to-woman marriage

This sub-theme offers a comparative analysis of woman-to-woman marriage and same-sex marriage, to exemplify common points of departure between the two institutions. Although it brings out some similarities between the two institutions, it ultimately enumerates that they are not the same.

As discussed earlier in the Chapter, the justification of woman-to-woman marriage is best understood from a social and functional perspective.¹⁶⁹ Woman-to-woman marriages fulfilled certain purposes in the community and women entered into these marriages for the propagation of progeny, acquisition of wealth or inheritance, for economic empowerment and division of labour, independence or for companionship.¹⁷⁰ The women in these marriages established different forms of family units. In certain instances, the family is formed between

¹⁶⁹ C Obbo 'Dominant male ideology and female options: Three East African case studies' (1976) 46 *Africa* 371.

¹⁷⁰ JR Cardigan 'Woman-to-woman marriages: practices and benefits in Sub-Saharan Africa' (1998) 29 *Journal of Comparative Family Studies* 90.

the *female husband*, her wife and their offspring,¹⁷¹ or between a *female husband*, her male husband and her wife and their offspring,¹⁷² or between the *female husband*, her wife and her wife's husband and their offspring.¹⁷³

Although there are some similarities, the overarching difference between the institutions of woman-to-woman marriage and same-sex marriage was the rationale behind the union. Woman-to-woman marriages are principally for the purpose of propagation of lineage and kinship, whereas same-sex marriage is a formal recognition of love between persons of the same sex. Same-sex marriage has been viewed as an attack on the traditional institution of marriage.¹⁷⁴ As discussed earlier, the traditional institution of marriage has been slowly changing over the course of the last century.¹⁷⁵ The decline of the traditional marriage has been stimulated by various factors such as the redefinition of gender roles in the family and changing societal needs.¹⁷⁶ Wax defines same-sex marriage as a modern and radical notion requiring societies to relinquish antiquated perceptions of traditional heterosexual marriage as the basic

¹⁷¹ This was the case in most woman-to-woman marriages where the *female husband* wanted to acquire a higher social status in the community or increase her economic status, or where a woman was old and barren without any heirs.

¹⁷² In certain cases, the *female husband* was already married but had no children in the marriage. She would then agree with her husband that she (*female husband*) marry another woman who either had her own children (whom they claimed their own) or allow the woman to have relations with a genitor (or may be the male husband is the *female husband* was barren) to get heirs. These heirs were considered to belong to the lineage of the male husband in patrilineal communities, and in matrilineal communities, they belonged to the lineage of the *female husband*.

¹⁷³ In other woman-to-woman marriages, if the *female husband* was barren and unmarried, she would enter into a woman-to-woman marriage with another woman who may be already married or she would allow her to get married. These types of marriages were mostly for companionship or where the *female husband* needed heirs.

¹⁷⁴ See generally Blood (n 38 above) 3; B Strong, C DeVault, & BW Sayad *the marriage and family experience: intimate relationships in a changing society* (1998) 9; Feinberg (n 37 above) 301 302; E O'Rielly 'Catholic marriage' (2012) 63 *The Furrow* 211 212.

¹⁷⁵ Shultz (n 84 above) 210.

¹⁷⁶ Shultz (n 84 above) 212.

unit of societies.¹⁷⁷ It has also been defined as an institution that has proposed a new type of formation of family¹⁷⁸ and has propagated the right to family as a civil rights issue.¹⁷⁹

This comparative analysis seeks to establish the rationales of same-sex marriages of the West and to illustrate that although there are some similarities, they are fundamentally different from woman-to-woman marriages in Africa.

Same-sex marriages as a formalization of a loving relationship

One of the more inherent motivations for same-sex marriage is the legal formalization of a loving relationship between two non-heterosexual people. This is a distinct departure from the motivation for woman-to-woman marriage. The justification of sexual gratification of the parties in a same-sex marriage is not essentially mirrored in woman-to-woman marriages.

The justifications proposed by traditionalists, religious proponents and moral realists against same-sex marriage relate to the sexual orientation of same-sex couples. Kohm's¹⁸⁰ paper offers evidence that portrays gay men as sexually promiscuous therefore are unlikely to make faithful spouses in same-sex relationships whereas in heterosexual marriages it is reported that 'sixty-seven percent of first marriages in the United States last ten years or more, and more than seventy-five percent of (heterosexual) married couples report being faithful to their vows'.¹⁸¹ Kohm contends that there is no known culture that presents homosexual parenting as an ideal family model and that in Europe, although a 'majority of Europeans

¹⁷⁷ Wax (n 83 above) 378.

¹⁷⁸ J Chamie & B Mirkin 'Same-sex marriage: a new social phenomenon' (2011) 37 *Population and Development Review* 529 529. Chapter 2 analyses the genesis of the institution of marriage as well as its evolution through the centuries. It identifies the challenges to the institution of same-sex marriages and explores the proponent theories such as the revisionist theory and opposing theories identified as the traditionalist theory.

¹⁷⁹ Borneman (n 120 above) 32.

¹⁸⁰ LM Kohm 'Moral realism and the adoption of children by homosexuals' (2004) 38 *New England Law Review* 646.

¹⁸¹ As above, 643.

[were] in favour of homosexual marriages [they] remained reluctant toward child adoption by homosexual couples'.¹⁸² Kohm argues that homosexual couples are seeking adoption rights as a way of attaining marriage rights as well. Kohm also argues that a same-sex couple cannot reproduce naturally and therefore cannot foster a 'future civilization'.¹⁸³ Although statistically Kohm's representations may have some basis, they still essential play on homophobic stereotypes that not only are same-sex marriages untenable because of their inability to naturally reproduce, it also plays into the stereotype that same-sex couples are not able to give their adoptive children stable home environments. These are sentiments that have been disproved by the many existing and prosperous same-sex marriages and relationships as well as socially stable children who are the products of such homes as discussed below.

The contention against same-sex marriage is that when it comes to matters of sexual orientation, there is an issue of nature versus nurture.¹⁸⁴ Proponents against same-sex marriage claim that there is little to present in the way of proof that sexual orientation is a biological inclination.¹⁸⁵ It is contended that because it is more a matter of preference, it is prejudicial to compare it to a heterosexual relationship, which is the natural order of human nature.¹⁸⁶ The calls for equality citing similarities to racial prejudice, as seen in the miscegenation acts, is erroneous, it is argued because race is a biological imperative that no one has a choice over.¹⁸⁷ In woman-to-woman marriages, however, the sexual orientation of the women is not a consideration. The foundation of woman-to-woman marriage is the need to propagate the

¹⁸² As above, 661.

¹⁸³ As above, 662.

¹⁸⁴ CL Heffner 'Homosexuality: nature or nature' (2003) *AllPsych Journal*
<https://allpsych.com/journal/homosexuality/> (accessed 9 August 2017).

¹⁸⁵ Stanford University 'Biological basis for sexual orientation' 3 October 1995
<http://news.stanford.edu/pr/95/950310Arc5328.html> (accessed 9 August 2017).

¹⁸⁶ Heffner (n 184 above).

¹⁸⁷ As above.

lineage and establish kinship through the children born in the woman-to-woman marriage. If there is any sexual attraction between the two women,¹⁸⁸ it is ancillary and coincidental and is not constitutive of the marriage.

Right to marry as a human right

The central argument for same-sex marriage is based on the well-established individual right to marry.¹⁸⁹ The right to choose and the right to marry, though not enumerated as a right in customary law, is present nonetheless in woman-to-woman marriages. The *female husband* in almost all instances chooses the woman that she wants to marry. It has not been documented of any instance where a woman has been denied the ability to enter into a woman-to-woman marriage in a community which upholds this custom.

Miller, Guyer, Tebbe and Widiss all argue that all persons have the right to marry the person of their choosing without being subjected to limitations such as race, nationality, religion or sexual orientation, a view that has been reflected by courts and legislation in many

¹⁸⁸ See generally Chapter 3 on fulfilment of sexual desire in woman-to-woman marriages.

¹⁸⁹ Chapter 2 discussed the institution of marriage in detail. The right to marry is founded on the basis of the concept dignity, equal access and equal protection that is owed by the state to all its private citizens. It has also been described as a creation of law and therefore it is in the realm of state regulation. In the various texts mentioned above, the right to marry is enumerated as a right that has been established in courts in the US as every man's right to the pursuit of happiness. See generally M Bernstein(ed) *The marrying kind? Debating same-sex marriage within the lesbian and gay movement* (2013); N Tebbe & DA Widiss 'Equal access and the right to marry' (2010) 158 *University of Pennsylvania Law Review* 1375 1449; MC Nussbaum 'A right to marry?' (2010) 98 *California Law Review* 667 696; M Nussbaum 'A right to marry? same-sex and constitutional law' (2009) 56 *Dissent* 43 55; S Miller & SE Guyer 'Introduction: Literature and the right to marriage' (2005) 35 *Diacritics* 3 22; M Heath 'Whither LGBT rights after marriage equality?: looking forward, looking back' (2016) *sociological forum* 1145 1149; S Sanders 'the constitutional right to(keep your) same-sex marriage' (2012) 110 *Michigan Law Review* 1421 1481; J Heaton 'the right to same-sex marriage in South Africa' (2010) 28 *Law In Context* 108 122.

countries in the West.¹⁹⁰ The Universal Declaration of Human Rights (1948)¹⁹¹ (Universal Declaration) in Article 16 provides that ‘men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family’.¹⁹² Williams proposes that in this instance, the right to equal treatment should not be viewed as an individual right, but rather as a collective right.¹⁹³ This would confer the right to the collective, similar to the right to assemble, ensuring that the right can be exercised by a group, namely the homosexual community. He speculates that the right to marry argument fails as an individual right because it essentially confers the right for an individual to marry a person of the opposite sex and not of the same sex and therefore same-sex couples cannot be protected by this provision.¹⁹⁴ However, the argument on the collective right to marry also raises complications, as the right, as a civil right, is envisioned as an individual right.¹⁹⁵ It gives rise to other contentions such as who becomes the right holder and who is the duty bearer. Williams continues to propagate this argument by presenting that the choice to enter into a marriage is a collective right that couples exercise as one cannot exercise the right alone.¹⁹⁶

The argument that the right to marry is a collective right fails on two major grounds. The first is that it discounts the individual’s choice to enter into the institution as a personal choice. Williams’ argument discounts the idea that a person who chooses to enter into a same-

¹⁹⁰ S Miller & SE Guyer ‘Introduction: Literature and the right to marriage’ (2005) 35 *Diacritics* 4; S Sanders ‘the constitutional right to (keep your) same-sex marriage’ (2012) 110 *Michigan Law Review* 1421; RA Lenhardt ‘Race, dignity and the right to marry’ (2015) 84 *Fordham Law Review* 54; N Tebbe & DA Widiss ‘Equal access and the right to marry’ (2010) 158 *University of Pennsylvania Law Review* 1377.

¹⁹¹ Universal Declaration on Human Rights (UDHR) adopted by the United Nations General Assembly on 10 December 1948.

¹⁹² Universal Declaration (n 191 above), Art 16.

¹⁹³ R Williams ‘Same-sex marriage and equality’ (2011) 14 *Ethical Theory and Moral Practice* 589 590.

¹⁹⁴ Williams (n 193 above) 593.

¹⁹⁵ As above.

¹⁹⁶ As above, 593.

sex marriage is exercising not only their right to choose but also the right to freedom of belief and conscience as well as other rights such as privacy. This choice does not have to be put in the realm of collective rights as the idea of this marriage is ultimately the choice to undertake the legal obligations to the spouse or partner, rather than to the collective as a statement of advocacy. Secondly, I submit that the right to marriage essentially offers a platform where an individual is able to demand their civil right and assert the obligations of the state towards the marriage.

Same-sex marriage proponents aspire to redefine the parameters that have been established regarding the institution of marriage. They propose that marriage is not just about the personal relationship between a man and a woman but can also about the intimate committed personal relationships between persons of the same gender.¹⁹⁷ In marriage, the essential element should be the love and commitment made by two persons regardless of their sex. Wardle presents the view from same-sex proponents in a holistic manner stating as follows:

If two persons care for each other, they argue, and wish to commit to love each other, share themselves sexually with each other, to assume spousal responsibility for each other, to live together, support each other, share their home, their food, their bank accounts, their lives, nurse each other in illness, support each other in poverty, possibly even raise children together, own property together, and leave property to each other, they should be entitled to marry each other regardless of whether they are of the same or opposite sexes.¹⁹⁸

Same-sex marriage entrenches the basic right of a person to enter into a relationship with any person of their choosing, free from the fear of expressing their choice in society. The family units formed in these families should also be the choice of the parties who enter into these institutions.

¹⁹⁷ Wardle (n 143 above)748.

¹⁹⁸ Wardle (n 143 above) 749.

Although the ability to enter into a woman-to-woman marriage may be equated to the right to marry as discussed above, this is the extent of the comparison that can be made. The institution of woman-to-woman marriage does not envision same sex erotic relationships and therefore cannot be equated to a same-sex marriage despite some similarity between the two institutions.

Social status to form a family unit

Same-sex marriages form families that do not conform to the traditional definition of family such as two men with children or two women with children. Woman-to-woman marriages also form non-conventional families.

Same-sex marriage allows the parties to have the ability to achieve a particular social status and legally enter into a family unit with a person of their choice. Same-sex couples should be allowed to enjoy all the privileges that heterosexual couples do.¹⁹⁹ As same-sex couples pay their taxes and contribute to society in a free, fair and democratic society, they should be allowed to enjoy the same privileges as opposite sex couples.²⁰⁰ Marriage has always been associated with a ‘desirable form of family life’,²⁰¹ and same-sex couples should have the same right to attain this ideal family life regardless of sexual orientation.

The right to form a family unit is based on Article 12 of the Universal Declaration guaranteeing freedom from interference with a person’s privacy, home or correspondence.²⁰² Family has been noted in international human rights documents as being ‘human’²⁰³ rather than

¹⁹⁹ Williams (n 193 above).

²⁰⁰ MVL Badgett ‘The economic benefits of gay marriage’ *PBS* 29 March 2013 <http://www.pbs.org/newshour/rundown/the-e/> (accessed 9 August 2017).

²⁰¹ JJ Josephson *Rethinking sexual citizenship* (2016) 74.

²⁰² Universal Declaration (n 191 above), Art 12.

²⁰³ D Petrova ‘Equal rights to marry and found a family’ (2013) 10 *Equal Rights Review* 5.

defining its forms.²⁰⁴ Increasingly, evolving technologies and other forms of marriage have illustrated that the concept of family is changing.²⁰⁵

Once again despite the similarity in the formation of family units between woman-to-woman marriages and same-sex marriages and the temptation to equate the two forms of marriage, the overarching rationale creates a fundamental distinction between the two forms of marriage

Legitimacy of children in same-sex marriages

With the debate on same-sex marriage gaining traction around the world, the issue of children began to raise concerns as well. The various jurisdictions needed to also define the position of children in the same-sex family. It was important to ensure that the children receive legal recognition in the institution of same-sex marriage.²⁰⁶ Conversely, the legitimacy of children in woman-to-woman marriages in pre-colonial Africa was not a direct issue. Children born in these marriages were considered as being in the lineage of the *female husband* where the *female husband* entered into the marriages to get progeny and as being from the *female husband's* lineage where the purpose of procreation was for inheritance and succession. Where there were disputes of lineage, these were resolved by clan elders.

The issue of children in same-sex relationships is as contentious as the issue of same-sex marriage. 'Under family law, a child's two legal parents are the woman who bears the child (the birth mother) and the male partner of the birth mother, if there is one (the birth father).²⁰⁷ Same-sex couples have children in various ways. In some situations, the children are from prior

²⁰⁴ Petrova (n 203 above) 5.

²⁰⁵ As above.

²⁰⁶ See generally GJ Gates 'Marriage and families: LGBT individuals and same-sex couples' (2011) 25 *Marriage and family*. <https://www.princeton.edu/futureofchildren/publications/docs/MarriageandFamily.pdf> (accessed 9 August 2017).

²⁰⁷ Australian Human Rights Commission *Same-sex: Same Entitlements* (2007) 91.

heterosexual relationships, in other instances, same-sex couples could choose, if it is a same-sex female couple, for one of the partners to go through donor insemination.²⁰⁸ In this case, the couple will consist of the birth mother and co-mother. If it is a male couple, the male partners may choose to get a child via surrogate, in this instance, the couple will consist of the birth father and the co-father.²⁰⁹

Whichever way the same-sex couple choose, the major issue is that of legal guardianship of the child, for the parent(s) who is not biologically linked to the child.²¹⁰ The society has always been very cautious, and the mechanisms put in place to protect the child have usually been quite stringent, even for heterosexual couples.²¹¹ Adoption has always been a preferred system of gaining guardianship over a child because unlike legal guardianship, adoption confers permanent parental rights over the child.²¹² Adoption laws were put in place to ensure that the actions taken were always in the best interest of the child. Historically, adoption laws served to benefit the adoptive parents.²¹³ The considerations now in adoption policies are the state of imitation of the natural family and the best interests of the child.

There are some legal considerations made when a parent is not biologically linked to the child. In the case where the other parent is alive but not married to the parent with guardianship over the child, the parent must either judicially or voluntarily terminate their

²⁰⁸ CJ Patterson 'Children of lesbian and gay parents' (2006) 15 *Association for Psychological Science* 241.

²⁰⁹ Human Rights and Equal Opportunity Commission 'Same-Sex: Same Entitlements, the Human Rights and Equal Opportunity Commission's report of the National Inquiry into Discrimination Against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits (2007) 87.

²¹⁰ Gates (n 206 above) 68.

²¹¹ As above.

²¹² As above.

²¹³ WC Duncan 'Whole best interests: sexual orientation and adoption law' (2003) 31 *Capital University Law Review* 787 788.

rights for the other party to be able to adopt the child.²¹⁴ However, the courts in Pennsylvania established a discretionary basis for determining whether there is a cause shown to necessitate the termination of the rights.²¹⁵

With same-sex couples, a child who is born to them will only have one legal parent, and this is the birth parent.²¹⁶ In the case of surrogacy, however, in most instances, the birth mother is the legal parent until adoption takes place. In situations where neither parent is the birth parent, it is often difficult for a same-sex couple to adopt a child that is not biologically theirs.²¹⁷ In instances where a same-sex male couple would like to adopt a child, it is usually complicated as they would have to involve the surrogate mother who in turn would be considered the biological birth mother and therefore the legal parent.²¹⁸

In many jurisdictions, there are two types of adoption permitted for same-sex couples- the second parent adoption and step parent adoption.²¹⁹ Second parent adoption is defined as

legal procedure that allows a same-sex parent, regardless of whether they have a legally recognized relationship with the other parent, to adopt her or his partner's biological or adoptive child without terminating the first parent's legal status as a parent.²²⁰

This type of adoption is favoured by same-sex couples as it allows both parents to have full rights over the child. Step parent adoption requires the parents to be married while second parent adoptions do not.²²¹ There are various arguments advanced for same-sex couple child

²¹⁴ Duncan (n 213 above) 787.

²¹⁵ Kohm (n 180 above) 646.

²¹⁶ Human Rights and Equal Opportunity Commission (n 209 above) 92.

²¹⁷ As above.

²¹⁸ As above, 93.

²¹⁹ Gates (n 206 above) 74.

²²⁰ Definition of second parent in the Adoption by LGBT parents http://www.nclrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf (accessed 15 August 2017).

²²¹ Human Rights and Equal Opportunity Commission (n 209 above) 94.

adoption. The first contention is that ‘gender is a construct.’²²² The gender of the parent does not confer any special ability to raise the child. Whether one is a mother or father is not relevant. What is relevant is the ability of the parent to love the child and offer the child a stable nurturing home.²²³ Opponents to this state that gender is biological and therefore not a social construct. They contend that a man cannot teach a girl how to be a woman and vice versa.²²⁴ This contention, however, holds no logic as the biological sex of the parent in no way alters the ability to raise a child of a different sex.

Another argument is that adoption confers legal rights over the child to the parent. Without this, the non-biological parent is not able to exercise certain rights over the child. Adoption of the child by this parent allows parent autonomy and ensures that both parents can make legal decisions for the child.²²⁵ Same-sex parents assert that they can provide the child with everything that a heterosexual couple can give. When the courts are acting in the best interest of the child, they are required to assess the ability of the child to thrive in the home under the protection and provision of the parents.²²⁶

Same-sex couples contend that they can offer children homes, security and a family life. They can provide the children with all that they would need to enjoy a normal childhood and stable upbringing. They also assert that there is nothing that a child can get in a heterosexual household that they cannot have in a same-sex parent home. In some situations, these children

²²² As above.

²²³ As above.

²²⁴ M Bauman ‘A non-religious case against same-sex marriage’ (2013) *The Imaginative Conservative* <http://www.theimaginativeconservative.org/2013/04/a-non-religious-case-against-same-sex-marriage.html> (accessed 9 August 2017)

²²⁵ Human Rights and Equal Opportunity Commission (n 209 above) 94.

²²⁶ Gates (n 206 above) 74.

would not have a stable home environment and are at risk of ending up in foster care or orphanages.²²⁷

The form of legal adoption that is discussed in same-sex marriage differs significantly from that of woman-to-woman marriage. The children from these marriages are almost always considered as offspring of the *female husband* and the wife and not often subjected to a legal process. However, where the legitimacy of the child is in question, courts often rely on the customary practice and its provisions on lineage and kinship rather than the statutory provisions on adoption. Further, the *female husband* need not submit to the court any application conferring maternal (or paternal rights) in order to be considered a legal parent to the child.

The issues raised in the legitimization of children in same-sex families have been evidenced in courts in Africa regarding the legitimacy of children in woman-to-woman marriages.²²⁸ The challenges are similar as they illustrate the challenges of the legitimacy of parents who have no biological association to the child in both same-sex and woman-to-woman marriages. However, the analysis of the families formed in same-sex marriages clearly espouses that biological connections to a child are not the only basis of parentage. The ability to offer a child a stable environment that provides all the essential needs for the healthy physical and emotional growth of the child is sufficient. In woman-to-woman marriages, the consideration of legitimacy is based on the establishment of lineage and kinship based on the customs and traditions of the community.

Although there are a number of similarities and differences enumerated above, the overarching difference between woman-to-woman marriages and same-sex marriages sets the two institutions apart. The essential element of a same-sex marriage is the sexual orientation of the individuals contracting the marriage. The marriage is founded on the sexual attraction to

²²⁷ Gates (n 206 above) 75 76.

²²⁸ Chapter 4 discusses the various challenges raised in the case analysis of some woman-to-woman marriages.

the person of the same-sex and the subsequent desire to formalize the affection and intimacy experienced in the relationship.

2.5. Impact of colonization on the recognition of woman-to-woman marriages in pre-colonial Africa

Marriages of the West were regulated by the state. However, although customary African marriages were accepted and formally recognized by the various political organisation of pre-colonial Africa, they were not regulated by them. Colonisation had a significant impact not only on the recognition of woman-to-woman marriage but on its regulation and acceptance in the legal systems in the modern African state.

Aristotle defined a society as naturally occurring from the development of the family.²²⁹ When these families come together, they form a village which in turn come together to form a community.²³⁰ Once this community is large enough and 'self-sufficing' it is then formally referred to as a state.²³¹ With time, marriage began to be defined to include concepts of monogamy and later as a religious institution. With the formation and introduction of the state in regulation of marriage, marriage became defined as 'no more and no less than an official status, imposed by law and accompanied by government entitlements and mandates'.²³² What is fundamentally clear is that marriage was intended for the propagation of the family and the general advancement of the state.

²²⁹ As above.

²³⁰ As above

²³¹ Zarri (n 5 above) 2.

²³² CR Sunstein & RH Thaler 'Privatizing marriage' (2008) 91 *Monist* 377 380.

John Locke²³³ and Jean Jacques Rousseau,²³⁴ in advancing the *social contract* theory, theorise that ‘man originally lived in a state of nature, where everyone was equal in the sense that all had everything required for his life’.²³⁵ Bennet while reviewing the theory of the *social contract* discusses the first societies and asserts that ‘the most ancient of all societies, and the only natural one, is the society of the family.’²³⁶ Of families, Bennet discusses their nature and equates it to the ‘prime model of political societies’ and theorises that the first law of man is that of self-preservation.²³⁷ However, as man’s power was limited, man had to come together to ensure a collective force safeguarding a better chance of survival.²³⁸ Conversely, when man comes together, he potentially loses his liberty and thus his self-preservation through his interests. The resolution presented is the *social contract* between man and the state.

The state’s role in the regulation of its citizens is limited to two functions, the ‘channelling of behaviour and the resolution of disputes’.²³⁹ With regard to the institution of marriage, the role of the state would include, but not be limited to ‘defin[ing] the rights and

²³³ John Locke (b. 1632, d. 1704) was a British philosopher, Oxford academic and medical researcher. ‘His political thought was grounded in the notion of a social contract between citizens and in the importance of toleration, especially in matters of religion’. GA Rogers ‘John Locke | English philosopher’ (December 14 2015) <http://global.britannica.com/biography/John-Locke> (accessed 17 March 2016).

²³⁴ Jean-Jacques Rousseau (b. 1712, d. 1778) was a Swiss-born philosopher, writer, and political theorist. Rousseau has two distinct social contract theories. ‘The first is found in his essay, *Discourse on the Origin and Foundations of Inequality Among Men*, commonly referred to as the Second Discourse, and is an account of the moral and political evolution of human beings over time, from a State of Nature to modern society. As such it contains his naturalized account of the social contract, which he sees as very problematic. The second is his normative, or idealized theory of the *social contract*, and is meant to provide the means by which to alleviate the problems that modern society has created for us, as laid out in the *Second Discourse*’. C Friend ‘Social Contract Theory’ <http://www.iep.utm.edu/soc-cont/#SH2c> (accessed 17 March 2016).

²³⁵ Zarri (n 5 above) 2.

²³⁶ J Bennet (ed) *The social contract* by Jean Jacques Rousseau trans J Bennet (2010) 1.

²³⁷ Bennet (n 236 above) 3.

²³⁸ As above, 6.

²³⁹ Shultz (n 84 above) 212.

obligations of spouses within marriage and within its dispute resolution mechanism’... [and] authoritatively interpret[ing] and enforce[ing] obligations [to] evaluate claims and select remedies’.²⁴⁰ This view outlines the basis of the justification of the state and its role in the construction of family and regulation of marriage.

In Africa, the formation of the formal state was a result of the scramble and partition of Africa in the early 20th century. There were, however, pre-existing political organizations in the communities but colonization led to more formalized states and governance structures that resembled the Western structures. In pre-colonial Africa, the formation of the clans had an important role in the political organization of the community.²⁴¹ There are two categories of political systems in pre-colonial Africa.²⁴² ‘There was significant heterogeneity in political centralization across African ethnicities before colonization’.²⁴³ In some African societies in East, Central and West of Africa, there existed centralized and hierarchical forms of administration and organization²⁴⁴ while in other parts of Africa there were ‘acephalous societies without political organization beyond the village level’.²⁴⁵ The arrival of the early Europeans did not seem to have any effect on the political structures of the communities and it is believed that the implementation of indirect rule using the pre-existing organizational and political structures reinforced these institutions.²⁴⁶ Ethnic communities formed large states

²⁴⁰ As above.

²⁴¹ AA Radcliff-Brown & D Forde *African systems of kinship and marriage* (1950) 23.

²⁴² M Fortes & EE Evans-Pritchard *African political systems* (1940) 5.

²⁴³ See generally GP Murdock *Africa: its peoples and their culture history* (1959).

²⁴⁴ Shongai Empire in Western Africa, the Luba kingdom in Central Africa and kingdoms of Buganda and Ankole in Eastern Africa had very organized political systems with hierarchical representations of Kings, chiefs and clan elders.

²⁴⁵ S Michalopoulos & E Papaioannou ‘Pre-colonial ethnic institutions and contemporary African development’ (2013) 81 *Econometrica* 119.

²⁴⁶ Michalopoulos & Papaioannou (n 245 above) 115.

where in centralized societies, there were forms of accountability of the political leaders, organized bureaucracy, legal resolution mechanisms and strong political institutions with complex ethnicities.²⁴⁷ Pre-colonial African societies had complex and evolved political centralization that eventually formed the basis of the contemporary development of countries.²⁴⁸

The political structures in communities were characterized by lineage which was defined as the ‘system of permanent unilateral descent [in] groups’.²⁴⁹ Kinship and domestic ties were important to the political system. In centralized politically structured communities, the formation of the community was based on the territory where as in the acephalous communities, kinship had a stronger role in the organization of the community.²⁵⁰ Fortes and Pritchard categorised the concept of kinship in political organization of African societies as follows:

Firstly, there are those very small societies [...] where even the largest political unit embraces a small group of people all of whom are united to one another by ties of kinship, so that [...] kinship relations and the political structure and kinship organization are completely fused. Secondly, there are societies in which a lineage structure is the framework of political systems [...]so that they are they are consistent with each other, though each remains distinct and autonomous in its own sphere. Thirdly, there are societies in which an administrative organization is the framework of the political structure.²⁵¹

In the African society, the concept of economic order differed from the societies of the West. The accumulation of wealth by individuals was not a significant consideration as the African societies were characterized by productive labour.²⁵² Where there was accumulation of wealth,

²⁴⁷ S Michalopoulos & E Papaioannou (n 246 above) 116.

²⁴⁸ As above.

²⁴⁹ Fortes & Evans-Pritchard (n 242 above) 6.

²⁵⁰ As above.

²⁵¹ Fortes & Evans-Pritchard (n 242 above) 7.

²⁵² As above, 8.

it was primarily in the form of goods or amenities for the added dependants in the African family.²⁵³

In the politically centralized societies, economic privilege was regarded as a reward for the political authority though there were no forms of sanctions.²⁵⁴ The formation of identifiable African societies in politically centralized societies was an amalgamation of the clans in proximity to one another whereas the acephalous societies were formations of ties of lineage and co-operation.²⁵⁵ In politically centralized societies '[t]he structure of the African state implies that the kings and chiefs ruled by consent',²⁵⁶ whereas in acephalous societies 'an equilibrium between a number of segments, spatially juxtaposed and structurally equivalent, which are defined in local and lineage and not administrative terms'.²⁵⁷ Further, in politically centralized African societies, there existed an organized force whereas there was none in the acephalous societies.²⁵⁸

Pre-colonial Africa had an identifiable and functioning societal structure that resembled the states of the West in substance if not form. The organizations of African societies were always part of 'a larger social system'.²⁵⁹ The structure of the African society comprised more than just the political structure; it anticipated the social relations between the clans and other forms of association, before the advent of the civilizing purpose of the early missionaries.²⁶⁰ Further, the institutions developed under the African political systems, such as marriage, were

²⁵³ As above.

²⁵⁴ As above.

²⁵⁵ M Fortes & EE Evans-Pritchard (n 242 above) 10.

²⁵⁶ As above, 12.

²⁵⁷ As above, 13.

²⁵⁸ As above, 14.

²⁵⁹ As above, 22.

²⁶⁰ As above, 23.

harmonised under these political systems as they were established with the same integral design of the African kinship system.

The introduction of Christianity into Africa, as well as the colonization of Africa, radically changed the form of African societies, culminating in a plurality in system of law and governance. This conflict has manifested itself in a myriad of ways including the challenges in the recognition of some forms of marriage in Africa. One of the affected institutions was woman-to-woman marriage. Moreover, with the advent of modernization and the progress of urbanization, the traditional African family began to change.²⁶¹ This has inevitably led to the transformation in African norms and values.²⁶²

2.6 Woman-to-woman marriage as a legitimate African family institution

In contemplating the African family and the implications of kinship and lineage, there is a need to situate woman-to-woman marriages as forming a traditional family institution. Analysing the interactions between the communities and these marriages as well as the rights and obligations of the parties in the institution, the legitimacy and rights of the children born in these institutions aids in illustrating the importance of the institution to the traditional African family.

In Africa, the social structures depend on the perpetuation of kinship and lineage through marriage, with the most important structures being the primary clan relationships formed through consanguinity.²⁶³ Affilial relationships formed through marriage, however, ensure the perpetuation of the entire community. Marriage bonds are essential, whether they are matrilineal or patrilineal. In many Kenyan communities, although the children are identified

²⁶¹ D Ekane 'Contemporary family patterns in sub-Saharan Africa' (2013) <http://su.diva-portal.org/smash/get/diva2:602444/FULLTEXT01.pdf> (accessed 15 March 2016).

²⁶² Ekane (n 201 above) 1.

²⁶³ L Magesa *African religion: the moral traditions of abundant life* (1998) 111.

through either matrilineal or patrilineal kinship affiliations, they acquire legitimacy as part of the clan and community. These kinship ties ensure succession in cases where the genitor of the child may be uncertain.²⁶⁴ It is clear that ‘the family created in marriage is the “fundamental element” and the “basic sphere of action” in African relationships’.²⁶⁵ In African marriages, life is not only biological but is determined by the relationships formed in these unions. The logic of this life in African marriages was perpetuated by the need to preserve and transmit the kinship and property throughout the lineage, from the ancestors down through the generations. Therefore, importance was not placed on the biological binary of the parties in the marriage, but rather the kinship and lineage bonds that were established.

One of the assumptions made about the institution of woman-to-woman marriage is that it was a ‘response to social hardship’.²⁶⁶ It is clear that woman-to-woman marriages provided an avenue for solving some of the challenges of succession and kinship. The children born from these unions were able to clearly identify where they were affiliated in their families and in their clans. Woman-to-woman marriages were treated similarly to heterosexual African marriages with the rights and duties of the parties to the marriage being essentially similar. The next Chapter enumerates more on the rationales of these marriages and their qualification as African customary marriages.

2.7 Conclusion

The Chapter has illustrated that woman-to-woman marriage through its motivation of propagation of lineage and kinship was different from the traditional marriages of the West. However, some similarities were also identified such as the motivation of the husband in

²⁶⁴ L Magesa (n 263 above) 112.

²⁶⁵ As above, 113.

²⁶⁶ JB Ojwang and E Kinama ‘woman-to-woman marriage: a cultural paradox in contemporary Africa’s constitutional profile’ (2014) 4 *Verfassung Und Recht in Uebersee* 427.

entering the institution of marriage to ensure linkage to his progeny as well as the reproductive role assumed by the woman.

There was also *de facto* recognition of the varied forms of the traditional African family and woman-to-woman marriages in pre-colonial Africa. The Chapter also identified a number of reasons why woman-to-woman marriage was compared to same-sex marriages of the West. One of the reasons was the comparison of the construction of family in Africa and its comparison with the Western family. When documenting the socialization of the communities in Africa, anthropologists and ethnographers undertook to write about the African family without contextualizing the unique motivation that underpinned the African society which was the propagation of lineage of the clans in the communities. Another issue was the assumption that African marriages were potentially monogamous, however, it was established that African marriages were predominantly polygamous. Further, an assumption was made that the state had a role to play in the regulation of marriages whereas in Africa, although marriages were recognized by political authorities in centralized societies, the regulation of marriage was left to the clan. Recognition of woman-to-woman marriages was ultimately affected by the introduction of Christianity through the missionaries and colonisation of Kenya by the British.

The characterization of African customary marriage and rationale for woman-to-woman marriage are discussed in greater detail in Chapter 3.

CHAPTER 3: WOMAN-TO-WOMAN MARRIAGE IN PRE-COLONIAL AFRICA

3.1 Introduction

This Chapter investigates woman-to-woman marriages in pre-colonial Africa with the aim of establishing the legal validity of this phenomenon in Africa. The Chapter discusses these marriages as a type of African customary marriage and expounds on the requirements for parties to enter into a valid customary marriage. Within these requirements, the Chapter critically analyses the specific requirements shared by almost all customary marriages ensuring their legal recognition by other African cultures and communities. The Chapter then delves into the incidence of these marriages in certain communities of West, East and Southern Africa, exemplifying the broad prevalence of woman-to-woman marriages. Women entered into woman-to-woman marriages for a variety of social and functional reasons. These reasons are outlined in detail in the latter parts of the Chapter, with a view of establishing woman-to-woman marriage as a significantly important and widespread institution in pre-colonial Africa.

Woman-to-woman marriage is a form of marriage between two women, predominantly found in Africa. These types of marriages were identified as marriages and not unions as they met the requirements for African customary marriages and were practised in Africa before the advent of colonialism and still exist in modern day Africa.¹ However, with the modernization of African societies, woman-to-woman marriages are

¹ H N Nyanungo 'Female husbands without male wives: women, culture and marriage in Africa' (2014) *BUWA! A Journal on African Women's Experiences* 62 http://www.osisa.org/sites/default/files/female_husbands_without_male_wives-women_culture_and_marriage_in_africa.pdf (accessed 15 March 2016).

not as prevalent today as they had been in pre-colonial Africa. They are also socially less acceptable in Africa today, due largely to their inevitable association with the prominent 21st century phenomenon of same-sex marriages in the West, concluded between persons in same-sex relationships, which have become notorious especially in a context of globalisation, characterised by omnipresent international media coverage.

Documented texts of the traditional institution of African marriage by ethnographers and anthropologists written about Africa in the late 18th and 19th centuries routinely compared the African institution of marriage with the Western conceptualization of marriage, and particularly the European concept thereof.² This comparison was attributable to the predominance of Western anthropologists who studied the marriage rites of pre-colonial Africa. The question that should have been considered when undertaking this analysis was whether the conception of marriage in the African social system could be compared to the concept of marriage in European societies. One of the major misconceptions was the assumption that the conjugal relationship formed in the Western marriage was comparable to the African marital kinship set up in African marriages.³ The traditional African marriage had significant distinguishing requirements such as bride wealth, polygamy, polygyny and patrifocal residence,⁴ which were not present in Western European marriages.

There is a distinct tension between African customary law and the introduction of English common law that plays out quite clearly in the discourses on colonialism in Africa and in Kenya, as well as the court cases that were considered during this period.

² M Epprecht “‘Bisexuality’ and the politics of normal African ethnography” (2006) 48 *Anthropologica* 187.

³ A Phillips Survey of African marriage and family life (1953) xi.

⁴ D Kayongo-Male & P Onyango *the sociology of the African family* (1984) 4.

Chirayath, Sage and Woolcock⁵ note that there are challenges where informal state systems such as customary law, which evolve organically, are forced to subsist with statutory legal systems that developed in other states. Oppressive regimes such as colonial rule often discount customary law as archaic and undeveloped and therefore lacking in legitimacy. Customary laws are often deemed to be ‘incompatible with economic, social and civil rights, and dominant notions of ‘justice’ attributed to the western notions of law’.⁶ This presumption is based on the sometimes-discriminatory practices against women in issues such as land ownership. It is clear, however, that there are customary practices that are laudable for their efforts to integrate women into traditionally patriarchal systems, such as woman-to-woman marriage.

The tension and disregard for customary practices can be observed in the 1919 South African case of *Guma v Guma*,⁷ where the Native Appeal Court was required to establish if a man could marry his deceased brother’s wife, whom the brother had married under customary law. The prevailing common law forbade such a marriage as criminal incest. Judge Warner held that the term marriage, although used as a singular term in both the common law and the native law of the country, comprised two fundamentally different institutions, as the two laws and the nature of the rules governing them, were fundamentally different.⁸ Judge Warner identified some of the essential characteristics of

⁵ L Chirayath, C Sage & M Woolcock ‘customary law and policy reform: engaging with the plurality of justice systems’ (2005) paper for the *World Development Report 2006: Equity and Development*. <http://documents.worldbank.org/curated/en/675681468178176738/pdf/336550Customary1Law01WDR060bkgd0paper1.pdf> (accessed 7 January 2018). See also JB Ojwang, *JB the common law, judges law: Land and environment before the Kenyan Courts* (2014) on the tension of the plurality of Kenya’s legal system and application of law.

⁶ L Chirayath et al (n 5 above) 4.

⁷ *Guma v Guma* 1919 NAC 220 223 224.

⁸ M Chanock *the making of South African legal culture 1902-1936: Fear favour and prejudice* (2001) 312.

native marriage as its ‘casual and one-sided’⁹ nature, the concept of polygyny as a feature, and the fact that its dissolution could be initiated by any one of the parties.¹⁰ He also stated that there had to be the exchange of cattle, assumedly, constituting the bride price, as a key requirement for obtaining a wife.

In Kenya, there were similar negative reflections on the application of customary law. The case of *R v Amkeyo* (1917)¹¹ dealt with the testament of a wife in court that the defendant has and was in possession of stolen property. What is significant in this case is the manner in which the Judge dismissed customary marriages. Justice Hamilton stated that

the use of the word “marriage” to describe the relationship entered into by an African native with a woman of his tribe according to tribal custom is a misnomer which has led in the past to a considerable confusion of ideas ... The elements of a so-called marriage by native custom differ so materially from the ordinary accepted idea of what constitutes a civilized form of marriage that it is difficult to compare the two.¹²

The Justice did not consider the payment of bride price or any subsequent recognition of a customary marriage as constituting a legally valid marriage. It is a reflection of a disparaging attitude towards the application of African customary law as a source of law as well as the recognition of the customs of the African people. In *R v Mwakio* (1932),¹³ the Judge states that the matter of determining if the wife could testify

⁹ *Guma v Guma* (n 7 above) 222.

¹⁰ As above.

¹¹ *R v Amkeyo* (1917) 7 EALR 14.

¹² Bitala ‘registration of customary marriages: 100 years after *R v Amkeyo*’ (2017) <http://bitalaadvocates.com/thedeuteronomy/2017/06/23/registration-customary-marriages-100-years-r-vs-amkeyo/> (accessed 5 January 2018).

¹³ *R v Mwakio* (1932), 14 KLR 133.

against her husband would be infinitely easier if she was considered a ‘concubine,’¹⁴ rather than a wife as the parties had married under customary law. This clearly illustrates the disdainful and dismissive manner in which the Court dealt with the recognition of marriage performed under customary law during the height of colonization. However, as discussed in detail in Chapter 4 on judicial decisions, the position of the Court began to progressively recognize and appreciate the application of African customary law as it was more capacitated to deal with challenges arising from customary practises that were not envisioned in English common law. Woman-to-woman marriages in Africa manifested themselves as a form of customary marriage. There were various ways in which parties could enter into a customary marriage. Parties could enter into this institution by capture, purchase and or by choice.¹⁵ In most of these customary marriages, there were certain established requirements that enabled the parties to enter these unions.¹⁶ Although these requirements were not absolute, in most communities they formed an integral part of the marriage. Woman-to-woman marriages also had distinct rationales for the union. The marriage ceremony took place in stages exhibited through ceremonies for different communities in the various parts of Africa.

This Chapter approaches the institution of the African customary marriage by establishing the general requirements for customary marriages. The Chapter establishes some of the differences between matrilineal and patrilineal communities as well the impact this distinction has on the requirements of customary marriages.

¹⁴ In the ruling, the Judge states ‘it is unfortunate that the word wife and marriage have been applied in this connection. If only the woman party had been described as a concubine or something of the sort, the question could never have arisen’.

¹⁵ African marriage <http://www.africanmarriage.info/> (accessed 29 November 2016).

¹⁶ E Cotran *Casebook on Kenya customary law* (1987) 30.

Against this background, the Chapter then focuses on the rationales for woman-to-woman marriage. As there are various reasons why these marriages took place, the Chapter analyses the social and functional aspects of the reasons why women chose to enter woman-to-woman marriages. The Chapter analyses woman-to-woman marriages in Africa, illustrating the prevalence of the practice in pre-colonial Africa and reveals that it was regulated rather than prohibited and an accepted institution in over forty cultures in pre-colonial Africa. It looks at the aspects of woman-to-woman marriage more generally within a cross section of cultures with an aim to understand the purpose of this institution and its co-relation with the conceptualization of male-to-female marriage in the African culture and the usurpation of gender roles in African woman-to-woman marriage. The incidence of these marriages in various part of Africa is outlined to gauge the prevalence of woman-to-woman marriage in the continent with a view illustrating its importance in pre-colonial Africa and prevalence of the custom. Subsequently, in narrowing to the approach to Kenya, woman-to-woman marriages are analysed in the context of their rationale in communities to understand these marriages. The conclusion of the Chapter provides a critical analysis of these marriages to present them as a normal and accepted institution in pre-colonial Africa.

3.2 Requirements of African customary marriages

African or customary marriages were considered one of the most important customs, if not the most important custom, in many African cultures.¹⁷ Customary marriages were a unique and complex institution and very different from Western marriages. African marriage customs were unique and different from their Western counterparts as they included ‘polygynous unions, child betrothals, child marriages and visiting unions in

¹⁷ African marriage <http://www.africanmarriage.info/> (accessed 29 November 2016).

which the spouses do not cohabit'.¹⁸ The family unit in African society differed from the family unit in Western society. In the traditional or 'classical' Western family unit, the family consisted of two parents and their children, and this formed the elementary family.¹⁹ In the African context, by contrast, the practice of polygyny was widely permissible, allowing a man to legally take more than two women as his wives.²⁰ The children from these unions were legally recognised as being offspring from legitimate marriages.²¹

In African customary marriages, it was important to differentiate between what were cultural ceremonies and what constituted the requirements of the marriage. The marriage celebration was gradual and had several ceremonies that were carried out over time culminating in the actual cohabitation of the couple. However, there was no formal event that marked the commencement of a customary marriage. These cultural ceremonies united the two families in stages and provided opportunities for the parties to engage their relatives and the community in the ceremony.²²

Reflecting about the requirements of customary marriages, Meekers wrote that the 'African marriage is a complex institution that proceeds by stages, most of which are characterised by the performance of prescribed requirements'.²³ Van de Walle described the African customary marriage as 'a process composed of several stages between

¹⁸ D Meekers 'The Process of marriage in African societies: A multiple indicator approach' (1992) 18 *Population and Development Review* 61.

¹⁹ LP Mair 'General characteristics of African family and marriage' in A Phillips (ed) *Survey of African marriage and family life* (1969) 1.

²⁰ Mair (n 19 above) 1.

²¹ As above.

²² African marriage (n 17 above).

²³ Meekers (n 18 above) 61.

preliminary requirements and full acceptance of the couple as a social unit'.²⁴ In his writing on customary law, Cotran established some requirements as the essentials of marriage as he understood them from the traditional cultural African ceremonies.²⁵ He organised these requirements into what he termed as the legal essentials of a valid marriage.²⁶ He noted that although the essential requirements of marriage were derived from the Kikuyu tribe, these requirements were 'repeated for all ethnic groups'.²⁷ It is also prudent to note that although Cotran established them as essential requirements, some of the requirements identified were not critical to the validity of the marriage and may or may not have taken place. However, a cross-sectional analysis of some communities in West, East and Southern Africa provided a general indication that the requirements were pervasive in these cultures.

Of these identified requirements, there was one requirement that seemed to be present in most of the communities that practised the traditional marriage; the payment of bride price. The other requirements included the capacity of the parties to enter the union, usually through age or a rite of passage, the option of the choice of partner- more often an option given to the man, and the entrance into cohabitation.

The most documented aspect of the African marriage and probably the most misleading about its purpose in the customary marriage was the payment of bride price.²⁸

²⁴ E Van De Walle 'Marriage in African censuses and inquiries' in W Brass (ed) *The demography of tropical Africa* (1968) 183 238.

²⁵ Cotran (n 16 above) 30.

²⁶ As above.

²⁷ As above.

²⁸ D Nsereko 'The nature and function of marriage gifts in customary African marriages' (1975) 23 *American Journal of Comparative Law* 682.

It has been defined as the ‘transmission of property at marriage’.²⁹ It was one of the requirements of undertaking the customary marriage that Cotran considered ‘the requirement that created a legally-binding marriage’.³⁰ For the marriage union to be considered by the girl’s family, it was customary for ‘property to be given or delivered by or on behalf of a prospective bridegroom to the relatives of the prospective bride. This property is variously referred to as “bride price”, “bride-wealth”, “marriage-consideration” or “marriage-payment”’.³¹

The practice of payment of bride price has been fraught with contention and has been misunderstood in many cultures to mean the literal purchase of the bride. It is apparent that this is an evident misconception of the role of bride price in an African marriage. The misconception was widely held by Western ethnographers, and anthropologists that paying of bride price was equivalent to purchasing a wife.³² The accusation that an African customary marriage is nothing but a ‘woman purchase’,³³ has been made by mostly writers who did not understand its implication in a customary marriage and thus they likened aspects of customary marriage to a business transaction.³⁴ The concept of the payment of bride price has been subject to contentious debate since the early 20th century where the discussion focused on what was the best term to use to

²⁹ J Goody ‘Bride wealth a dowry in Africa and Eurasia’ in J Goody & SJ Tambiah(eds) *Bride wealth and dowry* (1973) 1.

³⁰ Cotran (n 16 above) 30.

³¹ Nsereko (n 28 above) 682.

³² EE Pritchard ‘An alternative term for “bride price”’ (1931) 31 *Man* 36.

³³ Nsereko (n 28 above) 683.

³⁴ PE Lovejoy & T Falola (eds) *Pawn ship, slavery, and colonialism in Africa* (2003) 1. Anthropologists such as Lovejoy and Falola have described bride price as a form of economic purchase.

describe the property transfer that occurred during African marriages.³⁵ This contention was described as a ‘theoretical malaise that afflicts economic anthropology’³⁶ as it enumerated the way Western anthropologists dealt with any transaction encountered in a ‘primitive economy’³⁷ that had characteristics resembling some Western practices. The payment of bride price was erroneously viewed by anthropologists such as Raglan, as an economic transaction to secure a marriage³⁸ or compared to ‘pawn ship’,³⁹ which was essentially a term to describe ‘a legal form of “social and economic dependency”’.⁴⁰ Conversely, Evans-Pritchard described it as having other important social functions,⁴¹ for example as a form of recompense to the family of the bride for the loss of the girl, as a show of good faith and intentions by the groom to the family of the girl, or to solidify the familial ties formed between the two families upon the marriage or to legitimize the children who were born in the marriage.⁴² The second misconception was that the wife was a servant or laboured for her husband. These misconceptions have been used many times to assert the primitive nature of the African cultures and the people who practice these cultures.⁴³ The use of the term “bride price” is erroneous and harmful to describe

³⁵ R Gray ‘Sonjo Bride-price and the question of African “wife-purchase”’ (1960) 62 *American Anthropologist* 34.

³⁶ G Dalton ‘Brief communication: “bride wealth” vs “bride price”’ (1966) 68 *American Anthropologist* 732.

³⁷ Dalton (n 36 above) 732.

³⁸ Raglan ‘Bride-price’ (1930) 40 *Man* 92.

³⁹ Lovejoy & Falola (n 34 above) 1.

⁴⁰ Lovejoy & Falola (n 34 above) 1.

⁴¹ Pritchard (n 32 above) 36.

⁴² Dalton (no 36 above) 732.

⁴³ S Tamale ‘A review of tommy boys, lesbian men and ancestral wives: female same-sex practices in Africa’ R Morgan and S Wieringa (eds) *Tommy boys, lesbian men and ancestral wives: female same-sex practices in Africa* (2005) 115.

certain marriage customs of some African societies as economic transactions akin to the sale and purchase of property'.⁴⁴ Radcliff-Brown put it well when he wrote:

The idea that an African buys a wife in the way that an English farmer buys cattle is the result of ignorance, which may once have been excusable but is so no longer, or of blind prejudice, which is never excusable in those responsible for governing an African people.⁴⁵

Paying of bride price was merely a form of appreciation and gratitude to the family of the woman and was recognised as a way of paying tribute to the family that had taken care of the woman. It was not a measure of recompense for what the family had lost, nor was it a way of buying the woman from her family. Certain communities looked at the financial gain that they would get from the bride price, but majority of the communities did not consider it a sale. The payment of bride price was considered a small measure of appreciation that the man shows to offer some physical consolation to the family of the woman. There was no other better way to show gratitude to the family for bestowing the man with the great gift of their daughter as his wife.⁴⁶

In Kenya, the payment of the dowry is recognized at one of the legal essential requirement for the recognition of a customary marriage among all the Kenyan communities except the Elgeyo, Marakwet and the Tugen.⁴⁷ Amongst the Kikuyu community, the payment of the bride price was known as the *ruracio* whereas amongst the Luhya, it was known as *bukhwi*. Amongst the Maasai it is called the *isayieta* and amongst the Luo it is called *chulo ayie*.

⁴⁴ Gray (n 35 above) 732.

⁴⁵ AR Radcliffe-Brown 'Introduction' in AR Radcliffe-Brown & D Forde (eds) *In African systems of kinship and marriage* (1950) 47.

⁴⁶ GJ Wanjohi, 'African marriage, past and present' Chapter 5 'the institution of bride price in Africa' Council for research in values and philosophy <http://www.crvp.org/book/Series02/II-10/CH5.htm> (accessed 15 March 2016).

⁴⁷ E Cotran *Restatement of African law, Kenya, volume 1: the law of marriage & divorce* (1968) 125 134.

There have been numerous cases that have established this criterion as a requirement of a customary marriage. In the case of *Gertrude Nelima Nalwa v Francis Nalwa* (1972),⁴⁸ the issue before the District Magistrate Court was whether the defendant was actually married to the plaintiff, as the defendant claimed that the plaintiff was a girlfriend with whom he cohabited in his home and had children. Although the parties have indeed cohabited and had children, the Magistrate held that the absence of any form of dowry payment indicated that there was no marriage and did not award a maintenance orders to the plaintiff. In this case, the Magistrate was clear that one of the essential requirements in a union between two people in Kenya was the payment of dowry. It was not necessary to perform any other ceremony apart from the payment of bride price for there to have been a marriage between two people. Neither the existence of children nor the period of cohabitation mattered in this instance. Notably, this is an older judgment and recent developments in statute had given rise to other considerations. The case of *Amulan Ojwang v Edward Ojok* (1971)⁴⁹ established that there can be said to be no marriage unless the bride price is paid in full. Although bride price was considered as a token of appreciation, case precedent as well as prevalence in most cultural has secured the requirement as one of the most essential elements of an African customary marriage.

The paying of bride price was carried out in various ways by different communities. One of the elements of paying bride price was that although the primary responsibility of presenting bride price to the family of the girl, was on the prospective bridegroom, he was escorted by his family members (both nuclear and external) and clansmen. It emphasised the position and importance of the man in the clan, the unity of the community and more significantly, the importance of the marriage and family unit to

⁴⁸ *Gertrude Nelima Nalwa v Francis Nalwa* (1972) Maintenance suit 7 of 1972.

⁴⁹ *Amulan Ojwang v Edward Ojok* (1971) HCB 11.

the clan and the community.⁵⁰ Amongst the Kung tribe in Southern Africa, there was no payment of bride price, instead, the prospective husband worked for the parents of the bride for an identified period, while the bride was removed from her parent's residence before the actual finalisation of the marriage rites.⁵¹ When the husband completed the time in service to her parents, he collected his wife and moved her to his permanent residence. In certain communities, bride price was paid both by the groom and the bride. Amongst the Aboure of Ivory Coast, a small amount of bride price was paid by the family of the groom, while the family of the bride was required to pay dowry.⁵²

Another requirement that took place in many of the tribes was the consideration of the capacity of the parties. The parties needed to have the attainment of the age of majority as a prerequisite to the marriage. In most communities,⁵³ any person who wanted to prepare for a customary marriage had to have achieved 'adult status'.⁵⁴ The attainment could be established either through the actual age of the party or the performance of rites of passage for both the male and female.

The age of consent for marriage for the girl was determined to be between 15 to 18 years of age.⁵⁵ In some instances, the first menstruation of the girl established capacity⁵⁶ and this occurrence signified that she was able to enter into marriage. In some communities, the girls had to undergo either a hardship, sexual instruction or certain

⁵⁰ Kayongo-Male (n 4 above) 5.

⁵¹ As above.

⁵² As above.

⁵³ This was evident amongst the Southern African bantu communities.

⁵⁴ Kayongo-Male (n 4 above) 5.

⁵⁵ Mair (n 19 above) 10.

⁵⁶ See generally Kayongo-Male (n 4 above) 5. Amongst the Fulani tribe in West Africa, for example, 'girls were often betrothed before their first menstruation'.

procedures such as female genital mutilation.⁵⁷ In other communities, the intended bride would have had to live in seclusion, undergone instruction and ritual practices, received strengthening medicines and she would have also had to behave as a bride would during her first days in her husband's home.⁵⁸ Exceptions were sometimes made for girls to prepare to enter marriages when the rite required a betrothal or where the girl would have reached adult status by the time of the marriage ceremony.⁵⁹

For the men, the actual age of the boy was considered in some communities, but predominantly, they were deemed to be of age if they had undergone the rite of circumcision.⁶⁰ Men would sometimes marry at an older age due to the need to pay the bride price. This would require them to either take the time to gather the resources to pay the bride price or to complete their term of service to the family of the bride.⁶¹ This ceremony took place through verbal agreements between the parents of the parties. There may also have been the exchange of cows as a sacrifice or promise to the family of the girl. In some communities, the boys would have to undergo tests of courage and endurance to achieve adulthood.⁶² Another requirement identified was the consent of the parties or freedom of choice of partner. The freedom of choice as a practice, however,

⁵⁷ See generally Mair (n 19 above) 10. Amongst the Sotho community in Southern Africa, girls were considered to have reached adulthood, if they underwent collective initiation ceremonies that entailed 'infliction of hardships, sexual instruction, and magical rites to ensure fertility, and operations, not always on the sexual organ'.

⁵⁸ Amongst the Pondo and some tribes in the Eastern region of West Africa. See generally MM Hunter 'The effects of contact with the Europeans on the status of the Pondo women' (1933) 6 *Africa* 259 276.

⁵⁹ R Dyson-Hudson & D Meekers 'The universality of African marriage reconsidered: evidence from Turkana males' (1996) 35 *Ethnology* 301.

⁶⁰ Mair (n 19 above) 10.

⁶¹ Kayongo-Male (n 4 above) 5.

⁶² This was a practise amongst the Tswana in Southern Africa.

was evident more for the men rather than the women.⁶³ The freedom of choice was apparent in matrilineal communities whereas, in patrilineal communities, the woman's consent was seldom sought.⁶⁴ It was possible for the girl to be betrothed without her consent.⁶⁵

However, this should be contrasted with the practise of *Ukuthwala*, which is a form of abduction or forced marriage practised by some communities in South Africa.⁶⁶ In these types of marriages, in some cases the girl's parents may secretly arrange with the abductor or his family for the marriage to occur and are complicit on the abduction whereas in other instances neither the parents of the girl or the girl herself have any knowledge of the abduction.⁶⁷ However, in both scenarios the girl was not required to give consent nor was she informed of the intention to enter into marriage. Further, there was a general erroneous presumption by Western anthropologists and ethnographers that the girl was secretly complicit and was aware of the intentions of her parents or the intentions of her abductor. However, this theory was discredited by African anthropologists such as Soga.⁶⁸

In other instances, this practice of obtaining the consent of the parties was observed as a restatement of the family's commitment to the union especially amongst the tribes where betrothal had been undertaken before the parties attained the age of majority. In some communities, the man usually chose his bride and needed to secure her

⁶³ Kayongo-Male (n 4 above) 5.

⁶⁴ See generally CK Meek *Tribal studies in Northern Nigeria* (1931) 152. Patrilineal communities were mostly found in the West Africa.

⁶⁵ G Wagner *the changing family among the Bantu Kavirondo* (1939) 408.

⁶⁶ See generally K Rise 'Ukuthwala in rural South Africa: abduction marriage as a site of negotiation about gender, rights and generational authority among the Xhosa' (2014) *Journal of Southern African Studies* 381 399.

⁶⁷ Rise (n 66 above) 388.

⁶⁸ See generally JH Soga *the AmaXhosa: life and customs* (1932).

consent before the marriage.⁶⁹ In patrilineal communities, the parents of the parties would arrange a betrothal between the first cousins as they had a claim to the relative as a possible partner to their child.⁷⁰ Men and boys had more freedom to choose their partners⁷¹ but in some instances, others were allowed to orchestrate a marriage over the man's preference.⁷² It was also possible for the parents of the parties to prevent the marriage if they disagreed with the choice of their son or daughter.⁷³ In matrilineal communities, the parents and the age mates of males who wanted to marry looked for suitable girls in the community and created a list.⁷⁴ They would then check girl's background to establish her suitability as a mate. After settling on a mate, they quietly approached the girl's family and negotiated the girl's bride price. This practice often occurred without the knowledge or consent of the man or the girl.⁷⁵ In other matrilineal communities, male cousins could marry their younger female cousins and uncles, their nieces as this ensured more offspring, as well as retention of property in the kinship.⁷⁶

Notable cases that have affirmed this requirement include the case of *Mwagiru v Mumbi* (1967),⁷⁷ where the plaintiff sought to establish that there was a valid marriage between himself and the defendant. In this case, the defendant had not given her consent

⁶⁹ This was evident in tribes in East Africa.

⁷⁰ This was common amongst the Bemba community of Central Africa, see Mair (n 19 above) 81.

⁷¹ This was more evident amongst the communities in Central Africa in communities such as Kongo, Ila and Lamba.

⁷² EW Smith & A Dale *the Ila-speaking peoples of Northern Rhodesia* (1946) 46.

⁷³ This was possible amongst the Yao and the Ngoni of Central Africa.

⁷⁴ This was evident amongst the Igbo society in Nigeria.

⁷⁵ K Okonjo 'Aspects of continuity and change in mate-selection among the Igbo West of the River Niger' (1992) 23 *Journal of Comparative Family Studies* 339 360.

⁷⁶ AB Scott-Emukapori 'The mutation load in the African population' (1974) 26 *American Journal of Human Genetics* 674 682.

⁷⁷ *Mwagiru v Mumbi* (1967) EA 639.

and had not been present for the ceremony. The High Court held that there was no marriage as the consent of the bride is necessary for a marriage to be considered as valid.

The payment of bride price or dowry was an essential part of any customary marriage. In woman-to-woman marriages, the payment of bride price was essential in the marriage to signify the bond of marriage between the two parties. It was an established practice that occurred in all woman-to-woman marriages in all the tribes. It was a clear representation that woman-to-woman marriages were considered as customary marriages under customary law.

3.3 Rationale of woman-to-woman marriage in pre-colonial Africa

Woman-to-woman marriage was considered a valid customary marriage due to the fact that one of the essential requirements included the consent of the parties, the payment of bride price as well as the cohabitation of the women after the formalization of the marriage. The rationale of woman-to-woman marriage further exemplifies this as a customary marriage as well as an illustration of the progressive feminist ideologies adopted by African communities.

African construction of customary marriage was traditionally patriarchal. However, there were instances where women took leadership roles and appropriated male roles in society. In the early 17th century, in the West African Ndongo Kingdom,⁷⁸ there was a leader renowned as a fearsome warrior for successfully resisting colonisation by the Portuguese for forty years. Her name was Nzinga. It was documented that Nzinga was not considered a queen, but that she was regarded rather as a king and dressed in male attire. Her harem consisted of young men who dressed as women and were considered to be her 'wives'.⁷⁹ In the colonial Buha tribe of Western Tanzania, women 'behaved like

⁷⁸ The Ndonga Kingdom was a Kingdom found in Southern Angola.

⁷⁹ SO, Murray & W Roscoe *Boy-wives and female-husbands: Studies in African homosexualities* (1998) 2.

men⁸⁰ to have better control over their lives in a society dominated by men.⁸¹ Amongst the Igbo women of colonial Nigeria, Achebe styled some of the characters in his writings on the Nsukka Igbo women and particularly the ‘female sons, female traders and female kings’.⁸² In the early 20th century, King Ahebi Ugabe was an Igbo woman who used her femininity to rise to power using the British colonial officials and local kings. She was reputed to be a formidable and powerful force of power. According to Achebe, Ahebi used the Igbo’s ‘flexible gender system to establish herself as a ruler whose mystical powers were so extraordinary that they lived on beyond her death’.⁸³ Ahebi gained power and position that was only given to men and crossed the gender roles that were in play in the community.⁸⁴

Although it may be contended that woman-to-woman marriage took place in mostly matrilineal societies, this is not necessarily the case as the above examples serve as a reference point for the current placement of sex and gender dynamics in many African cultures. Woman-to-woman marriage took place in both matrilineal and patrilineal societies but was more clearly manifest in matrilineal communities. Achebe and Amadiume agreed that the gender dynamic in the Igbo tribe was fluid and in the ‘flexible Igbo gender system, such women were constructed as male’.⁸⁵ Illustrations of

⁸⁰ M Lovett ‘“She thinks she's like a man”: Marriage and (de)constructing gender identity in colonial Buha, Western Tanzania, 1943-1960’ (1996) 30 *Canadian Journal of African Studies* 52.

⁸¹ Unpublished: M Starace ‘“She is my husband”: Navigating discourses on relatedness, reproduction, gender and Christianity among the Simbiti of Tanzania’ unpublished MPhil thesis, African Studies Centre Leiden, 2009.

⁸² F White ‘Gender and power (Review of *The Female King of Colonial Nigeria: Achebi Ugabe* by N. Achebe)’ (2012) 29 *The Women's Review of Books* 30.

⁸³ White (n 82 above) 30.

⁸⁴ As above.

⁸⁵ I Amadiume *Male daughters, female-husbands: Gender and sex in an African society* (1987) 91.

the usurpation of gender roles and the interchangeability of patriarchal and matriarchal leadership were common in many African communities. Woman-to-woman marriage ascribed the gender role of men to women and altered the women's position within the kin and the tribe. There were many communities with the woman-to-woman marriage practice that were matrilineal, where women were the heads of the homes, communities and in some cases Kingdoms.

The definition of the term *female husband*, though used widely to describe the partner who pays the bride price in woman-to-woman marriage, has been fraught with contention over the assignation of the male gender. Anthropologists such as Leakey⁸⁶ and Mackenzie⁸⁷ use the term when describing woman-to-woman marriage (*uhiki*) in the Kikuyu culture. Oboler uses the term to describe the woman who becomes the 'social and legal father of her wife's children'.⁸⁸ The term is also employed by Evans-Pritchard⁸⁹ and Herskovits,⁹⁰ illustrating instances where the woman who pays the bride price and takes on the wife -a gender defined the role of being the male and assigns the characteristics of the male in the community on the *female husband*. Despite the obvious linkages of the woman's role in the procuring of the marriage and the gender respect of having acquired male characteristics, there are instances where the women take pride in being women who can take wives and do not see it necessary to appropriate the male

⁸⁶ LS Leakey *the Southern Kikuyu before 1903* (1977).

⁸⁷ F Mackenzie 'Gender and land rights in Murang'a district, Kenya' (1990) 17 *Journal of Peasant Studies* 609.

⁸⁸ RS Oboler 'Is the female-husband a man? Woman/woman marriage among the Nandi of Kenya' (1980) 19 *Ethnology* 69.

⁸⁹ Pritchard (n 32 above) 36.

⁹⁰ MJ Herskovits 'A note on 'woman marriage' in Dahomey' (1937) 10 *Africa* 335 338.

gender. Krige⁹¹ and Amadiume⁹² contend that the *female husband* may or may not take on a male role. Amadiume goes on to assert that the institution is a pro-female institution because it grants women rights that they would not ordinarily have in the community.⁹³ In the Kikuyu community, the women resented being referred to as the ‘males’ in the relationship. The woman procuring the marriage refers to her spouse as her ‘co-wife’ showing her obvious reluctance to being referred to as a husband. When discussing the gender roles in these marriages, Njambi and O’Brien contend as follows:⁹⁴

[T]he terms “*female husband*” should be reconsidered on the grounds that the male connotation of “husband” cannot be so easily disposed of; just as the term “wife” conjures an association with “female,” so does “husband” with “male”. Especially in contexts where gender roles are ambiguous, this implicit association will easily mislead readers to impose Western presumptions upon woman-woman marriages. Thus, in our view, efforts to theoretically disassociate gender from such role-centred terms — like “husband” and “wife” in this instance — imposed originally by Western researchers in colonial contexts, will in a practical way continue to impose a male/female dichotomy.⁹⁵

On the gender role propagation in woman-to-woman marriage, Cardigan identifies two approaches that encompass the rationales for the marriage: the social construction and the functional approach. Cardigan’s proposal for a wider spectrum of application of woman-to-woman marriage aimed to ‘understand women’s significance in the social structure’.⁹⁶ This spectrum was also alluded to by Greene in her discussion on gender

⁹¹ EJ Krige ‘Woman-marriage, with special reference to the Lovedu-its significance for the definition of marriage’ (1974) 44 *Africa* 11.

⁹² Amadiume (n 85 above) 91.

⁹³ Amadiume (n 85 above) 91.

⁹⁴ WN Njambi & WE O’Brien ‘Revisiting woman-woman marriage: Notes on Gikuyu women’ (2000) 12 *National Women's Studies Association Journal* 1 23.

⁹⁵ Njambi and O’Brien (n 94 above) 15.

⁹⁶ JR Cardigan ‘Woman-to-woman marriages: practices and benefits in Sub-Saharan Africa’ (1998) 29 *Journal of*

roles in African societies.⁹⁷ She enumerated its insights into the construction of the gender and its importance in propagating the gender role stereotype in the woman-to-woman marriage.

These rationales were critically taken into consideration before choosing to undertake the union. This was true for both the *female husband* and the wife, but more so for the society as it fulfilled a specific function for the community. Under the functional approach, the rationales for these marriages were accepted for specific and singular purposes, whether it was for the propagation of progeny, acquisition of wealth and property or conversely to ensure inheritance of property is kept within households or clans. However, it has been ‘proposed that woman-to-woman marriage attracts different types of women and at different periods in their lives’.⁹⁸ Under the social construction approach to these marriages, the rationales were that the marriages are contracted for ‘social, personal reasons such as the division of labour and economic reasons’,⁹⁹ as well as companionship.

3.3.1 Enhancement of kinship ties within the clan

Woman-to-woman marriages in certain tribes were undertaken to enhance the *female husband's* kinship ties within the community, particularly in patrilineal communities where gender roles held significant importance in customs such as paying of bride price and roles of women and men in the communities. Kinship ties created in these unions

Comparative Family Studies 90.

⁹⁷ B Greene ‘The institution of woman-to-woman marriage in Africa: a cross-sectional analysis’ (1998) 37 *Ethology* 399.

⁹⁸ C Obbo ‘Dominant male ideology and female options: three East African case studies’ (1976) 46 *Africa* 371.

⁹⁹ Obbo (n 98 above) 371.

advanced the communities' acceptance of the woman as filling the traditional male role in the community by her taking of a wife.

Reflections such as '[t]he institution of woman-marriage indicated either that a woman filled a typically male-occupied gender position (as an achieved or ascribed status) or that the manipulation of kin structures via woman-marriage secured a vacant gender position',¹⁰⁰ and similar reflections of this nature, continue to propagate and arrogate gender roles to African kinship and social, organizational structures that essentially were adaptable in African cultures. With regards to the consideration of the construction of sex and its malleability in woman-to-woman marriage, Greene said the following:

The construction of gender was the construction of a social identity that could be ascribed or achieved through the conceptual roles of male and female; these roles were available to either sex as a means to maintain and expand the kin structure. The conceptual male and female were neither static nor exclusive: gender positions existed that were traditionally occupied by male members of the kin structure, though this did not exclude women from being chosen or born into a typically male-occupied gender position.¹⁰¹

Kinship practices were part of the fabric of cultures in Africa and had characteristic qualities in the unique kinship practices that served to immediately identify a culture.¹⁰²

It is also important to note that the kin relationships within clan that presented stratified roles of the man and the woman in the household and in the society, were fluid. Although woman-to-woman marriage in many communities reflected the usurpation of the male role by the woman, there were myriad of gender interactions that illustrated that the gender roles in the communities were quite flexible.

¹⁰⁰ Greene (n 97 above) 399.

¹⁰¹ As above.

¹⁰² Cardigan (n 96 above) 89.

‘Woman-marriage was a logical outgrowth of creative kinship practices characteristic of African kin structures’.¹⁰³ Greene goes on to state that it ‘was an alliance of kin groups materially and ritually symbolized by bride wealth laws; each society had acceptable standards and particular rituals to guide the kin groups involved’.¹⁰⁴ In Greene’s elaboration of kinship, she noted the rites of kinship as being central to the interaction of social groups and pointed out that marriage achieved the same purpose.¹⁰⁵

It would also be remiss not to discuss the concept of gender roles ascribed to men and women in traditional African societies. The idea of patriarchy played an important role in woman-to-woman marriage as it created the basis for the institution. The need to appropriate masculinity was due to the entrenchment of patriarchy and the importance placed on it in social and cultural beliefs of communities.¹⁰⁶ While most traditional African communities were patrilineal, enforcing stricter rules of superior masculinities, there were quite a number of matrilineal cultures.¹⁰⁷ Obbo presents that, although matrilineal leadership was not often found in African communities, it should still be treated as a structure of kinship to establish the background of the understanding of woman-to-woman marriage.¹⁰⁸ Obbo asks two questions: ‘[d]oes the payment of bride wealth necessarily mean that the woman is playing a man’s role? Or does it represent the interference of the uterine element into the patrilineal descent structure?’¹⁰⁹ She goes on to reflect that the children in women-to-women marriages get their social position

¹⁰³ As above, 395.

¹⁰⁴ As above, 396.

¹⁰⁵ Starace (n 81 above)34.

¹⁰⁶ KC Nwoko ‘Female-husbands in Igbo land: Southeast Nigeria’ (2012) 5 *Journal of Pan African Studies* 72.

¹⁰⁷ Meekers (n 18 above) 71.

¹⁰⁸ Obbo (n 98 above) 372.

¹⁰⁹ As above, 384.

through their mother and that children who are from the same mother are more closely related than those with the same father suggesting complementary filiation rather than patriliney. She then states as follows:

If we argue that woman marriage is an 'institution by which it is possible for a woman to give bride wealth for, and marry, a woman, over whom and whose offspring she has full control, delegating to a male genitor the duties of procreation'...then it becomes clear that woman marriage can operate primarily in societies where the rights in genitricem are transferred at marriage so that the social status of the children is assured. In other words, the right of the pater, the social father (or in the case of woman marriage the social benefactor) is more important than the rights of the genitor.¹¹⁰

There was a strong matrilineal system that provided checks and balances to the powers of patriarchy.¹¹¹ In some African cultures, matrilineal lines of the communities mediated conflicts.¹¹² The kinship organization of traditional cultural families, delineating them as either matrilineal or patrilineal served to engage the importance of complementary filiation.¹¹³ On the issue of complementary filiation, Meyer provides the linkage to the more emotional and individual nature of the kinship ties in marriage requirements. She states that 'the concept of complementary filiation is a more personal and emotional link that enables 'all members of a descent group to have 'different ties of complementary filiation from one another, but are undifferentiated on the basis of descent, so that complementary filiation gives an idiom to feelings of individuality and independence'.¹¹⁴ In woman-to-woman marriage where the community was patrilineal, 'children generally belong to the lineage of the man who paid the bride price whereas in matrilineal societies

¹¹⁰ As above.

¹¹¹ Amadiume (n 85 above) 91.

¹¹² As above.

¹¹³ F Meyer *the web of kinship Among the Tallensi: The second part of an analysis of social structure of a Trans- Volta Tribe* (1949) 358.

¹¹⁴ Meyer (n 113 above) 358.

children belonged to the mother's lineage'.¹¹⁵ This was important because, in the matrilineal cultures, the children born of the union in woman-to-woman marriage would belong to the *female husband's* lineage. In the context of woman-to-woman marriage this is significant because these marriages stressed 'the importance of inheritance and showed how, while one inherited a certain type of property and status inside the descent group, one also inherited different kinds of property and status along the lines of complementary filiation'.¹¹⁶

3.3.2 Legitimacy of children and their kinship

Woman-to-woman marriages served to legitimise children in the community and offer direct linkages of these children to certain lineages, whether in patrilineal or matrilineal communities. The issue that arose was the lineage and kinship of the children. Admittedly, there has been no research on the psychological impact on the children raised in woman-to-woman marriage; this may be an area where further research should be carried out to ascertain the challenges, if any, that are present for the children born in woman-to-woman marriages.

O'Brian 'isolated two major types of *female husband*: surrogate *female husbands* and autonomous *female husband*'.¹¹⁷ In some of these marriages, the *female husbands* became 'fathers to their heirs and increasing lineages'.¹¹⁸ and this allowed them to pass down their names to future generations. In many woman-to-woman marriages, the *female husband* is usually an elderly barren woman. With the woman-to-woman marriage in

¹¹⁵ Meekers (n 18 above) 71.

¹¹⁶ Anthropology 'Complementary filiation' <http://what-when-how.com/social-and-cultural-anthropology/complementary-filiation-anthropology/> (accessed 8 March 2016).

¹¹⁷ D O'Brien 'Female-husbands in southern Bantu societies' in A Schlegel (ed) *Sexual stratification: A cross-cultural view* (1977) 400.

¹¹⁸ Cardigan (n 96 above) 94.

these communities, there were two instances where a woman would take a wife. In the first instance, a barren woman could marry a younger woman with the aim of having children. In the second instance, a wealthy woman, who may or may not be married, would marry a young girl and allow her to have relations with a man, with the aim of getting children, who would then belong to the *female husband*.

When she married, her wife became her companion and so did any children in the relationship. It was also the case that the woman may be a widow or barren but this was not a requirement for the validity of the marriage. The *female husband* paid the bride price and would choose the genitor who would sire the children with her wife. In some instances, a barren woman would marry a young girl and allow her husband to have relations with the girl with an aim of bearing children. In this occasion, the woman is categorized as the surrogate *female husband*. It is important to note that with women marriages, in most cases, the offspring belonged to the *female husband* and therefore also to the lineage of her father and not that of their biological father denoting the shift in the gender roles in this type of marriage. The *female husband* takes the proverbial patriarchal role of provider and protector, and this meant that she could enjoy equal status with her male kin. Woman-to-woman marriage legalised the recognition of children born out of this marriage who would have been considered illegitimate in the community. They would have been unable to inherit. The *female husband* provided the gender role of a father to the children in the society and in this way, she could legitimise them.¹¹⁹

3.3.3 Retention of wealth and economic empowerment

Woman-to-woman marriages enabled the women to acquire and own property and to inherit or confer property to their offspring.

¹¹⁹ Nwoko (n 106 above) 78.

In the case of autonomous *female husbands*, woman-to-woman marriages have ‘been utilised by sonless wives and widows as a means of maintaining control over the resources of their individual houses which could not be possible under other circumstances’.¹²⁰ There are woman-to-woman marriages that are conducted by women who could not have male children. Consequently, they enter the marriage to secure their ability to retain their wealth. Some women entered these marriages when their male children left the homestead and abandoned their mothers. As they required assistance, they took wives to support them in managing their homes.¹²¹ Woman to woman marriage offered the *female husband* freedom to choose a companion of her choice unlike in the different-sex marriage she was previously. She was also able to perpetuate her lineage after the first male child is born to the union.

With autonomous *female husbands*, the specific characteristics were that the woman was usually a woman with wealth and she initiated the marriage to the younger woman who came to be known as the ‘wife’ upon the marriage. Cardigan reflects that the institution of woman-to-woman marriage could have been used by women ‘as a strategy that women use to further their social and economic positions in society’.¹²² In most of the woman-to-woman marriages, ‘the motivating drive behind it [was] the desire for prestige and economic power’.¹²³ Within the woman-to-woman marriage in cultures such as the Dahomey, there were two classifications of woman-to-woman marriage.¹²⁴ One classification was the ‘money with woman’ marriage where the woman paid bride

¹²⁰ BA Rwezaura *Traditional family law and change in Tanzania: A study of the Kuria social system* (1985) 143.

¹²¹ Rwezaura (n 120 above) 143.

¹²² Cardigan (n 96 above) 89.

¹²³ This is particularly true in the form which the institution of ‘woman marriage’ takes in Dahomey (An African kingdom which lasted from the 1600 to the 1800 and that was around the present-day country of Benin).

¹²⁴ Herskovits (n 90 above) 338.

price to get the wife. The woman who made this undertaking was usually a woman who, although being of superior social status, was still considered inferior to that of men's status in the community. To remedy this, the wealthy woman took a wife to elevate her status to equal that of the man in the community. 'Woman-marriage, in particular, gave some women advantages that normally accrued to men and formed an avenue for social mobility for the women who served as husbands'.¹²⁵

Herskovits writes that, amongst the Dahomey, 'women in a position of authority, such as petty chiefs or witch-doctors, who have been able to accumulate the necessary wealth, often obtain wives in this way, even though they may themselves be married in an ordinary way'.¹²⁶ However, amongst the Kikuyu community in Kenya, it was believed that the girl child or woman was someone of great value not only to the family but to the community as well. The man seeking to marry the girl was seen to be asking for something of great value and her leaving the homestead would be regarded as an immense loss to the family and the community.¹²⁷

3.3.4 Fostering freedom and independence

Woman-to-woman marriage fostered freedom and independence for women in most communities as the customs in patrilineal communities were confining with regard to their choice of partner and their status in society.

Both parties, the wife and the *female husband*, gained freedom as a consequence of the marriage arrangement. In some cases, taking a wife as a female, denoted the woman's status in society.¹²⁸ Some of these marriages were conducted by women who

¹²⁵ Greene (n 97 above) 396.

¹²⁶ Herskovits (n 90 above) 337.

¹²⁷ As above, 338.

¹²⁸ WN Eskridge, 'A history of same-sex marriage' (1993) 79 *Virginia Law Review* 1419 1420.

had wealth and were well respected in their communities. Her ability to take a wife gave her more independence, particularly in a patrilineal community.

The wife was not left behind in this arrangement. Being a wife in a woman-to-woman marriage was an esteemed position.¹²⁹ One of the roles of a woman in some communities was the propagation of the tribe through the bearing of children.¹³⁰ Consequently, when a wife performed this task she was exalted in the community. In some cases, the wife could choose her own sexual partners or gain freedom from a previous relationship. The wife had the freedom, in some communities, to choose her male company without any interference from her spouse. She was also able to have her home separately from her *female husband* and that too guaranteed her a measure of freedom. In some instances, the wife had been married before and had been in an abusive marriage or had been with a man who did not provide. Once she got into this marriage, she could procure a divorce from her husband through the bride price that was paid for her. This would enable her to return the bribe price paid for her by the former abusive husband. The wife also enjoyed a measure of social freedom as she was deemed to be in a relationship with a partner who, often, has wealth and is in a higher position in the community.

3.3.5 Securing of companionship

One of the least discussed rationales of woman-to-woman marriage in all the cultures is securing of companionship.

When the women got married, one of the benefits, and arguably the most overt, was the fact that the parties gained the company of one another. As in most

¹²⁹ Cardigan (n 96 above) 95.

¹³⁰ This is notable in the Kamba community of East Africa.

heteronormative marriages, the *female husband* took the time to identify the woman whom she wanted to marry. It would be logical to assume that she would not settle on a person she did not like. Although in some cultures, the *female husbands* and her wives lived in separate houses, these homes were in the same compound and therefore commonly interacted with one another. The purpose of the marriages also intimated to a relationship between the two women as the wife took on the role of nurturer to the *female husband*. Oboler contends that the parties often felt that they offered one another companionship in the woman-to-woman marriage.¹³¹ This was certainly true amongst the Kikuyu community where the need for companionship was openly discussed as one of the reasons for the woman-to-woman marriage. In one of the interviews that Njambi and O'Brian conducted, their subject speaks openly of her need for a companion in her old age.¹³²

The *female husband* or in some instances, the 'mother in law'¹³³ usually gained much from the marriage. In addition to the wealth and status, they also got a helper or helpers (in the case that she married more than once). The *female husband* was usually an older woman who upon payment of the bride price obtained a wife who would take care of her and her homestead. This relationship was not one of master and servant as has been previously suggested,¹³⁴ but one of spousal help and appreciation. The *female husband* had often been married before and had been unhappy in the marriage and had subsequently divorced. Since the dynamic in the woman-to-woman marriage secured her

¹³¹ Oboler (n 88 above) 73.

¹³² Njambi and O'Brien (n 94 above) 5.

¹³³ Some communities such as the Gusii and Kuria communities referred to the woman who paid the bride price as the 'mother in law' because it was assumed that she had a fictitious 'son' for whom she was marrying a wife.

¹³⁴ Gray (n 35 above)34.

in a different status, she could be said to have acquired a measure of freedom from the previous arrangements.

3.3.6 Fulfilment of sexual desire

Although not often or elaborately discussed, this thesis contends that there was a rationale for sexual fulfilment in at least some woman-to-woman marriages. In most cases, Western anthropologists infused with contemporary morality did not want to consider the possibility of a sexual relationship as the motivation for the woman-to-woman marriage. African communities, their traditions and cultures have been notably imperfectly understood.¹³⁵

The sexual nature of these marriages is refuted by authors such as Herskovits, who wrote on the Dahomey culture of woman-to-woman marriage,¹³⁶ claiming that the marriages contained no elements of homosexuality.¹³⁷ Authors such as Krige,¹³⁸ who wrote on the Lovedu also claimed that homosexuality was foreign in such marriages. Nwoko recollects that woman-to-woman marriage in some cultures was for family duty or maybe inheritance, and contended that there were no sexual relations between the women.¹³⁹ Achebe¹⁴⁰ and Amadiume,¹⁴¹ who wrote on the Igbo of Southern Nigeria, also dismiss claims of lesbianism in woman-to-woman marriage, stressing that the focus of

¹³⁵ Krige (n 91 above).

¹³⁶ The Dahomey Kingdom was an African kingdom which lasted from the 1600 to the 1800 and that was around the present-day country of Benin.

¹³⁷ Herskovits (n 90 above) 338.

¹³⁸ Krige (n 91 above).

¹³⁹ Nwoko (n 106 above) 73.

¹⁴⁰ N Achebe *Farmers, traders, warriors, and kings: Female power and authority in northern Igboland, 1900-1960* (2005).

¹⁴¹ Amadiume (n 85 above) 91.

the union was economic and political. ‘Achebe and Amadiume set up homosexuality as a recent, alien, Western import to Africa’.¹⁴² When clarifying the concept of women-to-women marriages, Krige states that ‘[b]y woman-marriage we mean the institution by which it is possible for a woman to give bride wealth for, and marry, a woman, over whom and whose offspring she has full control, delegating to a male genitor the duties of procreation’.¹⁴³ This view is further reflected on by Nwoko who contends that the practice of woman-to-woman marriage among the Igbo community did not involve a sexual relationship between the couple.¹⁴⁴

Epprecht¹⁴⁵ and Newel¹⁴⁶ have been critical of writers who ‘ignored sexual desire as an element in marriage decision’.¹⁴⁷ Epprecht contends that ‘same-sex relationships existed in African societies with a wide variety of motives, practices and emotions, including affection and fertility control’.¹⁴⁸ This view is supported by Njambi and O’Brian who note the conflict of the concept of the sexual nature of the women-to-women relationships and reflect that although the issue was not discussed, it does not mean that it did not take place.¹⁴⁹ Obbo’s view was that as there is no clear indication of the nature of sexuality, the idea should not be discounted until further research on the issue is conducted.¹⁵⁰ Epprecht discusses the evidence of these sexual relationships citing

¹⁴² White (n 82 above) 30.

¹⁴³ Krige (n 91 above).

¹⁴⁴ Nwoko (n 106 above) 69.

¹⁴⁵ M Epprecht ‘“Bisexuality” and the politics of normal in African ethnography’ (2006) 48 *Anthropologica* 187-201.

¹⁴⁶ S Newell *the forger's tale: The search for Odeziaku* (2006).

¹⁴⁷ White (n 82 above) 30.

¹⁴⁸ Epprecht (n 145 above) 189.

¹⁴⁹ Njambi and O’Brien (n 94 above) 5.

¹⁵⁰ Obbo (n 98 above) 371.

research by lesbian anthropologists that there were ‘unspoken erotic relationships between African women within the rubric of spirit mediumship or divination’.¹⁵¹

In certain communities in Southern Africa, woman-to-woman marriages were undertaken to obtain an ancestral wife. The practice of taking an ancestral wife for companionship was a different form of woman-to-woman marriage. This was because the motivation for taking an ancestral wife was different from those of a regular *female husband*. The formative element of this type of woman-to-woman marriage concerned a medicine woman referred to as a *sangoma*.¹⁵² The *sangoma* was not considered a legitimate health practitioner and was often referred to as a witch doctor by the colonialists in Southern Africa. Widely disregarded in anthropological texts, their relationships and personal lives were not often documented leading to the elimination of the concept of sexuality in these types of unions.¹⁵³

Woman-to-woman marriages that involved taking an ancestral wife were intimate relationships. This phenomenon was found particularly in Southern Africa where the female medicine women known as *sangomas* formed intimate and sexual relationships with their ancestral wives.¹⁵⁴ Most of the text discussed the incidence of male *sangomas*, which in the politics and power that was portrayed in most of the anthropological studies of Africa, was the most preferred system of reporting. It is documented, however, that ‘[s]ame-sex *sangomas* [were] powerful people at the centre

¹⁵¹ Epprecht (n 145 above) 189.

¹⁵² Traditional term in Southern Africa to refer to the female medicine woman who was a traditional healer.

¹⁵³ N Nkabinde & R Morgan ‘Chapter seven’ in ‘Tommy boys, lesbian men and ancestral wives: female same-sex practices in Africa’ in R Morgan & S Wieringa (eds) *Tommy boys, lesbian men and Ancestral wives: Female same-sex practices in Africa* (2005) 232.

¹⁵⁴ Tamale (n 43 above) 115.

of African culture'.¹⁵⁵ There are documented cases of the practice of taking ancestral wives in Kwa-Zulu Natal, in South Africa. Nkabinde documented that same-sex *sangomas* openly lived together in both rural and urban communities.¹⁵⁶ In some instances, the female *sangoma* lived with her male husband who was also a *sangoma*, but carried on a same-sex relationship with other women, while in others, the female *sangoma* formally married her female "ancestral wife" and they lived together for an extended period. The documented cases illustrated that, apart from being a traditional healer, there were no formal elements attached to the institution of taking an ancestral wife. The women represented all ages and lived in both rural and urban communities. They were not required to have been in a prior childless marriage or to have achieved a stature as was the nature of the most prevalent institution of woman-to-woman marriage.

The acceptance of these types of woman-to-woman marriage was premised on the recognition of the traditional religious practices. The female *sangomas* had to receive an ancient calling to confer the gift of healing and the ability to divine the future. The *sangomas* believed strongly in the power of their ancestors and the ability of their ancestors to guide their decisions. They underwent training with other more qualified *sangomas* who were either male or female. While undergoing training, and although sexual relations of any kind was not permitted, there were instances of *sangomas* having sexual relationships with their trainees.¹⁵⁷ Nkabinde documented her interview with a *sangoma* in her mid- 40's. She recollected her days of training as a *sangoma* in her youth.

¹⁵⁵ Nkabinde (n 153 above) 232.

¹⁵⁶ Nkabinde identifies as a lesbian *sangoma* and has documented the practice of the taking of ancestral wives in her native home of Kwa-Zulu Natal in South Africa. She organized an informal group of 40 same-sex *sangomas* and carried out interviews with five identified same-sex *sangomas*. She documents her interviews in Nkabinde (n 153 above) 232.

¹⁵⁷ n 153 above, 238.

She recounted having a sexual relationship with her trainer and described the experience as liberating because she could finally express her desires.¹⁵⁸ Although she married a man at an early age, she preferred relationships with women rather than her husband. She also attested that she would have married her female trainees, had she not been married to a man.¹⁵⁹ In another documented interview, the interviewee was in a sexual relationship with her trainer and contended that her calling incited her inclination to the same-sex relationship. She also alleged that her trainer was directing her actions and ensuring her complicity with the relationship.¹⁶⁰ Although having sexual relations with their trainees was taboo, some *sangomas* violated this tenet. The relationships were conducted in secret, but some were later formalized after the taking of the trainee as an ancestral wife.

The *sangomas* were permitted to take an ancestral wife to assist with their work. The ancestral wife's duties were essential as they ensured that the traditional healer could complete her tasks. A sexual relationship with the ancestral wife was considered 'immaterial'.¹⁶¹ Their relationship was not required to be sexual; it was purely to assist the *sangoma* in her tasks. The *sangomas* paid a bride price to the family of the ancestral wife, known as *lobola*. In an interesting case documented by Nkabinde,¹⁶² the *sangoma* in her mid-40's claimed that her husband chose to not have intimate relations with her, though he had no knowledge of her sexual preference.¹⁶³ He alleged that his deceased grandfather had approached him in a dream and instructed him not to have intimate relations with her. They subsequently separated, and the husband went on to marry three

¹⁵⁸ As above, 239.

¹⁵⁹ As above, 241.

¹⁶⁰ As above, 240.

¹⁶¹ As above, 242.

¹⁶² As above, 242.

¹⁶³ As above, 243.

wives, with whom he had difficulty getting children. He revisited his first wife, the *sangoma*, with his problem. She claimed that upon divination with the ancestors, she was instructed that her former husband should take another wife and that she would take the new wife as her ancestral wife. The former husband consented and assisted her in paying the *lobola* for the ancestral wife. The *sangoma*, her husband and the wife, who is both his wife and the *sangoma*'s ancestral wife, lived together in the same home.¹⁶⁴

The payment of the bride price as well as the contract of marriage for getting progeny were characteristics of the most recognised form of woman-to-woman marriage. Marriages of this nature seemed to get easier recognition in the community.¹⁶⁵ This could be because the identified reasons for which the parties contracted the marriages were more socially acceptable.

In some instances, the *sangomas* identified more as men than as women, adopting more masculine identities. In another of the interviews that Nkabinde documents, she describes a *sangoma*, who had in her youth, displayed a preference for participating in masculine activities.¹⁶⁶ The *sangoma* reflects that she identified more with males in the society than with the female. In her training as a *sangoma*, she refused to adopt the role of ancestral wife to her trainer, and this led to a contentious relationship.¹⁶⁷

In other instances, *sangomas* preferred to identify as lesbians. This was more prevalent amongst the female *sangomas* in urban areas. They participated in LGBT parties and attended the pride marches in their regions.¹⁶⁸

¹⁶⁴ As above, 243.

¹⁶⁵ Nkabinde (n 153 above) 252. Nkabinde discusses different ancestral wife relationships that received formal recognition from the family as well as the community.

¹⁶⁶ Nkabinde (n 153 above) 248.

¹⁶⁷ As above, 249.

¹⁶⁸ As above, 249.

The female *sangomas* from cities interviewed by Nkabinde maintained that they identified more with their sexuality in spaces where the lesbian, gay, bi-sexual and transgender communities congregated. Some of them contended that although they were married to men, they had never had intimate relationships with their husbands as they did not have the desire for such intimacy.

In considering the dynamics of ancestral wife marriages, two things are apparent. These marriages were contracted by the *sangoma* with the intention of getting a helper for her work. Also, the marriage of ancestral wives for progeny was illustrated as a motivation for the marriage. It cannot be disregarded that many of these unions also have elements of intimate relationships of a sexual nature despite the fact that the act was prohibited. The practice of marrying an ancestral wife sometimes combined the concept of the customary woman-to-woman marriage with that of homosexual relationships, making it a unique African institution. It was however only prevalent in Southern Africa and therefore cannot be argued to have achieved recognition within other African communities.

Although sexual fulfilment was a consideration for the practice of woman-to-woman marriages in the case of medicine women in Southern Africa, it seemed to be particular to only a few communities and within these communities, only in identified circumstances. It cannot be said to be an essential consideration of woman-to-woman marriages amongst the other tribes in Africa and certainly was difficult to substantiate in these communities. It can reasonably be concluded as being isolated to only the Southern African communities and therefore not a socially accepted requirement in the woman-to-woman marriage.

3.4 Incidence of woman-to-woman marriage in West, East and Southern Africa

The concept of woman-to-woman marriage was documented on the continent in three distinct regions: West Africa, East Africa, and Southern Africa. In the 19th century, woman-to-woman marriage occurred across various parts and throughout Africa. There may be many reasons for this. It may be inferred that these marriages were more dominantly present in former British colonies. Some of these communities include the Dahomey of Benin, the Ibo and the Kalabari communities of Southern Nigeria, Yoruba, Yagba, Akoko, Nupe, and Gana-Gana of SouthWest and Northern Nigeria, the Nuer and Dinka communities of South Sudan, the Kikuyu, Kamba, Nandi, Kisii and Kamba communities in Kenya, the Simbiti people of Tarime district in Tanzania, the Buganda in Uganda, the Lovedu, Sotho and Zulu communities in South Africa.¹⁶⁹

It could also be that the marriages were present in other parts of Africa but were not as well documented. It may also be that these marriages were more affected by the introduction of colonial laws and therefore, the reference to them in administrative and legal cases was more evident in British colonial jurisdictions.

3.4.1 Woman-to-woman marriage in West Africa

Although there may have been instances of woman-to-woman marriage in other parts of West Africa, the most documented region of the prevalence of these unions was Nigeria. Woman-to-woman marriage were phenomena witnessed in both Northern Nigeria amongst Yoruba, Yagba, Akoko, Nupe, and Gana-Gana communities and Southern Nigeria amongst the Ibo and the Kalabari communities. Amongst the Ibo and the Kalabari communities of Southern Nigeria, these women-to-women marriages were ‘recognised

¹⁶⁹ CK Meek *the Northern Communities of Nigeria* (1925) 209 210.

as lawful marriages'.¹⁷⁰ Meekers and Herskovits reflected about these marriages amongst the communities in Northern Nigeria.¹⁷¹ Meekers wrote that 'there is a curious and ancient custom found, that of a woman going through a regular form of matrimony with other women'.¹⁷²

These communities were patrilineal(*obi*)¹⁷³ in nature, where the men were considered to have a higher social status than women. In instances where a barren woman had been married, and her husband died, she was not entitled to any of her husband's wealth and property.¹⁷⁴ However, if she married a young girl, the offspring of her 'wife' would have the right to inherit this wealth. In other instances, a wealthy woman would marry a younger girl and allow her to have relations with her male companion, and the resulting offspring would belong to the *female husband(umuada)*.¹⁷⁵ In Eastern Nigeria, amongst the Igbo tribe, there were documented cases of same-sex marriages that were accepted by most of the other Nigerian indigenous communities.¹⁷⁶

Among the Mbaise Igbo where the female children of a family collectively paid the pride price of a younger woman after the demise of their father in the name of their eldest sister so that the new bride could procreate and raise male children to preserve the family lineage.¹⁷⁷

¹⁷⁰ See generally A Talbot *Communities of the Niger Delta* (1932).

¹⁷¹ Meekers (n 18 above) 209.

¹⁷² Meekers (n 18 above) 209.

¹⁷³ This denotes patrilineal homesteads

¹⁷⁴ As above.

¹⁷⁵ As above.

¹⁷⁶ Nwoko (n 106 above) 78.

¹⁷⁷ Nwoko (n 106 above) 76.

For example, Ifeyinwa Olinke(*dike-nwari*)¹⁷⁸ was a wealthy woman from the Igbo tribe who married nine wives to gain prosperity and social standing.¹⁷⁹ These marriages were recognised as customary marriages as ‘all the ceremonial of marriage [were] observed in these marriages of women to women, and a bride price [was] even paid to the young girl’s father. The usual rules of divorce apply’.¹⁸⁰ It was widely observed that even the Chiefs, who were the heads of the clans, consented to have their daughters married in this manner.

3.4.2 Woman-to-woman marriage in Southern Africa

Instances of woman-to-woman marriage in Southern Africa have been documented in a number of communities. Literature has been predominantly documented concerning the Sotho and Zulu cultures in Southern Africa but perhaps the best documented was the Lovedu, which was a Southern African Tribe of the Northern Sotho within the Limpopo Province in South Africa. The Lovedu was a matrilineal community with a female ruler. Women are highly regarded within the community, and women can retain any wealth that they have earned, even after they have been married. Uniquely, the women of the Lovedu tribe had the right to ‘acquire and control property’.¹⁸¹ To engage in woman-to-woman marriage, the woman need not be barren. Although she was usually older, any woman who had the economic resources could acquire a wife whether she had a son or not. The genitor(*boho*) for the wife was usually a man from the *female husband*’s lineage and was selected by the *female husband*(*rakhadi*).¹⁸² In most cases, the older woman is

¹⁷⁸ This was the term given to the female husband who was considered a brave woman as she was very masculine.

¹⁷⁹ Nwoko (n 106 above) 76.

¹⁸⁰ As above.

¹⁸¹ Krige (n 91 above) 15.

¹⁸² This means either the father’s sister or the female father. See Krige (n 91 above)18.

referred to as grandmother(*koko*) and was only referred to as husband by her wife or father of her children if she held an esteemed position such as a queen or female district head. In cases where a son who was betrothed to a girl, refuses to marry the girl, his mother may go ahead and marry the girl. The girl lived with the mother in her home and had children with a male genitor.

In other communities, a woman chose to take a wife to access a political position. She decided to take a wife to get a son who could take up a political position. This happened when a district headman died without male children. The wife of the deceased district headman ruled, but she had to marry a wife from the husband's clan to propagate a male heir who could inherit the seat.

A woman who held an esteemed position as the tribe's diviner could take as many wives as she pleased as she would have accumulated enough wealth. In a unique arrangement only occurring amongst the Lovedu, a daughter could also inherit wives from her father if she was not yet married. Any children from the inherited wives gotten from a male genitor chosen by the daughter belonged to the lineage of the father.

Just as in many African communities, parents may send their daughters to the ruler as wives in return for privileges and favours. As the Lovedu's ruler was a queen, she chose to marry these girls, and they would remain in her royal household. They are required to stay as virgins unless the queen allowed them to bear children usually from a royal relative. 'A [wife] if related to the queen can, if the genitor is of royal blood, provide an heir to the throne'.¹⁸³

¹⁸³ As above, 22.

3.4.3 Woman-to-woman marriage in East Africa

East Africa has many instances of woman-to-woman marriages documented in various communities. There are illustrations of woman-to-woman marriages in South Sudan, Tanzania, and Uganda. However, the best documented of the communities were those found in Kenya which is dealt with separately below.

Amongst the Dinka in South Sudan, there have been documented instances of woman-to-woman marriage.¹⁸⁴ Elderly widows married girls who bore offspring. However, these offspring belonged to the deceased male husband of the elderly widow. There is also a similar custom among the Nuer¹⁸⁵ one of the many forms of marriage including concubine-age and ghost marriages.¹⁸⁶ Woman-to-woman marriage was regarded as a mere legal marriage. The Nuer community was patrilineal and was unique because although the man paid bride-price for a wife, the marriage was not considered complete until she got a child. Just as in the Ivory Coast visiting marriages, the married woman stayed in her family's home until she got a child. All children belonged to the husband's lineage.

In the woman-to-woman marriage, the children belonged to the *female husband's* lineage. The *female husband* was usually a barren woman, but this may not always be

¹⁸⁴ CG Seligman & BZ Seligman *Pagan communities of the Nilotic Sudan* (1932) 164.

¹⁸⁵ See generally Pritchard (n 32 above) 36. In this type of marriage, when a woman got children and she was not married, the children belonged to the lineage of the mother, however, if the man with whom she got the children paid a substantial fee, he could claim the children. With ghost marriages, a man could take a wife in the name of a kinsman who was already deceased and had no male children with a view of paying homage and sacrifice to the man. Some aspects of marriage and the family among the Nuer. Livingstone, Northern Rhodesia: Rhodes-Livingstone Institute.

¹⁸⁶ Concubinage and ghost marriage were unofficial pairings of partners for either sexual gratification or companionship without having to undertake the formalities of a customary marriage such as the payment of bride price.

the case. Upon taking a wife, she could take on rights that were only allowed to the male clansmen. She could ‘inherit cattle and receive from her family a share of the bride wealth coming in from the marriage of girls in the family as if she were one of the men’.¹⁸⁷ Her brother or his sons were also allowed to take ghost marriages in her name if her wife did not produce male heirs upon her death. Any children from this union belonged to the *female husband’s* lineage. She, in turn, could also take on a wife in the form of a ghost marriage for her (biological) brother who was deceased if he had died without a male heir. The *female husband* was regarded as a male in the community; she had her homestead and her wealth in the form of cattle. She could take as many wives as she desired and any children from these wives referred to her as a father. If an elderly woman had been married before and her husband died without any heir, she could take a wife bear her children. However, the children would belong to the clan of her deceased husband and not her clan as was the case in the other woman-to-woman marriage.

Woman-to-woman marriage was also practised among the Simbiti tribe of Tarime district in Tanzania.¹⁸⁸ They are a Bantu tribe that is thought to have migrated to Tanzania in the early 17th century from Kenya. Their culture is similar to that of the Kuria community in Kenya. The practice of woman-to-woman marriage was also evidenced in the Kuria tribe at the Tanzania border with Kenya. Like many of the woman-to-woman marriage, the marriages in this culture were predominantly for barren women or women who were unable to sire male progeny.

Nyumba Nthobu is not an option for women who have given birth to a son. Procreation plays an important role, as well as fertility being central in women’s lives. Continuity is hence expressed regarding procreation and fertility.¹⁸⁹

¹⁸⁷ Krige (n 91 above) 12.

¹⁸⁸ Starace (n 81 above) 34.

¹⁸⁹ Starace (n 81 above) 24.

The acquisition of the wife by paying the bride price ensured that the marriage was recognised in the culture as a formalised marriage. Starace in her writings conceded that the paying of bride price does not in itself guarantee the stability of the marriage, positing that ‘a degree of affection and care might reinforce this alliance’.¹⁹⁰ This idea also presented in the Kikuyu woman-to-woman marriage and supported in Njambi and O’Brian’s work, strengthens the indication of a more emotional bond and not just the functional component, reflected in the woman-to-woman marriage.¹⁹¹ In the Simbiti tribe, woman-to-woman marriage was usually conducted by elderly women and are ‘used to ensure continuity. In functional economic terms, we might explain it to allow the circulation of wealth’.¹⁹² It could even be hypothesised that these marriages could have been a way of self-preservation.

Amongst the Ihanzu tribe of Northern Tanzania, barren women were considered witches and shunned by the community.¹⁹³ The wife’s motivations for entering the marriage were seldom documented. In most instances, she gained a home, a provider and a protector and children. She was also empowered, in some situations, with her ability to choose the male counterpart that she has relations with. In some instances, she also gained freedom. Starace writes of the life of a wife who was able to secure freedom from an abusive husband and protection for her second child (her first child having died in the care of her husband) by marrying a wealthy woman who paid her bride price to the

¹⁹⁰ As above, 35.

¹⁹¹ Njambi and O’Brien (n 94 above) 5.

¹⁹² Starace (n 81 above) 43.

¹⁹³ T Sanders ‘Invisible hands and visible goods: revealed and concealed economies in millennial Tanzania’ in HG West & T Sanders (eds) *Transparency and Conspiracy: ethnographies of suspicion in the new world order* (2003) 148 174.

abusive husband, who in turn released her from the marriage.¹⁹⁴ She speculates that in some instances, the wife may get into the marriage due to the distrust of male figures and gains freedom and even a measure of happiness at not being forced to depend on a man.

With the Simbiti tribe, the wives in woman-to-woman marriages slept in separate homes.¹⁹⁵ This is mainly due to the fact the wife had to be able to welcome any gentlemen callers, which could present difficulties if she lived in the same house her spouse. The *female husband* was, however, able to present restrictions about the man that the wife chooses. In that way, the *female husband* is seen to exercise control over her wife.¹⁹⁶ In this community, the wife was not allowed to acquire any wealth, though she may labour and assist in the creation of the economic benefit, she would not be viewed as having any ownership, as all that belongs to her *female husband*. This is an aspect of the marriage that typically represents the male role of the *female husband*. She controls the social and economic rights in the homestead. This propagates the functional dimension of the marriage. The offspring of the wife, whether she comes with them from a previous relationship or got them in the marriage, belonged to her spouse. They defer to the *female husband* as the head of the home and she, in turn, dictates what they do, such as what schools they attend and work they undertake.¹⁹⁷

In Uganda, woman-to-woman marriage was documented in the Buganda kingdom, where the head of the household was a woman. She is usually an older woman who has either never been married or has subsequently divorced her husband and owns property. The marriages were usually conducted for economic reasons.

¹⁹⁴ Starace (n 81 above) 43.

¹⁹⁵ Starace (n 81 above) 34.

¹⁹⁶ As above, 34.

¹⁹⁷ See generally Njambi and O'Brien (n 94 above) 1 23.

3.5 Woman-to-woman marriage in Kenya

Woman-to-woman marriage in Kenya, the focus of this thesis, is unique for two reasons. The first is that most of the rationales of woman-to-woman marriage are often present in one or more of the communities and woman-to-woman marriages in Kenya have both functional and social justifications. Second, Kenya is one of the only countries in Africa where woman-to-woman marriages are still actively practised, recognised and accepted as a customary practice based on its prevalence in the country.

Woman-to-woman marriage has been documented in the Nandi, Kisii, Kamba, Kuria and Kikuyu communities. Kenya. When writing about the Nandi community in Kenya, Oboler expressed the view that ‘female marriages ha[d] increased since land registration as women ha[d] taken wives to keep their husband’s property’.¹⁹⁸ The introduction of land registration eased the issue of ownership of property. The documented purpose of women-to-women marriages amongst the Nandi community was to provide a sort of surrogate husband. The community was patriarchal in nature and therefore it is essential that the *female husband* adopts a male gender role. Just as in the cultural woman-to-woman marriage in West Africa, the *female husband* was the ‘social and legal father of any of the children that the wife may bear’.¹⁹⁹ The *female husband* was usually an older woman who had not borne any male heirs. She did not have to be barren since ‘the purpose of the union is to produce a male heir’.²⁰⁰ The marriage enabled the *female husband* to bequeath her wealth to her sons begotten by her wife. The *female husband* had a responsibility of being the ‘male’ in the family by providing and protecting her

¹⁹⁸ Oboler (n 88 above) 73.

¹⁹⁹ L Gray & M Kevan, ‘Diminished access, diverted exclusion: women and land tenure in sub-Saharan Africa’ (1999) 42 *African Studies Review* 15 39.

²⁰⁰ Oboler (n 88 above) 70.

wife and children and offering stability through her economic, social, and spiritual direction to her family. This was the role of the male and head of the household in the Nandi community. However, the challenge was in the execution of the totality of roles that the male in the Nandi community undertook, such as division of labour, public political discussions and undertaking male initiation requirements.²⁰¹ The *female husband* was therefore unable to integrate fully and assimilate into the male role despite the assertion that the woman-to-woman marriage in the Nandi community elevates the *female husband* to a male position in the community.

The Nandi community was patrilineal and women and girl children were not given many rights and especially over property and particularly family estate. The property could only be passed or inherited by male heirs, and where a man did not have any heirs, the property would then revert to his brothers and so on down the lineage. Neither his wife nor his daughters could inherit the property. Woman-to-woman marriage offered a solution to this inequality. As the *female husbands* were said to take on the male role, they also acquired all the privileges that other men had. Though it has been widely documented that the women-to-women marriages were for begetting male heirs, there are also other reasons posited to be gained from these marriages. Oboler wrote as follows:

[Regarding] informal interaction, it seems that *female husbands* and their wives enjoy more casual companionship than do ordinary couples. More opportunities for friendly and companionable conversation between *female husband* and wife arise since the *female husband* spends more time in her compound than a male husband.²⁰²

Although these marriages also offered companionship to the partners and was an important part of the marriage, it was not the main aim of the marriage.

²⁰¹ As above, 70.

²⁰² As above, 73.

Amongst the Kamba community the families were of ‘patrilineal descent and [practised a] virilocal residence’.²⁰³ This means that the women in the community deferred to their male counterparts as the heads of the home and the community and were part of the husband’s clan. Women in various situations chose to undertake woman-to-woman marriages. It may be that a single woman who usually holds wealth through having a home and land initiated the marriage and paid the bride price. She need not be barren and usually had been married before and was considered of wise years, presumably after 55 years.²⁰⁴ These characteristics were similar to those of the women-to-women marriages conducted in West Africa. However, a feature which was not shared by the Kamba woman-to-woman marriage was that the *female husband* did not choose the man whom her wife had relations. In fact, she lived separately from the wife to ensure that she [the wife] could have freedom in the choice of the sexual partner. The *female husband* still claimed the offspring as her legitimate children.

The Kisii tribe also conducted these types of woman-to-woman marriage in Kenya. They would then use their acquired ‘male’ kinship to secure their wealth and to enter partnerships with their male ‘kin’.²⁰⁵ The woman who chose to take a wife was thought to be a wise woman who assumes responsibility for the decisions that she makes and is not answerable to anyone.

Woman-to-woman marriage amongst the Kuria was known somewhat differently. It was referred to as a ‘daughter in law’ marriage. In this tribe, the girl married

²⁰³ Obbo (n 98 above) 375.

²⁰⁴ This was the age where persons were considered for a seat in the council of elders.

²⁰⁵ See generally T Hakansson ‘Landless Gusii women: a result of customary land law and modern marriage patterns’ Working Papers in African Studies University of Uppsala (1986).

the *female husband*'s fictitious son and becomes her daughter in law.²⁰⁶ It was originally thought that the purpose of woman-to-woman marriage was for a woman, who may or may not be barren, to have sons. However, on further research on the tribe, women who had sons were also found to have taken 'wives'.²⁰⁷ Kjerland outlined two reasons why the marriages were conducted. The first was for economic reasons -an increase in demand for female labour.²⁰⁸ The women were reputed to be the producers of primary products. The second reason was for a woman who had not gotten a son, to be able to 'secure her house with a male heir'.²⁰⁹ The daughter in law marriage was also seen as a liberation of females and reflects the less documented concept of freedom gained by women in these marriages.

Amongst the Kikuyu tribe in central Kenya, 'woman-to-woman marriage [was considered] a flexible option within which women may pursue a range of social, economic, political and personal interests'.²¹⁰ In their reflection on woman-to-woman marriage in the Kikuyu culture, Njambi and O'Brian noted that the term *female husband* was not favoured as the term 'promotes sex roles presumptions that do not fit these Kikuyu women'.²¹¹ This was a clear departure from the Nandi tribe who, in fact, emphasise the acquisition of the male gender and all that the role engenders. The marriage ceremony that was conducted between the two women was like that of the man-woman marriage. This signifies that these marriages were considered and recognised for

²⁰⁶ See generally KA Kjerland 'When women take wives: a historiographical overview' Occasional paper 'Poverty and Prosperity' The Nordic' Africa Institute Number 6 (1997).

²⁰⁷ Rwezaura (n 120 above) 162.

²⁰⁸ Kjerland (n 206 above) 6.

²⁰⁹ Kjerland (n 206 above) 17.

²¹⁰ Njambi and O'Brien (n 91 above) 1.

²¹¹ Njambi (n 91 as above) 2.

all intents and purposes as regular marriages including the payment of bride price to secure the ‘wedding’.²¹²

Njambi and O’Brian reflect that the Kikuyu woman-to-woman marriage challenged the stereotypical notion of Western marriage such as heteronormativity, monogamy, and permanence. Woman-to-woman marriage often included a broader spectrum of people in the union and the nature of the union dynamics would change from time to time.²¹³ Another interesting observation was that the women who marry other women in the Kikuyu tribe were not hesitant to express the love that they feel for their wives and this emotion was reciprocated by the wife. This is yet another deviation from the Nandi tribe, and indeed other woman-to-woman marriage, where affection for the spouse is not expressed. Notably, the woman-to-woman relationship that is presented in the study suggests a broader spectrum to the concept. The women who undertook these marriages sought other things such as companionship in some instances for the preservation of the homestead.²¹⁴ Another reason was that of a ‘strong desire to have

²¹² As above.

²¹³ See generally F Mackenzie, ‘Gender and Land Rights in Murang’a District, Kenya’ (1989-1990) 17 *Journal of Peasant Studies* 609 643. A scenario is presented where a couple Kuhi (woman) and Huta (man) were married. Huta marries another woman making the marriage polygamous marriage. Kuhi also marries a woman (Wamba) thereby entering a woman to woman marriage. Wamba can have relations with Huta and other men as well. Wamba later marries another woman (Wambui). This complex marriage system is recognized and accepted as a single nuclear family. In this instance, the woman whose husband and sons were poisoned by clan members over land ownership, is encouraged by her mother in law, to marry a woman to ensure that any other children she will have through her wife, are not subject to the fate of her husband and children. This is because any child begotten from the woman to woman marriage will not belong to the man’s clan but to the woman(*female-husband*).

²¹⁴ Mackenzie (n 213 above) 609 643. In this instance, the woman whose husband and sons were poisoned by clan members over land ownership, is encouraged by her mother in law, to marry a woman to ensure that any other children she will have through her wife, are not subject to the fate of her husband and children. This is because any child begotten from the woman to woman marriage will not belong to the man’s clan but to the woman (*female-husband*).

more children'.²¹⁵ In a documented case, the woman-to-woman marriage was conducted between a woman, who was already married to a man and with whom she had borne children and another woman who bore more children for her after having relations with her husband. The woman-to-woman marriage in the Kikuyu culture broadens the functional approach of the woman-to-woman marriage. It introduces concepts like companionship and personal preference into the idea of marriage, endearing to the revisionist concept of marriage.

3.6 Conclusion

This Chapter sought to answer the question of the recognition of woman-to-woman marriage in pre-colonial Africa, the prevalence of this institution in the three-distinct jurisdiction and the legal validity of this institution based on its recognition as a form of customary marriage.

Woman-to-woman marriage in pre-colonial Africa has been established as a well-recognized and prevalent institution. It has also been established as a customary marriage that met all the requirements. It enjoyed recognition based on its various rationales and fulfilled social and functional roles in the communities. The institution has established its dominance as a recognized institution in many communities in East, West and Southern Africa.

The concept of the African marriage system has been illustrated as being well founded in Africa with identifiable requisites that fulfilled the rationales outlined for marriage in Chapter 2. African customary marriages have also been shown to fulfil social and functional roles in the community important for the structure of the communities. Practices such as the payment of bride price have been established as positive aspects of the marriage system and have served to categorise African marriage system as being

²¹⁵ Njambi (n 94 as above) 13.

unique and not conforming to the Western ideals and moral limitations. The representation of the gender roles has been reflected to be diverse with different communities, whether patrilineal or matrilineal. The concept of kinship ties and its importance in the communities shows the widely-accepted nature of the customary marriage in the different diverse cultures. It has also been established that there were essential elements that had to be satisfied for a customary marriage to be considered as legal and binding in the communities. All these foundations of marriage, although somewhat different in some cultures, have established themselves as part of the African cultural system across the communities. This has served to illustrate that the Western conception of the institution of marriage should not be the benchmark by which the African customary marriage is subjected.

Woman-to-woman marriage has established itself as a custom in pre-colonial Africa that was acknowledged amongst the diverse communities by cultures that practised the custom and by those that did not. The component of recognition of these marriages has not been challenged and in fact, has been presented as a custom that was widely esteemed for the positive elements that it brought into the communities. Woman-to-woman marriage has also been established to have foundations that are similar in many communities, denoting how widespread the custom was. The fact that many of these communities shared the same practices reflects its acceptance and positive attributes.

The rationales presented in the Chapter are clear and identifiable. They illustrate the institution of woman-to-woman marriage as a well thought out and established cultural phenomenon that was important to the communities. Kenyan communities, in particular, embraced woman-to-woman marriage as an integral part of customary law and culture. It is evident that in pre-colonial Kenya, the purpose of this institution fulfilled various needs in the communities. Further, woman-to-woman marriages have been illustrated to

fulfil a feminist perspective by establishing a platform through which women were empowered to own and pass on property regardless of the patriarchal African society.

The introduction of the Western ideals through the missionaries and colonisation of the continent eroded many customs and requirements, negating their importance in the communities and forever altering the unique nature of these customs. Woman-to-woman marriage is an important aspect of the customary heritage of the African people and a testament to the acceptance and the non-binary approach to the institution of marriage.

CHAPTER 4: EFFECT OF POST-COLONIAL LAW ON CUSTOMARY RECOGNITION OF WOMAN-TO-WOMAN MARRIAGE IN KENYA

4.1 Introduction

This Chapter critically analyses the systems of law relating to woman-to-woman marriage in Kenya. It analyses the erosion of customary law by colonial laws and the effect that this had on customary marriage and, subsequently, on the recognition of woman-to-woman marriage. It also charts the evolution of Kenyan legislation on the regulation of marriage and in particular woman-to-woman marriage in Kenya. The 1963 Constitution is a fundamental part of post-colonial Kenyan law and provided the framework upon which marriage was legislated after colonisation. This Chapter offers a critical analysis of the judicial decisions made before and after the implementation of the post-independence Constitution and the Constitution of Kenya 2010.

The Chapter undertakes a critical discussion of the impact of colonisation on African customary law, the erosion of this traditional African system of law and its subsequent impact on woman-to-woman marriages. The latter part of the Chapter is an analysis of marriage legislation in the Kenya. This analysis frames judicial decisions on the recognition of woman-to-woman marriage. It presents the earliest cases that were dealt with by the courts and traces the development of precedent subsequently used to reshape living African customary law on woman-to-woman marriage. It observes the manner in which Kenyan courts interpret the Constitution and its provisions on equality, as well the Constitution's provision on the recognition of only opposite-sex marriage culminating in the apparent prohibition of woman-to-woman marriages in Kenya.

4.2 Customary law in sub-Saharan Africa

4.2.1 Introduction

The introduction of colonial law conflicted with African customary law because the colonisers were unfamiliar with the political systems of law in most African communities.¹ Amalgamation of colonial laws with customary law eventually led to woman-to-woman marriages being considered as repugnant to justice and morality due to particular elements of these types of marriages that the colonisers found difficult to comprehend.² Non-recognition of woman-to-woman marriage was further reinforced by the Constitution in post-colonial Kenya and prevailing international incongruity on same-sex marriages.³

Customary law tends to be largely unwritten due to the failure of the African people to document the customs in a written format. The formal system of writing was introduced with the advent of the missionaries. Africa is a diverse continent comprising of hundreds of tribes with different customs. Even though the formal system of writing of many African cultures, it has been noted by different ethnographers, such as Crowder, Bohannan and Curtin, that Africans are remarkable in their ability to pass down information through the generations in an

¹ See generally B Ibhawoh *Imperialism and human rights: colonial discourses of rights and liberties in African history* (2007) 60; J Lewin 'Recognition of native law and custom in British Africa' (1938) 20 *Journal of Comparative Legislation and International Law* 16 23.

² The concept of repugnancy was introduced in law through Act 16 of 1967, sec 3(2). Emphasis was placed in English statute and required application of African customary law only where it was not repugnant to English idealisation of ethics represented in English statute.

³ See generally DS Parsitau 'From prophetic voices to lack of voice: Christian Churches in Kenya and the dynamics of voice and voicelessness in a multi-religious space' (2012) 12 <http://uir.unisa.ac.za/bitstream/handle/10500/6620/Parsitau.pdf?sequence=1> (accessed 9 December 2016). This was evident in the negotiation of the Constitution of Kenya 2010, where the NCKK made reference to same-sex marriage as being against the Christian fabric of Kenyan society.

almost unadulterated manner.⁴ Elias spoke confidently of this ‘redeeming feature’ of African culture when he wrote that ‘the facility with which traditional norms of behaviour are recalled by the Africans themselves, when questioned about particular rules, is nothing short of remarkable, especially when the party giving evidence of customary rules has no motive to misrepresent the facts’.⁵

Although it has been alleged that the nature of customary law is very unreliable,⁶ it has been shown that many African communities across the continent have very similar if not exact customs, generating a basis of proof in itself. When writing on the nature of African customs, Dundas, a renowned anthropologist states that, in his observation of the tribes, there was a commonality in law and practice in all Bantu tribes of East Africa.⁷ Kenyatta concurred with this observation when writing about the Kikuyu people. He wrote that the Kikuyu people were taught their culture and history through vivid stories that were handed down through the generations. As a child, he was compelled to memorise the stories that he was told, and this became an indelible mental image in his young life. Other children were also taught in this manner and in so doing, the history of the Kikuyu was immortalised.⁸

When discussing administrative and legislative constructs, it is important to discuss the political compositions of African tribes as these are interdependent. Many of the African political structures were very similar. The similarities may be due to the migratory nature of many of the tribes or the trading routes in the quest for better economic prospects for the communities. In West Africa, Meek observed that many African political systems closely

⁴ P Bohannan & P Curtin *Africa and Africans* (1995) 52.

⁵ T Elias *the nature of African customary law* (1956) 2.

⁶ P Onyango *African Customary Law: an introduction* (2014) 46.

⁷ C Dundas ‘Native laws of some Bantu tribes of East Africa’ (1921) 51 *Journal of Royal Anthropological Institute* 217 278.

⁸ See generally J Kenyatta *Facing Mount Kenya* (1979).

resembled one another.⁹ Delafosse concurred with this statement. He reflected that regardless of the stage of development of the community and the peculiar system of organisation, African political institutions essentially offered the same characteristics.¹⁰ These observations from different ethnographers confirm the similarities and interlinkages in the nature of political arrangement, customs and practices of most of the African tribes.

The colonial administration did not take the time to understand African customary law resulting in many misconceptions. Colonial administrators contended that although African political institutions were organised, reliance on custom and tradition in uncivilised African societies was not an established system of law.¹¹ This misconception could be because older social anthropologists had little or no training in law and therefore had little understanding of the social foundations of law. There was a concerted effort by the social anthropologists to create a clear distinction between African 'native' law and custom.¹² The practical reality was that due to the centralised systems of political organisation, there were defined rules of governance and enforcement mechanisms, and this was in itself a clear indication that customs were law and African customary law was a legitimate legal system.

The second misunderstanding that was supported by the colonial administration theory was the primitive nature of African customary law. When the colonial administration was setting up various offices for the ease of governance, they had based their belief on the missionary view that Africans were uncivilised and therefore unable to adequately govern

⁹ C Meek *Law and authority in a Nigerian tribe* (1937) 346.

¹⁰ M Delafosse *Negroes of Africa* trans F Fligelman (1931) 144.

¹¹ B Ibhawoh *Imperialism and human rights: colonial discourses of rights and liberties in African history* (2007) 60.

¹² J Lewin 'Recognition of native law and custom in British Africa' (1938) 20 *Journal of Comparative Legislation and International Law* 16 23.

themselves.¹³ The belief was further compounded by the seemingly alien rites, customs and practices that they did not understand. When the judicial officers were brought in to apply English law, it became immediately apparent that the Native Law was extremely efficient in governing the natives and was more practical in application than English law. Sir James Marshall said of the African legal system that ‘these people have their laws and customs which are better adapted to their condition than the complicated system of English Jurisprudence’.¹⁴ A similar reflection was made of Uganda, that the ethnic tribes in Uganda had a centralised system of administration and governance even a tribunal that acted similarly to the English court in the arbitration of matters.¹⁵ The colonial administration, therefore, began to apply customary law in matters of marriage, inheritance, land, succession and other traditional offices.¹⁶

Although there was a general recognition of the systems of law for the African native people, the colonial administration still went ahead to introduce their law in the colonies. The English law worked side by side with the customary law which was seen as a more efficient way of governing the African people. They retained the Native courts through the Native Court Ordinance. These courts had to keep records of substantive rulings that were made as these formed a basis for creating new laws that would govern the communities. Codification of laws often happened in the ‘aftermath of a revolution to establish a new legal system’.¹⁷ The integration of colonial laws offered some codification process for customary law for the colonial administration. The Native courts relied heavily on African elders and people who

¹³ Elias (n 5 above) 25.

¹⁴ This was reflected by Sir James Marshall, former Chief Justice of the Gold Coast and Nigeria in *The Times* 17 July 1886.

¹⁵ H Rone ‘The native of Uganda and the criminal law’ (1938) 6 *Uganda Journal* 2.

¹⁶ Elias (n 5 above) 7.

¹⁷ T Bennet & T Vermeulen ‘Codification of Customary Law’ (1980) 24 *Journal of African Law* 207.

were deemed to have knowledge of customary law.¹⁸ Their roles were purely advisory, and the Judge was not bound by their input. Utilizing the wisdom of the African elders to arbitrate the disputes of the Africans worked to form a credible basis for customary law as often the Judges were not aware of the prevailing customs of the communities. However, the discretionary nature of the application of customary law in the cases and the similarity of issues to those dealt within the English system made it possible for the Judge to disregard the direction and rule within his realm of understanding. This pervaded the codification process.¹⁹ The practice of English law through established precedents in dealing with the African cases became the manner in which there was a direct integration of colonial law into African customary law.²⁰ The former Chief Justice of Buganda reflected in the Chief Justice Directions that it was not possible to create forgeries in customary law due to its unwritten nature. However, due to the integration of the practice of English law in the Native courts that were introduced by the British, it was possible to falsify the customary law in writing.²¹

There were two systems adopted while undertaking the codification of customary law by the colonialists. In the first system, there was an almost total eradication of customary law and a subsequent introduction of a new regime of law that was based on a comparative system of the civil codes and the customary norms.²² This ensured that though there was a total shift in the law, it was not so encompassing that it went against the African's way of thinking. The more pervasive system, however, was the one that was adopted by the English. The process adopted for the use of precedent to create a written code came with its fair share of challenges.

¹⁸ R Abel 'Customary laws of wrongs in Kenya: an essay in research method' (1969) *17 American Journal of Comparative Law* 582.

¹⁹ Abel (n 18 above) 584.

²⁰ Bennet & Vermeulen (n 17 above) 278.

²¹ Elias (n 5 above) 20.

²² Abel (n 18 above) 584.

One of the more resolute problems was the flexible and fluid nature of customary law. It was not so much that it was ever changing, more the fact that its application differed with each case. This was the total antithesis of common law, which relied solely on the unbending rules and regulations presented for each problem. Customary law was based on usage in the community, whereas English law was based on a code of edicts. The flexible nature of customary law made it difficult for the person writing the customary norms to establish the agreed and accepted norm to put down.²³ Any attempt to codify customary law ultimately created a distorted and prejudiced code that ultimately misrepresented the custom it was trying to reflect. The idea of woman-to-woman marriages was not based on the union of two women but rather on certain needs that the communities were trying to fill. The prejudice applied to the institution was based on the laws and morals of the coloniser's country of origin and these considerations were imposed on the African communities that had very different moral contemplations.

With the inevitable failure to fully reflect customary law in written legislation, the colonialists eventually comprehensively introduced common law and relegated customary law to specific circumstances of application. The fragmentation of not only political systems of governance for the Africans and the ineffective application of customary law created the perfect situation for a complex system to emerge and created the challenge of the plurality of legal systems that has plagued many African countries. Family law, and specifically laws on marriage and succession, created a multitude of laws that has taken over fifty years to correct. The recognition of woman-to-woman marriages which inevitably fell under family law, suffered greatly as it was a custom that was peculiar to the African systems of politics and governance. The rationales for marriage were varied and very different from those of the colonisers.

²³As above, 217.

4.2.2 Effect of colonization on customary law and marriage in Kenya

Colonial laws introduced by the British affected customary law in Kenya, among others by reshaping the understanding of marriage. Consequently, colonial laws changed the understanding of woman-to-woman marriages and framed them as being repugnant to the Western ideology of justice and morality and led to the *de jure* non-recognition of woman-to-woman marriage.

Colonisation in Africa has been defined as an era marked by intensive

explorations, the slave trade, the scramble for Africa, the territorial ambitions and pretensions of the Western nations, the imposition of alien rule and institutions, the planting of Western forms of Christianity, acculturation, racialism and exploitation.²⁴

Although there are debates on the role that missionaries played in the pervasive influence of colonialism, it is undeniable that Christianity spread through various colonial structures and aided the colonial administration in its dissonance of the African peoples.²⁵ Religion had a larger role to play in the influence of laws and especially those that pertained to marriage and the requisite customs. Colonisation took place in most of Africa, with near devastating effects on the social and cultural structures that existed, which are still visible in modern African societies.²⁶ Because most of the colonial administration took place through the enforcement of rules and regulations on the African communities, there was a need to introduce structures that were capable of enforcing these rules.

The premise of colonisation arguably began with some form of negotiation with the heads of communities such as Sultans who controlled the coastal strips and some ways into the

²⁴ S Iwe *Christianity, culture, and colonialism in Africa: organised religion and factors in developing culture-an analysis* (1979) 193.

²⁵ E Okon 'Christian missions and colonial rule in Africa: objective and contemporary analysis' (2014) 10 *European Scientific Journal* 192.

²⁶ Okon (n 25 above) 192.

interior.²⁷ Africans have been accused of complicity in the issue of colonisation.²⁸ Multi-tier structural resistance to the colonial administration only organised towards the end of colonisation, and more often than not, led to the advent of independence. There were various forms of rebellion during the introduction of colonialism by many communities with varied levels of success. In Central and West Africa, the Azande and the Dahomey tribes led powerful and strategic campaigns against the Western forces.²⁹ The colonial administration was at first overwhelmed but eventually met the rebellion with brutal force that radiated throughout their colonising rule. Some communities in Africa welcomed peaceful negotiations with the colonial administration while a vast majority, who were mostly independent and had settled in their systems of rule, established systems of governance in social and economic life, recognised colonisation as slavery and fought against it.³⁰ In Central Africa, the organised rebellion was so efficient at its guerrilla warfare that the French administration was forced to seek reinforcements from the French military. Apart from the armed resistance of the Africans, there was also a form of passive aggressive resistance through the rejection of religion.

African resistance ultimately failed because of the superior weaponry used by the European administration. Although the African military was significantly larger than the colonial armies, they were often defeated by a fraction of the colonial military. In fact, there were only a few Europeans in these colonial militaries. Most of the soldiers were European-

²⁷ See generally S Beck 'East Africa 1700-1950' in S Beck (ed) *MidEast & Africa 1700-1950* (2010).

²⁸ W Dooling 'Chapter 2: The Development of a Colonial Slave Society in The Department of Education *Turning Points 2: The Impact and Limitations of Colonialism* (2004) <http://www.sahistory.org.za/archive/book-2-impact-and-limitations-colonialism-chapter-2-development-colonial-slave-society-wayne> (accessed 30 March 2016).

²⁹ See generally HJ Sharkey 'African colonial states' in J Parker & R Reid (eds) *The Oxford handbook of modern African history* (2013) 151-170.

³⁰ A Okoth *A history of Africa: African societies and the establishment of colonial rule, 1800-1915* (2006) 158.

trained African soldiers who eventually stamped out the resistance.³¹ After this, the colonial administration set out administrative structures to govern the communities they had subdued. They set up military presence through the local government in strategic locations in the colony. They also established various economic structures that flourished, to the detriment of most local industries, often exploiting particular resources in the lands. One of the main motives for colonisation was the economic resources gained from the continent. Although some anthropologists posit that colonialism brought economic gains for Africans, some ethnographers of tribes and communities, such as the first Kenyan President disagree with this idea. Kenyatta wrote as follows of the white settlers and their interaction with the Kikuyu people:

They speak as if it were somehow beneficial to an African to work for them instead of for himself and to make sure that he will receive this benefit they do their best to take away his land and leave him no alternative. Along with his land, they rob him of his government, condemn his religions ideas, and ignore his fundamental conceptions of justice and morals, all under the name of civilisation and progress.³²

This sentiment was shared by most Africans concerning the civilisation and colonisation of Africans. There was a marked form of imperialism amongst the Europeans that presented Africans and their customs as ‘immutably separate and inferior to the Europeans’.³³ There was a marked general perception that Africans were to be treated as children who were not able to be in control of their affairs. They had to be guided by Europeans who were viewed as wiser than the Africans.³⁴

The disregard for the African system of life, leadership and social development led to the corruption and destruction of a whole continent, as very few parts of Africa were left

³¹ Okoth (n 30 above) 158.

³² J Kenyatta *Facing Mount Kenya* (1979) 318.

³³ M Crowder *West Africa under colonial rule* (1968) 5.

³⁴ Bohannan & Curtin (n 4 above) 332.

untainted. Although there were multiple European colonisers, the result is the same across Africa. The introduction of multiple legal systems led to undoubted confusion and distortion of the pre-existing customary laws such that the customary law that currently exists is an amalgamation of religious and social European influences. The more proper form of customary law is difficult to come by due to the pervasive impact of colonisation and even harder to prove due to lack of written evidence -- a predicament shared by most African customs due to their flexible nature.

4.3 Statute and marriage in Kenya

The introduction of a codified system of law gave rise to more formalised structures. Marriages were regulated in a combination of the African and the English system of law. Formalisation of marriage practices established more formal elements to marriages and identified forms of marriage deemed acceptable by the colonisers.

Kenya is a multiracial and multi-religious society, split broadly between the Muslims, Hindus, Kenya Europeans and diverse African religious and ethnic groups.³⁵ The amalgamated codification introduced four distinct marriage systems in Kenya; Civil or Christian, African, Islamic and Hindu systems. The disorder that plagued marriage, divorce and succession in Kenya was as a result of the application of multiple legal regimes as all of these groups had their marriage and divorce laws. The introduction of religion, the imposition of European systems of law on indigenous African customary law and the laws that governed immigrant communities that settled in Kenya, gave rise to complex and often conflicting systems of law. This plural organisation of laws was applied by the various court structures,³⁶ such as the civil courts and the Kadhi's courts. The discord was further exacerbated because countries like

³⁵ N Hunnings 'Kenya' (1969) 18 *International and Comparative Law Quarterly* 777 780.

³⁶ R E Robinson 'The administration of African Customary Law' (1949) 1 *Journal of African Administration* 158.

Britain and India, where the acquired systems of law like the English system and the Hindu or Islamic law, were reviewing their legislation. Those in Kenya were not being reviewed in similar fashion and this meant that although laws were outdated, they were still applied in this form. The subjects to Islam and Hindu law were often privy to the changes in the home jurisdiction and expected the laws to be applied in their revised formats. Bennett and Peart posed various questions that exemplified the challenges with adjudicating marriage matters using the amalgamated system of law.³⁷ They presented a scenario where two Africans who married under customary law, ascribed to a particular religious system such as Islam or Christianity. They wondered if the person would have to get into another marriage under the Christian or Islamic faith.³⁸ To add another layer of complexity, they questioned whether the person would have to contract, essentially a third marriage if they decided that they want it to be governed by civil law. The conflicts arising pertained to the system that would govern their relationship with their spouse about divorce and separation and the rules that governed the children born in the marriage in the event of a divorce.³⁹

A further challenge to the application of customary law in Kenya was the Judicature Act,⁴⁰ which made provisions concerning the jurisdiction of the High Court and other subordinate courts. It provided that High Court and all subordinate courts would only apply African customary law in civil cases where one or more of the parties were subject or affected by it provided it was not repugnant to justice and morality or inconsistent with any other written law.⁴¹

³⁷ TW Bennett & NS Peart 'The dualism of marriage laws in Africa' (1983) *Acta Juridica* 146.

³⁸ Bennet and Peart (n 37 above) 146.

³⁹ As above.

⁴⁰ Judicature Act 16 of 1967.

⁴¹ Judicature Act (n 40 above), sec 3(2).

This provision is still applicable in Kenya. The idea of justice and morality was a Western construct that often did not take into consideration the African ways and customs. The custom of paying of bride price, for instance, which was viewed by the colonialists as a form of purchasing a wife, was believed to be a repugnant practice. The fact that most African customary marriages were potentially polygamous, was also believed to be a repugnant practice and meant that often, these marriages were denied full recognition. After independence, the new regimes were left grappling to synchronise the myriad of laws that had been left behind. There was a need for radical reformation of the laws governing marriage, divorce and succession with a view of not only recognising the prevailing African systems but also creating a platform for uniform application of laws. The need to create one law that governed marriage gave rise to various mechanisms that were commissioned for the drafting of a new comprehensive legislation.

4.3.1 Marriage legislation in colonial Kenya

The integrated marriage laws took different forms throughout the colonial period. With the introduction of Native Court systems and subsequent English courts, the formulation of legislation on marriage evolved leading to the format that exists today. The recognition of woman-to-woman marriage, in particular, went through various stages of recognition based on the interpretation of the presiding Judge at the time. It was evident that there was a clear departure from its recognition when the colonial administration decided to do away with the Native courts and adopt the English courts. With the adoption of the English court, the principle of repugnance gained more prominence and its frequent application led to the non-recognition of woman-to-woman marriages.

Customs and rules applied differently to each community with a council of elders and other mechanisms for dispute settlement.⁴² Arguably, women and children were poorly considered in these processes and especially when it came to marriage, separation and succession issues. However, most of the matters were solved to the satisfaction of the community members. This was further complicated in woman-to-woman marriages where the courts had to decide on the nature of the marriage as well as the other issues of paternity and succession.

The colonial administration introduced rules and Ordinances in an attempt to civilise the natives and bring “uniformity” to the application of these rules across the different communities. The colonial administration’s policy was to introduce a metropolitan law in the colonies where they found ‘primitive’ native legal systems or no legal system at all.⁴³ When British East Africa was proclaimed a protectorate in 1895 the British government took over the administration of the territory.⁴⁴ In 1902 the administration of the territory was transferred from the Foreign Office in Britain to the Colonial Office in present day Kenya. A 1906 Order in Council established a government and legislature.⁴⁵ The colonial territories were governed by three system of laws which were; imperial legislation in the form of Orders in Council or Acts of Parliament, enactments of the local legislature and finally common law which comprised of Doctrines of Equity and the Statutes of General Application.⁴⁶ A Commissioner administered the territories by establishing Native courts, regulated the procedure and directed the

⁴² Abel (n 18 above) 582.

⁴³ A Phillips ‘Marriage and divorce laws in East Africa’ (1959) 3 *Journal of African Law* 93.

⁴⁴ W Kaguongo ‘Introductory note on Kenya’ Institute for International and Comparative Law http://www.icla.up.ac.za/images/country_reports/kenya_country_report.pdf (accessed 30 March 2016).

⁴⁵ K Roberts-Wray *Commonwealth and colonial law* (1966) 792.

⁴⁶ Bohannan & Curtin (n 4 above) 332.

application and norms of these procedures.⁴⁷ The general rule of the colonial administration was that where a matter involved natives, the rules applied were the laws and customs of the natives.

By 1897, the application of African customary law had already been relegated to situations where customary law was not deemed to be repugnant to justice and morality, through the 1897 order in Council, Native Courts Regulation⁴⁸. Article 64 of the Regulations provided that the Africans who had converted to Christianity would be subject to the Native Court Regulations of 1897 which was similar to the law of the Christian natives in India. Indian Acts⁴⁹ were also adopted as the Indian indentured labourers were brought into Kenya between 1896 and 1901.

The East African Marriage Ordinance⁵⁰ which was passed in 1902 provided that any native who was married under the Ordinance would not be subject to customary law, which meant that they had to adhere to the rules English marriage, including monogamy. On succession issues in such marriages, section 39 provided that any child of parents who married under this Ordinance and died intestate were subject to English law. This Ordinance was a law of general application but only provided for Christian forms of marriages. It stipulated that such marriages were monogamous. In 1904, the Native Christian Marriage Ordinance⁵¹ which closely resembled the Indian Christian Marriage Act of 1892 was passed and applied only to Christian marriages. On issues of succession, it required that ‘African customary law of

⁴⁷ Kenya Law Resource centre ‘Historical development of family laws in Kenya’ <http://www.kenyalawresourcecenter.org/2011/07/historical-development-of-family-laws.html> (accessed 7 July 2016).

⁴⁸ Native Courts Regulation Act 15 of 1897.

⁴⁹ Indian Act 2 of 1903.

⁵⁰ East African Marriage Ordinance 30 of 1902.

⁵¹ Native Christian Marriage Ordinance 9 of 1904.

succession be applied to all Africans irrespective of religion'.⁵² In the case *Benjawa Jembe v Priscilla Nyondo* (1912),⁵³ the Judge ruled that African Christian natives need only submit to the law of their communities. In 1922, an amendment to the Native Christian Marriage Ordinance⁵⁴ was passed. This converted marriage conducted under Native Law into legally binding marriages.⁵⁵ In 1931, the Native Christian Marriage Ordinance was replaced by the African Christian Marriage and Divorce Act⁵⁶ which applied to marriage of Africans when one or both of the parties professed Christianity.

Legal consideration was also made for marriages in the Hindu and Muslim communities. In 1906, the Mohammedan Marriage and Divorce Registration Act⁵⁷ was passed providing for the registration of all Islamic marriages. However, in the case of *Fatuma Binti Athuma v Ali Baka* (1918),⁵⁸ it was held that marriages under Islamic law were not considered valid if they were not conducted in accordance with the East African Marriage Ordinance. This led to the Mohammedan Marriage, Divorce and Succession Act⁵⁹ which declared that all marriages conducted under Islamic law were valid marriages in Kenya. Hindu marriage was only recognized by statute in 1946. The Hindu (Marriage, Divorce and Succession) Ordinance⁶⁰ provided that all marriages conducted under Hindu custom were valid marriages

⁵² Kenya Law Resource Centre 'History of the Law of Succession in Kenya' <http://www.kenyalawresourcecenter.org/2011/07/history-of-law-of-succession-in-kenya.html> (accessed 7 July 2016).

⁵³ *Benjawa Jembe v Priscilla Nyondo* (1912) 4 EALR 160.

⁵⁴ Native Marriage Ordinance (n 51 above).

⁵⁵ Native Marriage Ordinance (n 51 above), sec 7.

⁵⁶ African Christian Marriage and Divorce Act 51 of 1931.

⁵⁷ Mohammedan Marriage and Divorce Registration Act 13 of 1906.

⁵⁸ *Fatuma Binti Athuma v Ali Baka* (1918) EALR 171.

⁵⁹ Mohammedan Marriage, Divorce and Succession Act 34 of 1920.

⁶⁰ Hindu (Marriage, Divorce and Succession) Ordinance 43 of 1946.

in Kenya. When the laws in India changed requiring all marriages conducted under Hindu custom to be monogamous, the Hindu Marriage and Divorce Act⁶¹ was passed in 1955 to reflect these changes. As evidenced in the case of *R v Amkeyo* (1917), there was a general disregard for the application of African customary law especially in matters where there was a clear tension between customary law and colonial law. Cotran terms the conversion of customary law marriages into statutory marriages as ‘unsatisfactory’⁶² as the purpose of the traditional marriage ceremonies was to establish a legally valid marriage.

4.3.2 Marriage legislation in post-colonial Kenya

The form of codified marriage laws underwent significant changes after independence brought about by the 1963 Independence Constitution of Kenya.⁶³ It established new principles that had to be integrated into the various marriage laws. These principles altered the marriage laws and necessitated the adoption of a single comprehensive piece of legislation to govern all marriages.

Although the first Constitution of Kenya was formally introduced in 1963, the process of its formation began in 1957 with the first eight Kenyans who were elected to the Legislative Council.⁶⁴ In 1960, the first Lancaster House Conference was held in London to discuss the Independence Constitution. Kenya became self-governing in June 1963 and achieved its independence in December of the same year. In the same year, the Constitution of Kenya 1963 came into force. In 1964 however, the Independence Constitution underwent extensive

⁶¹ Hindu Marriage and Divorce Act 25 of 1955.

⁶² E Cotran ‘marriage, divorce and succession laws in Kenya: is integration or unification possible?’ (1996) 40 *Journal of African Law* 197.

⁶³ The Constitution of Kenya 2010: The people’s power ‘The history of constitutional reform in Kenya’ http://www.juakatiba.com/home/publication?t_id=77#.WYjbFMcjE2w (accessed 30 March 2016).

⁶⁴ Kenya: key historical and constitutional developments <http://www.kituoachakatiba.org/sites/default/files/legal-resources/kenya%20Key%20Historical%20and%20Constitutional%20Developments.pdf> (accessed 31 March 2016).

parliamentary amendments to the extent that it was referred to as the 1964 Constitution.⁶⁵ In 1967, after almost five years of independence, the Kenyan government sanctioned the creation of two commissions: one was tasked with reviewing the existing laws that governed marriage, divorce and related matters and the other was mandated to deal with matters of succession. The purpose of these commissions was to encourage nation building by decreasing the divide on tribal matters and consolidating the ownership of land, fragmented due to the existence of multiple legislations dealing with the same issue.⁶⁶ The commissions were tasked with making recommendations on a new comprehensive legislation that would provide a uniform law applicable to all Kenyans.

The law was required to pay particular attention to matters regarding the status of women in marriage and divorce, as there were several laws that affected marriage, divorce and succession. This resulted in the inclusion in legislation, provisions relating to issues of age requirement, the giving of consent, registration of marriages and the grounds for divorce'.⁶⁷ These created many problems with the administration of the laws. In 1968, the Commission presented its report and a draft Marriage Bill. The report's recommendations were categorised into three sections, 'Contracting of Marriage, the Effect of Marriage on Status and Legal Rights and Obligations and Matrimonial Causes'.⁶⁸

The Bill was ultimately rejected with one of the major contentions being that it un-African as it borrowed largely from English law including requiring that any person who

⁶⁵ A short history of the 2010 Kenya constitution <http://www.kenyaconstitution.org/history/a-short-history-of-the-2010-kenya-constitution/> (accessed 30 March 2016).

⁶⁶ School of oriental African Studies 'Commissions on the laws of marriage and succession in Kenya' (1967) 11 *Journal of African Law* 1.

⁶⁷ E Cotran 'Marriage, divorce and succession laws in Kenya: Is integration or unification possible?' (1996) 40 *Journal of African Law* 196.

⁶⁸ Hunnings (n 35 above) 777.

entered into a monogamous marriage was to be subject to the English law.⁶⁹ It was also accused of not taking into account African traditions and granting women many rights.⁷⁰ The arguments made by the authors of the report and the Bill were that the Bill reflected the will of the Kenyan people as their input was gained through various public meetings and questionnaires. It was also contended that as the society was evolving, the law would reflect a more urban perspective of marriage, recognising the diverse cultures and religions practised in the country as well as reflecting international perspectives.⁷¹ The Bill introduced a class system of marriages where the first class marriages were monogamous marriages celebrated at the Registry offices and churches, while the second class were customary polygamous marriages.⁷² The introduction of the class system was perceived to be a clear indication of the disregard for the African marriages in favour of more Western forms of marriage. Despite these negative proposals, some positive provisions provided for better protection and provision mechanisms for women. It provided that women be allowed to retain their property if they had acquired it themselves, that women were entitled to receive maintenance after divorce and that women also had interests in the matrimonial home.⁷³

Members of the judiciary saw the rejection of the Bill for the third time by parliament as a grave mistake. The then secretary of the Commission, Justice Cotran, felt that the reason for the rejection was “unfounded and based on the complete misunderstanding of the

⁶⁹ School of Oriental and African Studies ‘The rejection of the Marriage Bill in Kenya’ 23 *Journal of African Law* 109.

⁷⁰ As above, 109.

⁷¹ ‘The report of the commission on the law of marriage and divorce’ August 1968 78 <http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Commission-on-the-Law-of-Marriage-and-Divorce-1968.pdf> (accessed 31 March 2016).

⁷² Recommendation 10 (n 71 above) 23.

⁷³ Recommendation 58 (n 71 above) 53.

background and reasons for the measure.”⁷⁴ He further lamented that Kenyans failed to comprehend why those who contracted monogamous marriages were subjected to English law, while others were aggrieved about being subjected to customary law in a society that was increasingly becoming modern.⁷⁵ The Commission report contended that it had held public meetings and sent out questionnaires with a view of obtaining the opinions of the Kenyan people. The composition of the Commission also reflected diverse input with a distinguished Judge from East Africa, two African members of parliament and two women representatives who worked in the women’s movement, senior advocates and other non-lawyers.⁷⁶ The report presented to Parliament on the law espoused that consideration was made for the recognition and protection of human dignity as well as the respect for the institution of marriage and family life.

’The report proposed that there be a minimum age of consent which was 18 for men and 16 for women.⁷⁷ It also provided that the consent needed to be freely established before the marriage was to be contracted. It recommended that the marriage laws preserve the integrity of customary law by allowing Kenyans to enter into legally valid customary marriages and accepted the custom of the payment of dowry. It also maintained the right to enter into polygamous marriages.⁷⁸ Concerning children, as African customary law did not abide by the concept of illegitimacy, the laws were amended to ensure that no child was considered to be illegitimate regardless of the parents’ marital status.⁷⁹ Women’s rights were also sufficiently presented in the proposed legislation by conferring equal rights to wives who were married to

⁷⁴ School of Oriental and African Studies (n 69 above) 109.

⁷⁵ As above.

⁷⁶ Report of the commission (n 71 above) 1.

⁷⁷ Report of the commission (n 71 above), recomm 20.

⁷⁸ As above, recomm 9.

⁷⁹ As above, recomm 113.

the same man in a polygamous union. It further espoused the rights of women to acquire and independently own property, enter into contracts and the right to be held accountable for any breaches of the contract.⁸⁰

Some of the negative features of the laws that governed marriage and divorce were that they were predominately based on the English laws, which were heavily influenced by religion and religious views of marriage. Whereas the former colonial masters revised their laws, Kenya was left with the old English laws which were often very narrow in application. Marriage under English statutes provided that marriages could only be conducted between one man and one woman.⁸¹ This exempted polygamous unions and other types of customary marriages such as woman-to-woman marriages. These were treated as inferior to monogamous Christian marriages. There was no clear application of law or its limits concerning persons who had solemnised their unions under civil law and who practised customary traditions as well. There were ‘doubts as to which of the constituent elements of a customary marriage are essential to the validity of the marriage and at what point the marriage is complete’.⁸²

After the rejection of the Commission’s recommendations as well as the draft Marriage bill it sought to introduce, the next attempt to review the legislation was in 1985. The Marriage Bill⁸³ desired to create a central marriage registry and ‘sought to give equal rights to spouses in marriage in matters concerning custody of children, divorce or division of matrimonial property’.⁸⁴ It was a general feeling that extended families established defined family values. The custom in Kenya was that the family was more than just its nuclear members as people

⁸⁰ As above, recomm 59.

⁸¹ As above, recomm 47.

⁸² Cotran (n 67 above) 198.

⁸³ The draft marriage bill of 1985 was never passed.

⁸⁴ M Nzomo & P Kameri-Mbote ‘Gender issues in the Draft Bill of the Constitution of Kenya: An analysis’ (2003) 2 <http://www.ielrc.org/content/w0301.pdf> (accessed 8 July 2016).

had a responsibility to one another and this extended to the other citizens of the country.⁸⁵ Although the Marriage Act was amended over the years, no substantive amendments were made. The last amendment made to the Act was in 1975 concerning the issuing of the Registrar's certificate, through the Statute Law (Miscellaneous Amendments Act)⁸⁶ effectively reducing the number of days from 21 to 18 days. The Marriage Act⁸⁷ remained in force through the various amendments. The draft Marriage Bill of 2007 was the first attempt to make substantive changes to the letter of the law from the rejected draft Marriage Bill of 1975. The 2007 Marriage Bill sought to consolidate all the laws that related to marriage into one piece of encompassing legislation. There were seven laws that dealt with marriage; the Marriage Act, the African Christian and Divorce Act, the Matrimonial Causes Act, the Separation and Maintenance Act, the Mohammedan Marriage and Divorce Registration Act, the Mohammedan Marriage and Divorce Succession Act and the Hindu Marriage and Divorce Act. The Bill defined different kinds of marriages and categorised them as either monogamous or polygamous.⁸⁸ If marriage was monogamous, the parties could not get into polygamous unions. It provided that marriages contracted in Islamic form or in accordance with customary law were polygamous or potentially polygamous.⁸⁹ Another issue proposed to deal with was the law surrounding issues of cohabitation. It provided a presumption of marriage clause that to the effect that a man and a woman who had openly lived together for two years were presumed to be husband and wife.⁹⁰ It sought to protect the legitimacy of children born in a marriage that

⁸⁵ Kerugo 'Kenya's Marriage Bill' 29 March 2009 <https://gukira.wordpress.com/2009/03/29/kenyas-marriage-Bill/> (accessed 8 July 2016).

⁸⁶ Statute Law (Miscellaneous Amendments Act) Act 7 of 1974.

⁸⁷ Marriage Act 2 of 1964 (now repealed).

⁸⁸ The Marriage Bill 2007, sec 4 <http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/Unpublished/200703.pdf> (accessed 11 July 2016).

⁸⁹ Marriage Bill (n 88 above), sec 4(2).

⁹⁰ Marriage Bill (n 88 above), sec 7.

was voided because of nullity and ensured that this did not affect the legitimacy of the child. It provided for the recognition and the manner by which marriage could be contracted and included marriages contracted under civil law, customary law, Islamic law, as well as Hindu and any Christian denominations or faiths.⁹¹ On matrimonial rights and liabilities, both sides were granted equal rights and liabilities in the event of the breakdown of the marriage.⁹² Each party would be responsible for any tortious acts committed by themselves.⁹³ Either party was granted the right to petition for divorce where the marriage had irretrievably broken down.⁹⁴ Most importantly, it legally provided for the recognition of customary marriages, which had only been recognised through court rulings by Judges.

4.4 Effect of the Constitution and marriage laws on the recognition of woman-to-woman marriage

The attempts to formalise inclusive marriage legislation led to the recognition of customary practices in marriage. However, certain types of customary marriages were not included. Levirate unions in the form of woman-to-woman marriage were identified in legal texts and by legal authors such as Cotran.⁹⁵ However, when the matter of adjudication of issues arising out of these forms of marriages was presented to courts, it became clear that the courts would have to adapt a system that recognised both the codified marriage laws and the customs that were followed by the members of communities who still practised these marriages.⁹⁶

⁹¹ Marriage Bill (n 88 above), sec 21.

⁹² Marriage Bill (n 88 above), sec 48.

⁹³ Marriage Bill (n 88 above), sec 50.

⁹⁴ Marriage Bill (n 88 above), sec 69.

⁹⁵ Cotran (n 67 above) 196.

⁹⁶ C Hildebrand and J Lewis *Kenya: wife inheritance* (2013) 6 <http://blogs.ubc.ca/cfls/files/2013/07/Wife-Inheritance-in-Kenya.pdf> (accessed 30 March 2016).

4.4.1 The Constitution and marriage in Kenya

After the failed attempt to review the Marriage Act in 2007, the country went through an era of legal reform. Although the constitutional review process had been on-going from the early 1990s, the new shift in political leadership after the highly contested general elections held in 2007, spearheaded the reforms beginning with the reenergized efforts towards constitutional review. The outcome of the review process was a draft constitution that was subjected to a referendum process and ultimately promulgated in August 2010.⁹⁷ One of the many gains of the Constitution of Kenya 2010⁹⁸ was the protection of marginalised groups, identified as women, children, persons living with disabilities and minority groups. However, one of the most valuable contributions of women to the debate on the Constitution was the discussion that was sparked on marriage and family. The previous Constitution ‘legitimised the traditional position which accorded women fewer privileges than men in matters concerning families, marriage, divorce and succession’,⁹⁹ while the Constitution of Kenya 2010 promoted greater equality and made steps towards dismantling patriarchy.

During the constitutional review process, the groups working on women’s rights clamoured for various changes with regards to marriage and the rights of women.¹⁰⁰ Women’s rights groups wanted laws that guaranteed that a woman would not lose her citizenship upon the dissolution of the marriage. They also wanted laws that gave women the right to have a marriage certificate and that women get rights concerning ‘marriage, burial, inheritance, personal law issues to removing the cultural concessions made to men in gender relations that

⁹⁷ The Constitution of Kenya 2010.

⁹⁸ Africa Woman and Child Feature Service ‘Women’s power through the constitution’ http://www.awcfs.org/dmdocuments/books/Womens_Constitution.pdf (accessed 13 July 2016).

⁹⁹ Nzomo (n 84 above) 1.

¹⁰⁰ As above.

uphold tenets of a patrilineal society'.¹⁰¹ These groups pressed that the Constitution, although providing for protection and provision for ethnic and cultural practices, should also outlaw harmful practices like child marriage and requiring mandatory HIV testing before contracting marriage.¹⁰²

However, not all the debates that centred on marriage were advantageous to customary marriages. There were heavy distortion and misrepresentation on the clause that enshrined the sanctity of marriage anchoring it as a religious institution.¹⁰³ The antagonists of the Constitution decried the wording on the provision claiming that by providing that 'any person' can contract a marriage, the Constitution presented an avenue for the recognition of same-sex marriages.¹⁰⁴ The most vocal of these groups were the churches, who felt that the sanctity of marriage and the protection of the family unit was being undermined.¹⁰⁵ While drafting the Constitution, the Committee of Experts was clear that the provisions of Constitution of Kenya 2010 on marriage were drafted with the intention of eliminating any ambiguity on the persons who could contract a marriage, citing that it would lead to the rejection of the Constitution by the majority of Kenyans during the referendum process.¹⁰⁶

¹⁰¹ As above, 4.

¹⁰² Nzomo (n 84 above) 4.

¹⁰³ DS Parsitau (n 3 above) 12.

¹⁰⁴ See generally 'The religious community rejected the constitution on the basis that homosexuality and same-sex marriages were un-Christian'. <https://www.standardmedia.co.ke/ureport/story/2000221093/why-same-sex-marriages-should-be-legalized-in-kenya>; NCKK says no to push for gay marriages <http://www.capitalfm.co.ke/news/2012/05/nckk-says-no-to-push-for-gay-marriages/> (accessed 13 July 2016).

¹⁰⁵ See generally Parsitau (n 3 above) 12; 'Kenya gay homosexual consensus' <https://www.theguardian.com/commentisfree/2009/nov/04/kenya-gay-homosexual-census>. Anglican Archbishop stated that the union between Charles Ngengi and Daniel Chege Gichia (Kenya nationals who entered into a civil union in London in 2009) was abnormal. This sentiment was shared by PCEA St. Andrews church moderator Patrick Mungariria who held the view that the family unit was coming under attack.

¹⁰⁶ 'Kenyan law review experts rule out rights for homosexuals' *The Nation* 19 October 2009. <http://humanrightshouse.org/noop/page.php?p=Articles/12138.html&d=shdbylgzokyw>; 'New law shuts door to

4.4.2 The Marriage Act 2014

The Marriage Act of 2014¹⁰⁷ was a contentious piece of legislation. It presented many gains for both men and women, as had been negotiated during the constitutional review process. Some of the provisions were clear demarcations of the presentation of women and the provisions on marriage in customary law. The Act was signed into law in March 2014, ‘despite protests from female lawmakers who angrily stormed out of the late-night session (of parliament) at the time’.¹⁰⁸ There were various provisions in the marriage law that had already been introduced in the various drafts that preceded it. It also reflected the provisions of complementary legislation such as the Children’s Act with regard to the age of majority. The law reflected the definition of a child as any individual who was under the age of eighteen as had been provided for in the Children’s Act.¹⁰⁹

The definition of marriage in the Marriage Act¹¹⁰ is derived from the Constitution of Kenya 2010, which provides that it is a voluntary union between a man and a woman.¹¹¹ On its face, this provision disallows the recognition of any other type of marriage. The law further espouses that both parties have equal rights in marriage, reflecting once again the Constitution of Kenya 2010, which enshrines the principle of equality. The legislation provides that all marriages must have two witnesses present,¹¹² a fact that was introduced in the application of customary law in matters of succession during the colonial period. In keeping with its inclusive

gay weddings’ *The Nation* 18 November 2009. <http://www.nation.co.ke/news/1056-688058-jk0qvpz/index.html> (accessed 8 August 2016).

¹⁰⁷ The Marriage Act 4 of 2014.

¹⁰⁸ F Karimi & L Leposo ‘New Kenya Law legalizes Polygamy; Women’s group applauds it’. *CNN* 1 May 2014 <http://edition.cnn.com/2014/05/01/world/africa/kenya-polygamy-law/> (accessed 8 August 2016).

¹⁰⁹ Children’s Act 38 of 2005.

¹¹⁰ Marriage Act (n 107 above).

¹¹¹ Marriage Act (n 107 above), sec 3(1).

¹¹² Marriage Act (n 107 above), sec 5(3).

nature, it provides for the registration of all marriages whether Christian, Hindu, Islamic, civil or customary.¹¹³ On the contentious provisions of polygamy, the Marriage Act recognised that Islamic and customary law marriages are potentially polygamous, a provision presented in the earlier Bills and presents that civil, and Christian and Hindu marriages are monogamous. It provides exclusively for civil marriages in section 24, customary marriages in section 43, Hindu marriages section 46 and 47 and Islamic marriages in sections 48 and 49. It provides for the recognition of foreign marriages, but this is limited to Christian marriages. It also provides the circumstances under which a marriage may be considered void or voidable as well as the dissolution of marriage. It provides for the maintenance of the spouse upon the dissolution of the marriage as well as the custody and maintenance of children.

On the provisions of customary law, the Act provides that recognition of customary law is based on the customs of one or both parties.¹¹⁴ This is an explicit provision and binds the court to the recognition of customary marriages.¹¹⁵ It provides for the payment of a dowry where the customs require it and concede that a token amount is a sufficient proof of marriage. This concession stems from various customs such as those of the Kikuyu people, where the paying of dowry was intended to be a long drawn out process, which took place in multiple ceremonies over the years, to ensure that the girl and the families have an opportunity to meet every couple of years. The Marriage Act state that the parties are required to inform the Registrar within three months of completing the requisite stages to secure the marriage. There is a necessity to state the custom that was applied while conducting the customary marriage. Upon the dissolution of the marriage, the parties are required to file a report in court. The dissolution is granted once the parties have gone through the requisite customs of dissolution.

¹¹³ Marriage Act (n 107 above), sec 6(1).

¹¹⁴ Marriage Act (n 107 above), sec 43.

¹¹⁵ As above

The Marriage Act presents an all-encompassing legislation that attempts in as far as protection within marriage is concerned, to ensure that all communities in Kenya are adequately included by ensuring the recognition of both parties' rights irrespective of the system of law that governs the marriage.¹¹⁶ However, there is a clear effort to not evaluate the full extent of marriages under customary law by not explicitly defining the forms of marriage that exist within the jurisdiction. Although the conduct of customs as according to the tribe of one or both parties remains undefined, it is clear that the law is granting as much autonomy as it can in the conduct of the marriage. The constitutional provisions on the parties to a marriage are reinforced in the Marriage Act. However, there is the complication of pre-existing woman-to-woman marriages that predate the Constitution and the Act. It is trite that the rule of law abhors retroactive application of the law and therefore may not be cited to invalidate already existing marriages. The question then becomes: What is to be done with parties who subscribe to customary law and entered into woman-to-woman marriages? What becomes of the offspring of such unions and should there be any recognition of these marriages to secure the future of the parties and their offspring?

4.5 Judicial determinations on woman-to-woman marriage in Kenya

Woman-to-woman marriages have been established as a recognized form of customary marriage in pre-colonial Kenya. However, the courts still needed to adjudicate on woman-to-woman marriages that were performed according to customary law. In adjudicating on woman-to-woman marriages, the courts were compelled, in some instances, to make judgments that in effect recognised the institution as a formal marriage institution under customary law.

The 1963 Constitution¹¹⁷ did not have any specific provision on who could contract a valid marriage except the ability for women to acquire citizenship through marriage. The direct

¹¹⁶ Marriage Act (n 107 above), sec 6(1).

¹¹⁷ Constitution of Kenya 1963.

provisions on marriage were left to the various Marriage Acts and their subsequent amendments. These Marriage Acts defined marriage as being between a man and a woman and this did not include woman-to-woman marriages. The regulation and adjudication of woman-to-woman marriages under customary law remained a preserve of the courts and any direction on challenges was from the precedents set by the court. However, with the passing of the Constitution of Kenya 2010, the uncertainty of the recognition of woman-to-woman marriage was arguably eliminated by virtue of Article 45(2),¹¹⁸ which clearly defined marriages as being between a man and woman. At face value, the provision seemed to prohibit the legal recognition of woman-to-woman marriage. The challenge of the court was thus, how to ensure that the widely recognised and accepted custom of woman-to-woman marriage remained legally valid despite the provisions of Constitution of Kenya 2010.

In the cases and judgments on woman-to-woman marriage prior to the passing of the Constitution in 2010, the courts dealt with the issue of acknowledgement and application of the common formative elements such as the payment of bride-price in woman-to-woman marriage. After the passing of the Constitution of Kenya 2010 and the more formalised marriage legislation, the courts began integrating human rights principles such as equality and the right to exercising cultural preference when making judgments on woman-to-woman marriages. The cases brought before the court was from the Kisii, Nandi, Kikuyu, Kamba, Suba and Kuria communities, as they actively performed and recognize woman-to-woman marriages.

4.5.1 Judicial determinations before 2010

Any challenges to woman-to-woman marriages after colonization were deferred to the Native courts and subsequently the Kenyan courts where English statute law was applied. The initial

¹¹⁸ Constitution of Kenya (n 96 above), Art 45(2).

challenge did not have to do with the recognition of these marriages, but rather to do with the dissolution and issues of succession. However, with the introduction of the repugnancy clause in the Judicature Act, some of the judgments dealt with the challenge that marriage was ideally between a man and a woman, although this did not deter the court from deciding on these marriages. The focus dwelled predominantly on the nature of the marriage and whether it achieved the threshold that defined it as a customary marriage. Other considerations included the rights of the *female husband* who was considered as the head of the household and family as well as issues of divorce and succession.

The development of jurisprudence evolved from general disregard for African customary law in *R v Amkeyo* to a consideration of the marriage practices and their impact in determining legal validity of African marriages.

Kisii

One of the earliest documented cases on woman-to-woman marriage in Kenya is the case of *Maria Gisese w/o v Marcella Nyomenda* (1981) heard by the High Court of Kenya.¹¹⁹ It arose from a dispute over the dissolution of a marriage between the *female husband* and her wife performed under Kisii customary law. According to Kisii custom, a widow who had no male offspring could enter a woman-to-woman marriage with a girl after making the arrangement with the girl's parents. The widow, who was the *female husband*, identified a man with whom the wife would bear a child; according to custom, the child or children would then be regarded as the *female husband's* offspring.¹²⁰

The facts of the case were that in July 1974, the appellant married the respondent in a customary woman-to-woman marriage and paid a sum of Kenya shillings 1000, as well as a goat, to the respondent's mother. This marriage was witnessed by Orori Ochoki as he was part

¹¹⁹ *Maria Gisese w/o v Angoi v Marcella Nyomenda* Civil Appeal 1 of 1981.

¹²⁰ *Maria Gisese* case (n 119 above).

of the liaison between the two parties. Two months after the woman-to-woman marriage, the respondent ran away and began cohabiting with the man who had been identified by the *female husband*, and with whom she had two children. The respondent's mother intervened after being informed of the situation and returned the 'wife' to the appellant (the *female husband*). However, soon thereafter, the respondent ran away again. The matter had been referred to the council of elders. There is a dispute between the parties about the council's resolution of the issue. On the one hand, the respondent claimed that the council of elders had decided that the appellant should be repaid the dowry and that the marriage should be dissolved. The appellant, on the other hand, claimed that the elders had demanded that the respondent return to her matrimonial home to stay with the appellant.

The respondent then decided to seek a divorce through the courts. During the initial trial proceedings, the respondent claimed that she had been forced into the marriage and that she had been subjected to cruel treatment while in the marriage. The appellant countered this, arguing that the respondent had not been forced into the marriage and had not been treated cruelly. In the court of first instance, the magistrate court established that a woman-to-woman marriage had indeed been conducted in July 1974 and that the respondent deserted the matrimonial home in September of the same year. The respondent then went on to have two children with the man that the *female husband* had identified. She was consequently compelled by her mother to return to her matrimonial home with the appellant, but she again deserted the home two months later. In looking at the evidence, the trial magistrate established that the reason why the respondent had deserted her matrimonial home twice, and after very short periods of time, was because she had not initially consented to the marriage. The magistrate also contended that the claims of cruelty could not be discounted. The most important take from this case was the magistrate's pronouncement that under Kisii customary law, in woman-to-woman marriages, a woman who is widowed and has no children or has only female

children, may take ‘a girl to be her wife and then choose a man from amongst her late husband’s clan who will have sexual intercourse with the new wife’.¹²¹

The appellant appealed against the magistrate court ruling. In the High Court, the Judge ruled that lack of choice or consent from the wife on the matter of which man should have sexual intercourse with her was ‘repugnant to justice and an abuse of an individual freedom of choice... (and that the) custom does not fit in with modern developments’.¹²² The Judge also held that woman-to-woman marriages could not be recognized and concluded that the appellant had no legal rights over the children.¹²³

There are a number of observations to be gleaned from this case. The first is that there was evidence of the considerations of the requirements of a valid customary marriage. The *female husband* paid the bride price, and the wife agreed to cohabit in the matrimonial home, which indicated that there was consent and there was cohabitation. The Court is essentially recognizing that woman-to-woman marriages meet the required threshold of being recognized as a customary marriage.

Another issue that arises that the Court seems to consider is the implication of retraction of consent, as the wife ran away from the matrimonial home twice. What happens when the consent has been retracted? Can this be considered to be appeal for divorce and should the bride price be paid back? It appears that that the Judge seems to be persuaded that the retraction of consent is equivalent to the nullification of the marriage rather than an application for divorce.

¹²¹ E Cotran ‘Case no. 56 A in E Cotran ‘Casebook on African Customary Law’ (1995) 197.

¹²² Published: A Wassuna ‘Averting a clash between culture, law and science’ an examination of the effects of new reproductive technologies in Kenya’ Published Master’s thesis, McGill University, 1999 77.

¹²³ Wassuna (n 122 above) 77.

Another issue that the court considered was the repugnancy of the forced choice of sexual partner. This is interesting as it gives rise to the question of cultural practice vis-à-vis moral obligation. It is apparent that the Judge was persuaded that the customary practice of choosing a genitor was a cultural norm that was requisite to the institution of woman-to-woman marriage amongst the Kisii and that was repugnant to justice and morality. This once again raises the question of the superiority of colonial laws such as the repugnancy clause over customary law. This challenge is also noted in the subsequent cases discussed. However, although the idea of the choice of the genitor is left to the *female husband*, is there not an implied issue of consent if the wife agrees to have sexual relations with the genitor to beget children? If this is true, then the issue of repugnance does not apply. However, conversely, can there be said to be consent if the wife entered into the woman-to-woman marriage due to some form of inadequacy, whether economic or social? Does she have the capacity to refuse her spouse if she consented to the woman-to-woman marriage and all its considerations?

Nandi

Unlike the previous case, the case of *Esther Chepkuauui v Chepngeno Kobot Chebet and Johanah Kipsang* (1981)¹²⁴ concerns a marriage that was dissolved by consent.

The parties (Esther Chepkuauui (Esther, the *female husband*) and Chepngeno Kobot Chebet (Chepngeno, the wife) were in a woman-to-woman marriage as recognised in the Nandi community. While in this marriage, they had two children and the biological father was not considered as the children's father as was usually the case in such situations. 'The children are, however, known to be those of the woman who pays dowry'.¹²⁵ In this instance, they belonged to Esther. Esther and Chepngeno subsequently separated, and Chepngeno married Johanah Kipsang. Despite the separation, there was no evidence that the dowry paid for the woman-to-

¹²⁴ *Esther Chepkuauui v Chepngeno Kobot Chebet and Johanah Kipsang* (1981) Divorce Cause 16 of 1980.

¹²⁵ Cotran (n 121 above) 195.

woman marriage was returned. Chepngeno went on to bear two more children with Kipsang after her separation from Esther. However, the separation between Esther and Chepngeno was not considered as complete, as Chepngeno had not returned the bride price paid by Esther. According to Nandi tradition, the children born after the first two children from the woman-to-woman marriage were therefore born when the marriage between Esther and Chepngeno was still subsisting and legal. One of the issues raised in the trial court (before the magistrate) was that of custody. It was hard to determine if the first two children were to remain with Esther or go to Chepngeno. Chebet, the first child from the woman-to-woman marriage between Esther and Chepngeno, subsequently married a man, and her dowry was paid to her mother, Chepngeno, and her husband, Johanah. Esther contended that since the dowry had not been returned and the woman-to-woman marriage had not been formally dissolved in this manner, Chebet was her child and the dowry should have been paid to her.

In deciding this matter, the High Court held that although the practice ‘looks an abuse and indeed repugnant to justice and morality, the practice is in force and remains to be recognised by the entire community such as the Nandi’.¹²⁶ and therefore should be recognized as customary law practice. The High Court determined that because the marriage was accepted according to custom and that the payment of dowry had been ‘according to the contractual nature of such marriage’, the plaintiff, Esther, had a valid claim. The High Court, therefore, ruled that the dowry paid to the respondent should instead be paid to the plaintiff.

In this case, the material issue of the validity of marriage was established as the payment of dowry. The High Court set a precedent that the payment of dowry is part of the contractual obligation in a woman-to-woman marriage. Such marriages were not only established as a contractual obligation between two parties, even if they were both women but also entailed that there were obligations that needed to be met, in the form of the payment of dowry to ensure

¹²⁶ *Esther Chepkuaui* case (n 124 above).

that the marriage was legally binding. Another issue raised was that, for a custom to be recognized by a court, it had to be recognized by the entire community. The custom was not considered to be against morals in as far it did not seem to offend the rules of natural justice. It seems that the repugnancy clause only applied where the matter had further implications for the freedom of the individual or the violation of the person's individual rights.

Further, the precedent set in this case was that where the choice is between customary law and the application of statutory law, in this case the Judicature Act, the Court opted to place customary law at a higher order. This is a distinct departure from the previous ruling where the customary law was disregarded in favour of the repugnancy clause. There are a few ideas that come to mind as to reasons for the deviation. The first could be that the Court was increasingly becoming aware of the tension between customary law and statute and wanted to ensure that customary law, especially in matters where it was applicable, received precedence so as to not invalidate it. Another reason may be that the Courts were persuaded by the arguments on the applicability of customary law to the unique institution of woman-to-woman marriage. Alternatively, the Judge who was adjudicating on the matter, valued the application of customary law.

Whatever the rationale, this ruling marked the beginning of the tussle of supremacy between customary law and statutory law on matters of woman-to-woman marriage.

Kikuyu

After the review of the marriage legislation another matter concerning woman-to-woman marriage was brought before the Court. In the case of *Re the Estate of Priscilla Nduta Gitwande* (deceased) (2006),¹²⁷ the matter before the High Court was the issue of succession in a woman-to-woman marriage.

¹²⁷ *Re the Estate of Priscilla Nduta Gitwande* (deceased) (2006) Succession Cause 616 of 1997.

The facts of this case were that the administratrix, Salina, was the traditional wife of the deceased in a woman-to-woman marriage, and the objector was the biological daughter of the deceased. Both the objector and the administratrix were given four acres of land by the deceased, while the other five children of the administratrix were given two acres each. The objector contended that under section 38 of the Law of Succession Act,¹²⁸ the only heir recognised is the objector as she was the daughter of the deceased. The section provided as follows:

Where an intestate has left a surviving child or children but no spouse, the net estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child if there is only one, or be equally divided among the surviving children.¹²⁹

The Law of Succession Act provides that the term “wife” includes a wife who is separated from her husband and the terms “husband”, and “spouse” “widow” and “widower” shall have a corresponding meaning’.¹³⁰

The objector contended that customs were not recognized in the application of the Law of Succession Act. She also contended that, according to Kikuyu custom, one could only enter a woman-to-woman marriage if a husband died leaving a childless widow who was past childbearing age, in which case the widow could then marry a wife upon paying the dowry. The *female husband* (the widow) would then arrange a man from her deceased husband’s age group to sleep with her wife and these children were regarded to be those of the widow’s deceased husband. The objector emphasized that she was the biological child of the deceased and that the woman-to-woman marriage was not a normal or natural marriage.

In dealing with this matter, the Judge considered various issues. She first considered if the marriage was repugnant to justice and morality and in case it was not, she considered if the

¹²⁸ Law of Succession Act 14 of 1972.

¹²⁹ Law of Succession Act (n 128 above), sec 30.

¹³⁰ Law of Succession Act (n 128 above), sec 3.

deceased was a childless widow who had married the administratrix to continue her husband's progeny. The Judge contended that she was not able to establish if the deceased was a widow when she contracted the woman-to-woman marriage or what the motivation was. However, it was evident that the deceased was not childless. She, therefore, was not able to accept that the marriage had been solemnised according to Kikuyu customary law, and did not recognise the validity of the marriage either under customary law or the Law of Succession Act. The objector was declared to be the sole heir of the estate of the deceased.

In this case, the issue before the High Court was the validity of the woman-to-woman marriage. The Judge was persuaded that in Kikuyu custom, woman-to-woman marriage did exist, however, certain criteria had to be followed to ensure the validity of the marriage. These were that the woman undertaking the marriage had to be a childless widow and that the purpose of undertaking the marriage was to beget progeny for the deceased husband. The question as to the repugnancy clause, though it was raised, was not discussed. In fact, the case established the precedent as to the recognition of woman-to-woman marriage amongst the Kikuyu tribe.

Another matter that arose in this case was the rights and duties of biological children over those of children born in woman-to-woman marriage. The argument presented to the Court was that a biological child had more rights than a child born in a woman-to-woman marriage. Although the matter was not substantively discussed, it can be inferred that the recognition of woman-to-woman marriage as a legally valid marriage, granted the same rights and responsibilities to the children regardless of the biological considerations. Once again, the issue of supremacy of customary law in deciding a customary issue was established.

In 2008, in the appeal case of *Millicent Njeri Mbugua v Alice Wambui Wainana* (2008),¹³¹ the requirements of a valid woman-to-woman marriage under customary law among

¹³¹ *Millicent Njeri Mbugua v Alice Wambui Wainana* (2008) Civil Appeal 50 of 2003.

the Kikuyu people were considered.¹³² In this case, the deceased Murachia Burugu (the husband of Priscilla Wanjiru) had been survived by the daughter who was the appellant. The respondent, Alice Wainaina, claimed that she had married Priscilla Wanjiru, the deceased's wife, according to Kikuyu custom in a woman-to-woman marriage. She claimed to have cohabited with the deceased and deceased's wife up until the death of the deceased's wife and was left caring for the late Murachia Burugu. She claimed that she had been utilizing part of the deceased's land and that the appellant had been utilizing the other part. She claimed that she was a legitimate heir and not an employee as alleged by the appellant. The appellant was the daughter-in-law to the deceased and therefore the only surviving heir. The lower court held that Kikuyu custom allowed woman-to-woman marriages. It also held that wives in the Kikuyu custom owned no land but were allowed to marry another woman, and the married wife would be able to use the land of the husband of the wife who had married her.¹³³ The court, therefore, held that the land should be shared between the two women. Millicent, the daughter-in-law and only surviving heir, appealed this decision to the High Court on various grounds. The appellant argued that there was an absence of all the factors that comprised a levirate marriage, and therefore such a marriage had not been substantiated by the respondent. She also claimed that the respondent was still an employee although there was no stated salary, that the respondent was not a dependant as defined in the laws of succession and that the respondent was not a daughter in law as she had not sworn an affidavit determining this. In the High Court, the Judge held that

for woman-to-woman marriage to be valid and which the respondent claims she was, the husband of the woman marrying another must have died, the woman marrying must have been left childless by her deceased husband, she must be past child bearing, the said woman or widow must pay *ruracio* to the

¹³² E Mwobobia 'Court Affirms the Right of Inheritance in Woman-to-woman Marriage' Kenya Law Reports. <http://kenyalaw.org/newsletter/20110708.html> (accessed 11 July 2016).

¹³³ Mwobobia (n 132 above).

family of the woman she is marrying and must subsequently arrange for a man from her deceased husband's age group to have intercourse with her wife.¹³⁴

The Judge found that these conditions had not been met. The respondent had met the deceased and his wife during their lifetimes and the deceased's wife was not a childless widow. She did not pay the dowry, nor did she arrange for a man from her husband's age group to have relations with the respondent as her husband was still alive. Although there was some indication that dowry was paid, it was established that the amount was not equivalent to an amount that would be paid for a dowry. The respondent had previously submitted an affidavit stating that she was married to the deceased's son, making her the daughter in law. She never had these documents amended or struck out of evidence. Finally, the Judge also defined the term 'dependant' as follows:

- (a) The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death
- (b) such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sister, as were being maintained by the deceased immediately prior to his death; and
- (c) where the deceased was a woman, her husband if he was being maintained by her immediately before the date of her death.¹³⁵

The Court concluded that the respondent did not fit any of these definitions because, although she lived with the deceased and his wife, she was not a dependant. The Judge, therefore, set aside the lower court's decision.

In this matter, the High Court once again established the nature and conditions that need to be met for a woman-to-woman marriage to be legally valid. It also went further to elaborate on who qualifies as a 'dependant' for the purposes of inheritance. Once again, the courts

¹³⁴ *Millicent Njeri Mbugua* case (n 130 above).

¹³⁵ As above.

recognized, in principle, the validity of woman-to-woman marriages. These are very significant precedents set as they deal not only with the essential requirements of customary marriages, but also the question as to legitimacy of the wife in woman-to-woman marriages. What is fascinating, is the manner in which the Judge dealt with the role of the wife in a woman-to-woman marriage. Although the marriage was not found to be a woman-to-woman marriage, the significance of the definitions of 'dependant' are subjected to statutory tests rather than customary practice. It seems that the considerations of the African family, clan and community interrelationships, discussed in Chapter 2, were not applied. In most instances in customary African law, a dependant is not limited to a biological child or a wife for whom dowry was paid. A dependant includes everyone in the clan and community with the descent of kinship and lineage. The issue of utility of one's land could not be used to establish ownership.

This case illustrates the paradox of legal plurality, where the application of laws may not necessarily depend on the situation of the marriage, but rather on the evolution of the society and subsequent changes in the application of other laws such as land law. How, then, can a Court objectively make a ruling where the lines are not clear and external forces further hinder the correct application of law?

Kamba

In the same year, in *Re Matter of the Estate of Musau Ngau (deceased)* (2008),¹³⁶ which was a matter dealing with succession, the High Court upheld a woman-to-woman marriage carried out according to Kamba customary law.

The facts of the case were that the late Musau Ngau left behind two widows, Kakuli Musau (who had one daughter) and Mutindi Musau (who had eight children). Kakuli married Grace Wayua in a Kamba woman-to-woman marriage, which was witnessed by many people.

¹³⁶ *Re matter of the Estate of Musau Ngau (Deceased)* (2008) Prob & Admin Cause 137 of 1992.

Grace went on to have five children with a selected man, chosen according to Kamba custom, who all lived on the deceased's property.

There were various challenges raised upon the death of Musau Ngau. One challenge was whether as Kakuli was married to Grace in a recognized customary woman-to-woman marriage, she should inherit a portion of Musau's property. The other view was that Kakuli should share her portion of the inheritance she received with Grace as Grace was her wife and not Musau's. The Judge held that under Kamba customary law Grace held the same position as any wife and that she was entitled to inherit from her husband and not from her husband's husband. In this case, as Grace was married to Kakuli, she can only inherit from her and not from Musau. He also determined that Grace's children belonged to Kakuli's household. Therefore, the estate was shared equally between Musau's two wives, and Grace Wayua would inherit from Kakuli's portion.

This case established clearly that woman-to-woman marriage was practised and recognized within the Kamba community. It further established the position of the 'wife' and any children who were begotten from the woman-to-woman marriage as belonging to the *female husband* and not to the *female husband's* husband. This case further confirms the status of the *female husband* as being equivalent to a male in the Kamba community.

The judicial decisions on woman-to-woman marriages before 2010 are clear indications of the tension and growth of the Courts in adjudicating on matters of customary law. It shows the evolution from the adoption of colonial laws to the almost observable awakening of the Judges on the need to protect and promote customary law. The Constitution of Kenya 2010 introduces a different paradigm, namely, human rights. The Courts had to consider how human rights relate to customary law, and the clear challenges of the application on various rights which seemingly contradicted human rights principles. However, as the subsequent cases

show, human rights enabled the Courts to tackle issues such as discrimination and the respect of culture and tradition.

4.5.2 Judicial determinations after 2010

The institution of woman-to-woman marriage has been affirmed after the adoption of the 2010 Constitution despite the provisions of Article 45(2) of the Constitution of Kenya 2010, which restricts marriage to a union between for a man and a woman. The courts seemed to interpret the provision as not excluding the recognition of woman-to-woman marriage by considering the spirit of the Constitution. It is evident that upon the reading of the document, its intention is to recognise and respect the customs of the people of Kenya. It also emphasises the respect for basic human rights principles such as inclusion and equality as some of the important tenets of the people of Kenya. The decisions made subsequent to the passing of the Constitution of Kenya 2010, are a reflection of the court's intention to legally validate the institution of woman-to-woman marriage as an important customary practice.

Nandi

In the case of *Monica Jesang Katam v Jackson Chepkwony and Selina Jemaiyo Tirop* (2011),¹³⁷ Monica Katam wanted to claim the right to inherit from the estate of Cherotich Kimong'ony Kibserea (the deceased), whom she claimed she had married under the Nandi customary law in a woman-to-woman marriage. In support of her claim, she argued that she had undergone all the customary rites to contract marriage and had a contract of marriage that had been signed by the deceased. She also claimed to have lived with the deceased for one year during the year 2005 and 2006. The respondents, who were relatives of the deceased, alleged that the petitioner was a servant of the deceased and not a wife. They claimed that she carried out chores for the deceased and argued that there had been no marriage between the deceased and the petitioner.

¹³⁷ *Monica Jesang Katam v Jackson Chepkwony and Selina Jemaiyo Tirop* (2011) Succession Cause 212 of 2010.

There were witnesses who claimed that the deceased had written a will and that she had not provided for the petitioner in the will.

The presiding Judge made some observations on some of the central issues raised in the matter. He noted that there was ethnographic evidence to support the fact there were women-to-women marriages in the Nandi community, as well as agreement about the circumstances under which they took place. He also held that the evidence that was presented illustrated that there was indeed a valid woman-to-woman marriage and that Monica Jesang was a 'wife' under Nandi customary law and was therefore entitled to the inheritance.

In reflecting on the issues that were raised on woman-to-woman marriage in the case, the Judge contemplated whether woman-to-woman marriage was a basis of grant of letters of administration. The Judge established that for the purpose of establishing devolution of deceased person's estate, it was necessary to define the term dependant as set out in section 29 of the Law of Succession Act.¹³⁸ He established that the dependant meant *inter alia*

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death; (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.¹³⁹

This was significant as the deceased was an elderly woman who had no wife or children in the conventional sense. It was important to establish that the deceased could have only acquired dependants through a woman-to-woman marriage and that Nandi customary law provided for such situations.¹⁴⁰ He referred to the fact that the valid position on relevant customary law could be established from works of scholarship and cited Cotran, who stated that woman-to-woman marriage is a recognised family institution in Nandi customary law.¹⁴¹ He also made reference

¹³⁸ Succession Act (n 127 above), sec 29.

¹³⁹ *Monica Jesang Katam v Jackson Chepkwony and Selina Jemaiyo Tirop* (n 137 above) 21.

¹⁴⁰ As above.

¹⁴¹ E Cotran *the Law of marriage and divorce* (1968) 141 142.

to case precedent set in *Esther Chepkuai v Chepngeno Kobot Chebet and Jonathan Kipsang* on the validity of woman-to-woman marriage as a marriage practice amongst the Nandi as well as Regina Smith Oboler, who establishes the purpose of the practice of woman-to-woman marriage amongst the Nandi as a union to provide a male heir.¹⁴²

Further, the Judge held that though Nandi customary was in a ‘state of flux’¹⁴³ due to the interrelation of cultures from other communities, institutions of justice still needed to take into account current practices of cultures in domains such as family. He emphasised that culture was a protected right under Article 11(1) of the Constitution of Kenya 2010 and that the protection of this principle should be used to guide the Court on the implications of woman-to-woman marriage.¹⁴⁴ He also stated that the evidence presented in the case that a betrothal and marriage ceremony took place between the deceased and the petitioner according to Nandi custom illustrated that the custom of woman-to-woman marriage still takes place amongst members of the community. According to Nandi customary law, the petitioner would be considered the ‘wife’ of the deceased and section 29 of the Law of Succession Act states that the wife of the deceased and her children was first in the line of inheritance.¹⁴⁵

This was a landmark ruling because it not only recognised the legal validity of woman-to-woman marriage, it also affirmed the application of customary law as holding an equal legal place in the system of laws. It is, however, important to highlight that although the petition was instituted in the High Court in 2008, the determination of the case was made in 2011. Many questions arise on the application of the principles of the Constitution of Kenya which was passed in 2010. In making his ruling, the Judge cited the protection of culture under the

¹⁴² RS Oboler ‘is the *female husband* a man? woman/woman marriage among the Nandi of Kenya’ (1980) 19 *Ethnology* 74.

¹⁴³ *Monica Jesang Katam v Jackson Chepkwony and Selina Jemaiyo Tirop* (2011) 23.

¹⁴⁴ *Monica Jesang Katam* case (n 143 above) 23.

¹⁴⁵ As above, 24.

Constitution 2010. However, according to Article 263, the Constitution of Kenya 2010 shall take effect on the date of promulgation,¹⁴⁶ which was in August 2010. The effect of this Article is to establish the Constitution as prospective and therefore cannot be applied to matters that took place before this time.¹⁴⁷ While this study is aware that the Constitution was retrospectively applied what is important is that the court clearly recognised the existence and validity of woman-to-woman marriages despite the constitutional provision purportedly limiting marriage to unions between persons of the opposite sex. Of course, the apparent prohibition of same-sex marriages by the constitution is not uncontested. As one scholar notes, ‘Constitution only states that one “has the right to marry a person of the opposite sex”’ but does not expressly provide that ‘one “shall only marry” marry a person of the opposite sex. This silence, it has been argued, could not be taken to mean the prohibition of same-sex marriages.’¹⁴⁸

Whatever the right legal positions are, the fact remains that this ruling firmly established woman-to-woman marriage as a valid marriage under customary law and as a recognised marriage in the Court.

Kuria

In the appeal case of *Maroa Wambura Gatimwa v Sabina Nyanokwe Gatimwa & 5 others* (2010),¹⁴⁹ the matter before the Court of Appeal was once again succession in the context of a woman-to-woman marriage, this time among the Kuria people of Kenya and Tanzania. Sabina was the first respondent and plaintiff, as well as the mother to the other respondents. She was

¹⁴⁶ Constitution of Kenya (n 96 above), Art 263.

¹⁴⁷ The principle of non-retroactive application of the Constitution of Kenya 2010 for matters that took place before the promulgation of the Constitution was established in the case of *Duncan Otieno Waga v Hon Attorney General* (2012) Petition 94 of 2011; See *Joseph Ihugo Mwaura v Attorney General* (2009) Petition 498 of 2009 (Unreported) and *Du Plessis and Others v De Klerk and Another* 1996 5 BCLR 658 (CC).

¹⁴⁸ Makau Mutua ‘Why Kenya’s new constitution protects gays’ *The Nation* 11 December 2010.

¹⁴⁹ *Maroa Wambura Gatimwa v Sabina Nyanokwe Gatimwa & 5 others* (2010) Civil Appeal 331 of 2003.

joined in a woman-to-woman marriage with Wantiko, one of the four wives of Gatimwa Chacha. There was no challenge as to the validity of woman-to-woman marriage among the Kuria. The Judge stated as follows:

[In]woman-to-woman marriage (*ogetetwa busino*) [amongst the Kuria] [a] woman who is barren or who has female children only may marry a girl to pay *ikihingo* for her in the normal way. This can be done during her husband's lifetime or after his death. The woman appoints a man from her husband's clan to have sexual intercourse with the girl and any children born will belong to the woman who paid the *ikihingo*.¹⁵⁰

The Judge also noted that there were no authoritative court decisions on whether woman-to-woman marriages were repugnant to justice and morality, but pointed out that these types of marriages were rare. The Judge also pointed out that the children from Sabina belonged to the house of Wantiko and not to her husband, Gatimwa Chacha. Gatimwa's other wives were Nyabande who has a son named Wambura. Wambura subsequently fathered Maroa who was the appellant. Under Kuria custom, Sabina would be considered the stepmother of Maroa and her children were cousins to Maroa. Sabina and her children filed a case in the Superior Court in Kisii stating that when she was away seeking treatment in Tanzania the land belonging to Gatimwa had been adjudicated, demarcated and registered and when she returned, the defendant had sold the land that had been placed in trust for Sabina which he was to hold in trust for her. Maroa denied these claims and instead presented that the plaintiff's claim of having undertaken a woman-to-woman marriage did not exist. He further alleged that Sabina was instead lawfully married to Nchama Gatimwa who sold off the land in 1960 and moved to Tanzania. He also claimed that the land in question belonged to his father Wambura Gatimwa and that the plaintiff had returned in 1981, bought a portion of that land and settled there. The Judge in the superior court of Kisii held that Maroa (the defendant) had indeed unlawfully sold

¹⁵⁰ Cotran (n 141 above) 74 75.

the land of the plaintiff and that he should return the portion of land to the plaintiff. Maroa, feeling aggrieved by this decision appealed to the Court of Appeal in Kisumu. The Court of Appeal held that the appellant would compensate the respondent for the loss of their land, which had been sold unlawfully, and transfer the ownership of the land back to the respondent and dismissed the appeal.

This case was unique in that there was no real contestation as to the lawful nature of woman-to-woman marriage. It was upheld as a legitimate Kuria custom and established that the wife and her children belonged to the home of the *female husband*. One of the more significant issues enumerated in this case was that woman-to-woman marriage was upheld by a Court of Appeal, one of the highest courts in the land. Further, it was established that there was no decisive presentation that woman-to-woman marriage was repugnant to justice and morality.

The appeal case of *Eunita Anyango Geko & Another v Philip Obungu Orinda* (2013)¹⁵¹ applied the precedent established in the case of *Millicent Njeri Mbugua v Alice Wambui Wainaina* (2008) and *Agnes Kwamboka Ombuna v Birisila Kerubo Ombuna* (2008),¹⁵² as well as the case of *Monica Jesang Katam v Jackson Chepkwony & another* (2011).

The applicants in the case sought an injunction against the respondent restraining him or his agent or any other person acting on his behalf from intermeddling in any manner whether by sale, lease mortgage, charge or in any other manner detrimental or adverse to the interest of the applicants¹⁵³ as well as the revocation of the Grant Letters of Administration granted to the respondent in respect of the estate of Gladis Odinga Orinda (deceased). Eunita, the respondent, was married to Gladis Odinga Oringa in a woman-to-woman marriage according to Suba

¹⁵¹ *Eunita Anyango Geko & Another v Philip Obungu Orinda* (2013) Miscellaneous Civil Application 1 of 2013.

¹⁵² *Agnes Kwamboka Ombuna v Birisila Kerubo Ombuna* (2008) Kisii High Court Civil Appeal 132 of 2008.

¹⁵³ *Eunita Anyango Geko & Another v Philip Obungu Orinda* (n 151 above).

customary law with whom she has ten children. Gladis Oringa was the sixth wife to Orinda Chacha. Gladis also conducted another woman-to-woman marriage with Esther Otieno Maucha who was Eunita's co-wife. When Orinda Chacha died, his land was divided amongst his six wives with Gladis and another wife Margaret Aoko Orinda's house receiving one parcel of land being parcel 'which was registered in the names of the only surviving sons from the two houses, namely Jomo Orinda and Philip Orinda each with ½ share'.¹⁵⁴ Upon the death of Jomo Orinda, Gladis Odinga Orinda instituted a succession case in Kisii High Court in respect of parcel which was later partitioned into two parcels one being registered in the name of Philip Obungu Orinda while the other was registered in the name of Gladis. Gladis further subdivided this land into three portions, selling one to Samson Noel Onguru and retaining the other two.

Eunita alleged that the respondent has used the land to secure a loan with Agricultural Finance Corporation and Samson Onguru also pledged his parcel of land he bought to Development Company Limited. Upon discovering that the respondent planned to grab the remainder of the land, she lodged a caution on the land. Eunita also suspected that with the Grant Letters of Administration obtained by the respondent, he would try and use the land to secure a further loan. In the applicant's submissions, it was noted that woman-to-woman marriage was also practised by the Luo community;

Woman-To-Woman Marriage (*chi mwandu*). Where a husband dies leaving a childless widow or a widow with no male children, the widow may marry a wife by giving *dho Ikeny* (marriage consideration) to her family in the usual way. The widow then selects a man from her late husband's clan to have sexual intercourse with her wife, and any children resulting from such intercourse will be regarded as those of the widow's deceased husband.¹⁵⁵

¹⁵⁴ *Eunita Anyango Geko* case (n 153 above).

¹⁵⁵ Cotran (n 141 above) 172.

Once a woman-to-woman marriage has taken place in accordance with the relevant customs, then the laws of succession apply to the marriage in the usual manner. In citing the *Millicent Njeri Mbugua* case, the applicants referred to the conditions that had to be met to prove that a woman-to-woman marriage had taken place. These were that

the husband of the woman marrying another woman must have died; the woman marrying must have been left childless by her deceased husband; the woman marrying must be past child bearing age; the woman-husband must pay dowry (ruracio in Kikuyu)[...]the woman-husband must also arrange for a man from her deceased's husband age group to have intercourse with her wife.¹⁵⁶

In this case, Gladis had paid nine heads of cattle as dowry for Eunita and six head of cattle for Esther respectively. Gladis' husband had died without a male heir, she was past child bearing age and 'after she had married each of the applicants, she arranged for a man of her husband's age set to have intercourse with her wives, and as a result thereof, the two wives bore 11 children between them'.¹⁵⁷ In determining if the children were dependents of Gladis, the court relied on the definition of a dependant in section 29 of the Law of Succession Act as well as the precedent set in the case of *Monica Jesang Katam v Jackson Chepkwony & another* (2011). The court was persuaded that the 'applicants (herein) and their respective children are in the first line of inheritance regarding the estate of Gladis Odinga Orinda'.¹⁵⁸ The Court, therefore, concluded that that Eunita and Esther and their children were the rightful heirs. The Grant Letters of Administration granted to the respondent were revoked.

This case illustrated the importance of the precedents set in establishing living customary law and issue that was in contention regarding the application of customary law. It also illustrated the readiness of the court to rely on living customary law in determining matters that were not expressly provided by written law.

¹⁵⁶ *Millicent Njeri Mbugua* case (n 131 above).

¹⁵⁷ As above.

¹⁵⁸ As above.

In *Eliud Maina Mwangi v Margaret Wanjiru Gachangi* (2013),¹⁵⁹ the trial Judge also applied precedent that had been set out in preceding cases on the legal validity of the woman-to-woman marriage. In this case, the question that arose was whether the respondent, Margaret Wanjiru Gachangi, was married to the late Keziah Wanjiru Kahiga in a woman-to-woman marriage under Kikuyu customary law to entitle her to a grant of letters of administration of the estate of the deceased and to inherit the deceased's property.¹⁶⁰ The deceased Keziah Wanjiru Kahiga had been married to Jonathan Kahiga Mwangi, the elder brother of the appellant. They had no children at the death of Jonathan Mwangi in 1972. The respondent had previously been married to Karimi Njomo, and they had four children. She moved with her children to the home of Keziah Wanjiru Kahiga in 1987. In the original case that was heard in the High Court, the court ordered the respondent to hold the net estate of the deceased in trust for the children named above and the distribution of the estate to be done as equitably as possible. The appeal of this decision was filed at the Court of Appeal with the applicant, Eliud Maina Mwangi, alleging that the grant had been obtained fraudulently and that the deceased had never been married to the respondent.

The applicant submitted that woman-to-woman marriage was indeed recognized in Kikuyu customary law, a fact that was not in contention. However, he alleged that the respondent did not provide sufficient evidence that she had entered a woman-to-woman marriage with the deceased. He further submitted that the ceremonies held in man to woman marriage to validate a traditional marriage, which were *ngurario*, *mwati*, *harika* and *ngoima* had not taken place. Further, he said that there were no witnesses from close family relations who could provide evidence that the dowry ceremony had taken place. The opposing counsel for the respondent presented that there was no customary law requirement for close family

¹⁵⁹ *Eliud Maina Mwangi v Margaret Wanjiru Gachangi* (2013) Civil Appeal 281 (A) of 2003.

¹⁶⁰ *Eliud Maina Mwangi* case (n 159 above).

members to be part of the ceremony. He stated that there was sufficient evidence to prove that a woman-to-woman marriage under the Kikuyu customary law had taken place. He contended that the respondent was not an employee and that the children did not have to be born in the homestead for them to be recognized as children of the deceased.

The Court cited many precedents on the nature of customary law and presented customary law as being dynamic and not static. Therefore, marriages conducted in recent years will not necessarily follow those conducted seventy years ago. On the essentials of a valid Kikuyu customary marriage, it was provided that there can be no valid marriage unless the *ruracio* is paid. Regarding the woman-to-woman marriage, the conditions set out in Cotran's 'Restatement of African Law' was reiterated. The respondent was found to not have provided enough evidence to prove that the woman-to-woman marriage had taken place as the evidence provided was the testimony of one witness. She also stated that after the death of Karimi Njomo, the father of her children, she went back home to her father's house, and that while there, the deceased and another lady approached her father and requested a woman with children so that they may inherit the property as the deceased had no children. She stated that the deceased took to her father an ewe and traditional beer and later, the elders visited her father three times and paid dowry. Two goats were later taken to her father's house for the *ngurario* ceremony. This evidence provided was not substantiated with dates or witnesses, and it was difficult for the court to establish that a woman-to-woman marriage had taken place without sufficient proof. Effectively, the respondent was found to not be a widow of the deceased and her children were not dependants of the deceased.

This case elaborated on the marriage rites of the Kikuyu people in depth and provided more nuanced evidence of the customs and traditions of the community. It also established that there is need to provide proof on a balance of probabilities that the ceremony did take place

and this included witnesses. African customary law was further elaborated to be living and dynamic with the potential to evolve with the changing times.

The case of *Agnes Kwamboka Ombuna v Birisira Kerubo Ombuna* (2014)¹⁶¹ was another landmark case because the Court of Appeal at length discussed the nature of customary law and referenced the Constitution regarding woman-to-woman marriage, and may have overlooked the nature of woman-to-woman marriage as being purportedly contrary to the Constitution. The case was an appeal from a senior magistrate court in Kisii. The respondent, Birisira Ombuna, claimed that she was the sole registered owner of a parcel of land and had secured an injunction and eviction orders against the appellant Agnes Ombuna. The appellant lodged counter claim stating that she had a right to half of the parcel of land on account of having entered into a woman-to-woman marriage with the original proprietor of the land, Birita Asairi Nyanchama, under Kisii customary law. She claimed that as co wives of Birita, both Agnes and Birisira were entitled to equal portions of the parcel of land and that the respondent, who was the registered proprietor, was holding her share in trust. The Acting Senior Principal Magistrate found in favour of the respondent. The case was appealed to the High Court, but the High Court dismissed it. The appellant was still aggrieved and approached the Court of Appeal in further appeal. The grounds of the appeal were that the appellant was a co-wife with the respondent, that the custom was not considered or appreciated, that consideration was not given to the fact that the respondent was the only registered proprietor of the disputed land and was holding the same in trust for the appellant and her children and that it was wrong to find that the appellant did not have the capacity to enter into a woman-to-woman marriage.

The Court of Appeal only found on one primary issue, and this was whether the appellant and the respondent were both validly married to Birita in a woman-to-woman marriage arrangement under the Kisii customary law. As both previous courts had held that

¹⁶¹ *Agnes Kwamboka Ombuna v Birisira Kerubo Ombuna* (2014) Civil Appeal 106 of 2011.

there was no woman-to-woman marriage, the Court of Appeal delved into the definition of customary law as

[c]ustoms or usages practiced by a particular community for over a long period of time and have consequently acquired the binding force of law within the particular community as they have been accepted within that community. To demonstrate that such customs or usages have acquired the binding force of law a party relying on the same must lead evidence in that regard. So, the issue of whether a particular custom or usage is binding on any particular community is one of fact.¹⁶²

The Court, therefore, held that in Kisii customary law, woman-to-woman marriage existed and was accepted as part of customs and therefore had the binding force of law. The Court of Appeal also noted that the lower courts had carefully looked at the evidence that was provided by both parties and found that the appellant at the time of the alleged marriage was already married to Makori Onguso and had no capacity to enter into the marriage with Birita. Therefore, the only ‘wife’ was the respondent.

However, the Court of Appeal felt compelled to comment on the practice of woman-to-woman marriage and stated that due to the Constitution of Kenya 2010, a woman need not go through the practice of a woman-to-woman marriage to perpetuate her lineage. The Judge contended that the woman-to-woman marriage was conducted for the *female husband* to perpetuate her lineage. The Judge stated that the custom was discriminatory as it favoured the male child who in traditional society, was the only gender allowed to inherit. The Succession Act¹⁶³ does not create any distinction based on gender in matters of inheritance. Further, the Judge cited Article 27 of the Constitution of Kenya 2010, which deals with equal treatment and freedom from discrimination.

Although it considers the current constitutional provisions, this ruling does not find woman-to-woman marriage to be unconstitutional – notwithstanding the provisions of Article

¹⁶² *Agnes Kwamboka Ombuna v Birisira Kerubo Ombuna* (n 161 above).

¹⁶³ Succession Act (n 127 above).

45(2) in the same Constitution of Kenya 2010. Essentially, after establishing that there are various reasons why people enter this form of union, the Court does not consider the norm inconsistent with the customary law but instead defends the custom as an essential part of African customary law.

4.6 Conclusion

The advent of colonisation sparked a maelstrom beginning with the appropriation of the freedom of the African people and culminating in the codification of a hybrid legal system that has been challenging to utilise. The misconception of the both the missionaries and the colonisers on African customs and the construction of the elements of marriage began the ultimate destruction of customary laws. The African continent evidently had political systems in place and centralised forms of government that served the African people well. The legal system, which was customary law, was greatly respected by the relevant communities. They understood the nature of customary law and did not try to codify it. The fluid and highly adaptable system of law were able to sufficiently represent the interest of different communities. What the colonial administration failed to take into consideration was that no two continents were the same, and what may have worked in Europe may not have worked in Africa. The reluctance to learn the ways of the African continent and its communities is a reflection of the narrow conception of the understanding of African systems. It may be contended that had the colonialists understood the uniqueness of the continent; they may have been better able to govern it, and possibly gained more than just the continent's natural resources and labour.

The introduction of English law served to hasten the colonial plan of 'divide and conquer' and subsequently left the colonies dealing with more than just legal dilemmas. The continent may be distributed on territorial demarcations but the ultimate loss is the division of the African communities. The deconstruction and mutilation of customary law with Western

laws ensured that recent generations do not have a reference point as to what customary law was. The introduction of common law to sub-Saharan Africa is as subversive as the colonisation of the continent. Countries are left grasping at what is imagined to be customary law but cognizant that there are customs that have been irrevocably changed by the pervasion of law.

The challenge of dealing with matters that arose from customary marriages such as woman-to-woman marriages, was how to integrate the marriage laws of two systems of law, in this particular case those of the African people and the colonisers, without infringing on the character of customary law. Subsequently, through judicial precedents, the courts of the courts have provided recognition to woman-to-woman marriages.

CHAPTER 5: STATUTORY REGULATION OF WOMAN-TO-WOMAN MARRIAGE IN POST-COLONIAL KENYA

5.1 Introduction

This Chapter addresses the fundamental question of the legal validity of woman-to-woman marriage in post-colonial Kenya. The challenge posed by the definition of marriage in the Constitution and the Marriage Act as being only between a man and a woman seemingly implies that woman-to-woman marriages are not legally valid. However, the Constitution also emphasises the importance of culture and custom and reiterates that they form an integral part of the fabric of the Kenyan society. The importance of customary law is further emphasised in various laws, as well as in its ongoing practical application. This Chapter discusses the existence of the apparent conflict between the constitutional embrace of heterosexual marriage, on the one hand, and the importance attached to culture of which woman-to-woman marriage is an integral part, on the other hand. This apparent inconsistency has led to uncertainty regarding the institution of woman-to-woman marriage in Kenya. The Chapter also analyses the plural systems of law to understand the evolution of the plurality and addresses the interaction between the ordinals of custom, statute and the Constitution and hierarchical precedence of the various components of the legal systems in this jurisdiction. In answering the question posed on the legal validity of woman-to-woman marriages, the Chapter critically examines the spirit and letter of the Constitution of Kenya and the Marriage Act as well as the substance and significance of customary law and culture in post-colonial Kenya. This Chapter concludes that woman-to-woman marriage remains a legally valid institution in Kenya reinforced by the deeply entrenched cultural foundation of the Kenyan society.

5.2 Sources of law in Kenya: Legal plurality and the tension in statutory law and customary law

When attempting to discuss the complexity of the plural systems of law in most states in Africa and indeed in Kenya, three fundamental questions arise that need to be addressed. The legitimacy of customary law as a recognised system of law, the adaptability and applicability of statute law in the African context with regards to its conception and appropriation of colonial law and the supremacy of the Constitution juxtaposed with the consideration of the customs and practices of the Kenyan people.

Ambani and Ahaya make the statement that '[t]he rise of colonial rule in Kenya was the beginning of the fall of African traditional religion, custom and law'.¹ This statement is supported by the previous Chapter's analysis of the challenges of the application of customary law in dealing with African customary marriages and in particular, woman-to-woman marriages. The authentic manner in which customary law dealt with the challenges in African communities is an illustration of the compatibility of the system as a preferred system of law in matters to do with African customary marriages. It is important to note that no legal system is perfect and, indeed, customary law had its challenges due to the patriarchal system of African communities. However, logical consideration of the unique issues in African customary marriages would ensure that hierarchically, the application of customary law would be the first point of reference although this is not the practice. The introduction of the colonial systems of administration and subsequently the English Common law system of governance led to a distinct challenge of superiority in the application of systems of law. Ultimately it is clear that

¹ JO Ambani & O Ahaya 'the wretched African traditionalists in Kenya: the challenges and prospects of customary law in the new constitutional era' (2015) 1 *Strathmore Law Journal* 43. See also I Osabutey-Aguedze *the principles underlying the African religion and philosophy: A textbook on the aesthetics of the black man* (1990) on the African religion and the challenges of the application of customary law.

statutory law emerged as the victor in the challenge and African customary law's limited application, a testament to the disregard for the organic African legal process.

5.2.1 Customary law

Customary law has been difficult to qualify as a source of law due to differing views about its viability as a form of law. It is established to be a source of law in Kenya by its inclusion in the Constitution as well as other laws as a source of law.² It reflects the traditions, beliefs and the will of the Kenyan people from the pre-colonial period up to the present day.

Customary law has more commonly been referred to as an indigenous law signifying its apparent departure from the more formally recognised systems of law.³ It is referred to thus because the law is viewed to be more legitimate if it is written. Where it is unwritten, the legitimacy of customary law becomes difficult to qualify.⁴ The nature of African law has been discussed extensively in various texts but to answer the contentious question of the legitimacy of customary law, it is necessary to deconstruct the source of its 'illegitimacy'.⁵ The nature of customary law has been influenced by four different schools of thought. The first is that African customs were paganist and uncivilised and therefore without a recognisable rule or order which could be made into law from these customs.⁶ This was a view adopted by the missionaries as part of their civilising mission to Africa and was particularly evident in the negative representation of African culture and religion in literary works by anthropologists such as

² Judicature Act 16 of 1967.

³ MB Hooker *Legal pluralism: An introduction to colonial and neo-colonial laws* (1975) 119.

⁴ Hooker (n 3 above) 119.

⁵ TO Elias *the nature of customary law* (1956) 25.

⁶ Elias (n 5 above) 25.

Freeman, Bowen and Stone,⁷ Baudin⁸ and Burton and Hutchinson.⁹ The second is that the native customs conflicted with the Western ethical conceptions and that this inevitably required sublimation to the more evolved and superior system of Western administration and justice.¹⁰ The concept of 'sublimation of native custom',¹¹ was expressed by a colonial district officer in Senegal as a means to raise the African to a 'higher standard'.¹² The third is the anthropological perception that custom and traditional practices were mere 'ceremonial practices'¹³ that did not form the essentials of the law. Customs and practices were not deemed to have a logical historical development that was necessary for the formulation of a system of law. Although anthropologists recognised that the African societies had highly developed political systems, African people were still perceived as *primitive* governed by a rudimentary political system with diverse and differing customs that had not advanced enough to form a formal legal system.¹⁴ The fourth school of thought had a better perception of African customary law and was supported by anthropologists such as Rattray, Talbot, Ellis and Farrow,¹⁵ who had carried out extensive studies of different African cultures and customs. This school of thought held that the African system of administration of justice was the best-suited system as it was best adapted to deal with the African people and their system of life. It stressed the customs were indeed a

⁷ JO Awolalu 'What is African traditional religion?' (1976) 10 *Studies in Comparative Religion* 4.

⁸ Awolalu (n 7 above) 4.

⁹ As above.

¹⁰ Elias (n 5 above) 27.

¹¹ M Toufayan 'When British justice (in African colonies) points two ways: on dualism, hybridity and the genealogy of juridical negritude in Taslim Olawale Elias' (2008) 21 *Leiden Journals of International Law* 392.

¹² K M'baye 'The African conception of law' (1973) 1 *International Encyclopedia of Comparative Law* 148.

¹³ Elias (n 5 above) 34. Elias quotes Sir Donald Cameron, the former governor of Tanganyika and Nigeria in his Memoranda No.2 on Tanganyika territory native administration and native courts.

¹⁴ Elias (n 5 above) 36.

¹⁵ Awolalu (n 7 above) 4.

system of law that was adequately equipped to regulate the society as it was adaptable and considered the peculiarities of the African communities.¹⁶

In the pre-colonial African society, the question of the legitimacy of customary law did not arise as the African societies applied their customs and traditions through their various political organisations, predominantly established to be kingdoms.¹⁷ It was well documented by Spanish-Arab scholars that from at least the fourth century, African empires and kingdoms in West, East and Southern Africa were well established with flourishing political systems.¹⁸ The arrival of the Arab slavers and European settlers who introduced religion and commercial pilfering of African human and natural resources greatly disrupted the effectiveness of the African empires and principalities. Political disorganisation, the scramble and partition of Africa and subsequent subjugation of the African people ‘contributed towards the disintegration of African societies in most parts of the continent’.¹⁹

During colonisation, the legitimacy of customary law was questioned as it did not distinguish criminal wrongs from civil wrongs making it difficult for the administrators to pass judgment on the severity of the crime.²⁰ Aspects such as murder and theft that were considered criminal offences by European law were considered as issues of private law that could be resolved within the community and the particular individuals and did not require state intervention. The belief that customary law was unsuitable was as a result of the pre-colonial perception that the African person was not civilised enough to form or understand such complicated notions such as distinction of crimes. This assumption based on the idea that the African people were a *primitive savage* people who were almost always at war with one another

¹⁶ Elias (n 5 above) 34 36.

¹⁷ CK Meek *Law and authority in a Nigerian tribe* (1937) 336 347.

¹⁸ Elias (n 5 above) 9.

¹⁹ As above, 10.

²⁰ As above, 110.

and unable to rule themselves due to social ineptitudes.²¹ This belief was however disproved with the anthropological study of the complex and highly developed political and administrative processes of traditional communities as well as the recognition of different forms of justice amongst African communities. In fact, Meek reflected that ‘... what [were] crimes or torts to us [Europeans] for the most part [were also] crimes or torts to them’.²² On writing about the nature of the primitive society, Lowie assessed that ‘primitive law [made] a clear distinction between torts and crimes’.²³ This view was supported by Diamond who also held the view that African societies were able to distinguish between criminal and civil wrongs.²⁴ Whereas African customary law was admittedly not as established as European law in the qualification of the different wrongs and their forms of redress, it was clear that there was a recognisable system of law that recognised criminal and civil wrongs and offered measures for redress. The African system did not offer imprisonment as a sanction but offered compensation to the victims of crimes such as murder.²⁵ It also provided for other sanctions such as summary execution which was similar to the European development of a death sentence for a grievous crime.²⁶ If the qualification of a system of law was defined as the recognition of the different categorizations of wrongs in the society and their redress, then the African system certainly met this threshold and was considered a recognisable system of law.²⁷

²¹ As above, 111.

²² Meek (n 17 above) xiii.

²³ RH Lowie *Primitive society* (1920) 385.

²⁴ AS Diamond *Plaw* (1935) 192.

²⁵ Elias (n 5 above) 124.

²⁶ As above, 125.

²⁷ As above, 129.

In the period before independence, various policy debates emerged in the British East African colonies.²⁸ One of the questions that needed to be dealt with was the adoption of a legal system that reflected being African. The intricate, complex plural systems of law that attempted to merge colonial law and African customary law was not ideal. The adulteration of customary law was because of forcing it to ‘comply with the requirements of the dominant legal culture’.²⁹ The ‘political rulers would reaffirm their commitment to the advancement of the African spirit and the exaltation of the African way of life’.³⁰ This was true of all the former British colonies such as Tanzania, Malawi and Mozambique, all of whom were grappling with the issue of the integration of customary law.

Immediately preceding the Lancaster House Conference of 1960, African leaders met and ‘joined forces to present a common African front’,³¹ to negotiate the constitutional framework for post-independence Kenya.³² In the post-independence period after 1963, there was no clear challenge to upholding the notion of being African while preserving the need to progress and adapt to the modern society. Some social scientists postulated that Africa did not conform to the widely held integrationist thesis which held that with the increase in modernization, there is a decline in ethnicity and African identity.³³ The fact that the colonial settlers choose to deal with large African groups contributed to the development of ethnicity and consolidated the solidarity amongst the communities particularly in Kenya leading to an

²⁸ See generally R Maxon *Britain and Kenya's Constitutions, 1950-1960* (2011).

²⁹ TW Bennett ‘African customary law’ (1991) 18 *Acta Juridica* 18 35.

³⁰ L Juma ‘African customary law and human rights in Kenya: in search of a viable framework of coexistence’ (2002) *The East Africa Journal of Peace and Human Rights* 53.

³¹ M Tamarkin ‘The impact of the first Lancaster house conference (1960) and the Kenyatta election (1961) on urban politics in Nakuru, Kenya (1981) 10 *Transafrican Journal of History* 30.

³² See generally Maxon (n 27 above). The Lancaster House Conferences were meetings that were held in 1960, 1962 and 1963 to negotiate the constitutional framework and Kenya’s independence.

³³ Tamarkin (n 31 above) 28.

evolved acceptance of customs and practices.³⁴ This established a need for the recognition of customary law. Countries such as Zimbabwe, a former British colony like Kenya, with African customary law was able to establish the customary law and Primary Courts Act³⁵ and later the Customary Law and Local Courts Act.³⁶ South Africa, with a similar background, enshrined the application of customary law in the interim Constitution of 1993 and later the Constitution of 1996.³⁷ Kenya, however, grappled with the implementation of customary law in its limited form.

The Magistrates Court Act³⁸ in Kenya attempted to present an avenue where customary law received recognition. The limited scope of application of customary law and the repugnancy clause of the Judicature Act, however, severely limited its application. The Magistrates Act allowed the application of claims under customary law. The Act provided that the matters dealt with under customary law included *inter alia* matters of land held under customary tenure, marriage, divorce, maintenance or dowry, matters affecting the status of widows and children including guardianship, custody, adoption and legitimacy and intestate succession and administration of intestate estates.³⁹ There was uncertainty on whether the list was intended to be exhaustive. On this matter, Cotran⁴⁰ wrote that it could ‘legitimately be argued that the list is exhaustive given the use of “means” rather than “includes” ‘.⁴¹

³⁴ As above, 29.

³⁵ Primary Courts Act 6 of 1981.

³⁶ Customary Law and Law Courts Act 2 of 1990.

³⁷ C Himonga & C Bosch ‘The application of African customary law under the constitutions of South Africa: problems solved or just beginning?’ (2000) 117 *South African Law Journal* 312.

³⁸ Magistrates Courts Act 17 of 1967.

³⁹ Magistrates Act (n 38 above), sec 2.

⁴⁰ E Cotran ‘Integration of courts and application of customary law in Kenya’ (1968) 4 *East African Law Journal* 17.

⁴¹ Cotran (n 40 above) 17.

Unlike all the other jurisdictions, Kenya did not include the issues of contract and tort into the realm of customary law. On the intention of the Act towards granting the Magistrates Courts permission to apply the whole of customary law, the Judicature Act did not set out to specifically define customary law. Nowrojee presented that the wording of the section illustrated the intention of the legislature to limit the application of customary law to the provided areas.⁴²

The substance of customary law in Kenya is not found in statute but in case law that has applied customary law.⁴³ In a landmark ruling in 1986 that situated the place of customary law in the legal system, the Supreme Court affirmed the supremacy of customary law over colonial law in a case of succession. In the case of *Virginia Edith Wambui v Joash Ochieng Hugo and Omolo Siranga* (1987),⁴⁴ popularly referred to as the *SM Otieno* case,⁴⁵ SM Otieno, a prominent lawyer in Nairobi, died in 1986 without leaving a will. His wife, Wambui Otieno began to prepare for his burial in their property in Ngong. Her husband's clan *Umira Kager* decided that he would be buried according to Luo custom in his ancestral home in *Nyalgunga Nyanza*. Wambui sought a declaration from the court that would permit her to claim her husband's body and enable her bury him on their property in *Upper Matasia*, Ngong.⁴⁶ Judge

⁴² P Nowrojee 'Can the district magistrate administer the whole of the customary law?' (1973) 9 *East African Law Journal* 59.

⁴³ Juma (n 30 above) 61.

⁴⁴ *Virginia Edith Wambui v Joash Ochieng Ougo and Omolo Siranga* (1987) Civil Case 4873 of 1986.

⁴⁵ JM Malelu "Concept paper on need for disposal of a dead body legislation in Kenya" Kenya Law Reform Commission (7 October 2014) <http://www.klrc.go.ke/index.php/klrc-blog/511-concept-paper-on-need-for-disposal-of-dead-body-legislation-in-kenya?start=1> (accessed 14 July 2016). See generally W Cohen & ES Odhiambo *Burying SM: The politics of knowledge and the sociology of power in Africa* (1992) on the SM Otieno case and burial rites amongst the Luo.

⁴⁶ See generally Malelu (n 45 above). In Kenya, there are no laws that give an express provision on who has rights or the responsibility of burying a deceased person nor are there provisions on where the deceased should be buried.

Frank Shields allowed her petition *ex parte* on the same day that the application was filed and issued an injunction prohibiting the clan from burying the deceased in the ancestral land. The defendants, who were the deceased's younger brother and a member of the deceased's clan, were served the plaint and chamber summons on the same day that it was filed. The defendants then filed a defence and counter claim seeking to set aside the *ex parte* order in favour of the plaintiff as well as an injunction directed at the plaintiff barring her from burying the deceased until the hearing of the suit.⁴⁷ This application was also heard on the day it was filed by Judge Shields who dismissed it.

The clan filed a notice and a petition to the Court of Appeal challenging the decision of Judge Shields which was allowed. A three-judge panel was set up to hear the matter, presided over by Justice Bosire.⁴⁸ Justice Bosire dealt with various aspects of customary law, affirming for instances that the payment of dowry or bride price is a 'basic requirement in most if not all customary law marriages'.⁴⁹ He also defined the marriage between Jairo, the father of the deceased and Magdalena, the step-mother of the deceased, as a levirate union. With this definition of the deceased's parent's marriage, he acknowledged the existence of forms of customary law marriages such as levirate unions, sororate unions and woman-to-woman marriages amongst others.⁵⁰

While discussing the issue of matrimonial home, Judge Bosire differentiated the English common law concept of a matrimonial home from the Luo cultural concept of a home. He stated that according to common law, although the deceased's matrimonial home was his residence in *Langata*, he did not have a matrimonial home in *Matasia* and that the deceased

⁴⁷ *Virginia Edith Wambui* case (n 44 above).

⁴⁸ *Malelu* (n 45 above).

⁴⁹ As above.

⁵⁰ Marriage under customary law <http://www.kenyalawresourcecenter.org/2011/07/marriage-under-customary-law.html> (accessed 8 August 2017).

also had not established a home in *Nyahunga*, where the deceased was born and raised according to Luo customs and traditions. This indicates that the Judge acknowledges a conflict of laws between two applied systems of law in Kenya.

Justice Bosire acknowledged Luo customary law that the decision as to how and where to bury an adult Luo rests with the clan he hails from and also depends on whether he predeceases his father, in which case, Luo custom dictates that he should be buried next to his father's house even where he may have already established his own home.⁵¹ He also observed that Kenya had not enacted any law that governed the burial of deceased persons and that there was no such statute of general application in England which was in force by 12 August 1897. The Judicature Act⁵² provides that the High Court and Court of Appeal and all subordinate courts should be guided by African customary law where it is applicable in civil cases and where the parties to the case are subject to it. However, it is only applicable where it is not repugnant to justice and morality and where it is not inconsistent with any written law. He ruled that there was no rule or provision in Kenyan statute, English common law or English statute of general application that governed the disposal of a dead body or which granted the responsibility of burying the deceased and where they should be buried. He, therefore, held that the Court was left with no option but to apply personal law, which was the Luo customary law.⁵³

Justice Bosire also discussed issues of the supremacy of marriage under the Marriage Act⁵⁴ and the custom under Luo customary law. The plaintiff (the deceased's wife) implied that deceased was not subject to Luo customs having chosen to marry under the Marriage Act as

⁵¹ *Virginia Edith Wambui* case (n 43 above).

⁵² Judicature Act (n 2 above), sec 3(2).

⁵³ D Mosota 'Bosire has strong credentials but past Kanu ties could spoil for him' *Daily Nation* 23 April 2011 <http://www.nation.co.ke/news/1056-1149804-15ufo0e/index.html> (accessed 23 August 2016).

⁵⁴ Marriage Act 4 of 2014.

well as the fact that the deceased lived away from his ancestral land and had chosen a lifestyle that seemed to conform to Western ideals and practised Christianity. Justice Bosire relied on the actions of the deceased stating that the deceased not only joined a Luo clan association but was also immensely involved in funerals in his ancestral Luo home. The deceased had also been part of a meeting where he had expressed interest in inheriting his father's land indicating that he must have wanted to establish a home there. The deceased had also paid dowry for his son's wife according to traditional customs and despite the fact that the deceased had not paid his wife's dowry, this did not preclude him from being subject to other customs. The Justice indicated that intention could be inferred from actions of a person illustrating that they still wished to be bound by tradition or custom.

Justice Bosire also dealt with the matter of equal rights and opportunities for women and the apparent discrimination of women in Luo custom with regard to their exclusion in decision-making forums as to where their deceased husbands would be buried. He referenced section 82(4) of the former Constitution of Kenya,⁵⁵ which exempted personal law on burial.

The ruling, in this case, established the precedent in law that governed the responsibility and place to bury a deceased person. It established customary law as an integral part of the identity of a person in Kenya.⁵⁶ The Court stated as follows:

[T]here is no way an African citizen of Kenya can divest himself of the association with the tribe of his father if those customs are patrilineal. It is thus clear that Mr Otieno having been born and bred a Luo remained a member of the Luo tribe and subject[ed] to the customary law of the Luo people.⁵⁷

⁵⁵ Constitution of the Republic of Kenya 1963.

⁵⁶ Juma (n 30 above) 63. Juma observes that the choice of the court to fly against the already burgeoning human rights discourse that may have been applied to this case, illustrated the importance of customary law in the human rights discourse. He questions the extent to which legal systems integrate customary law in the emerging context of human rights.

⁵⁷ *SM Otieno* case (n 43 above).

The conflict presents the interminable struggle between the respect of customs and traditions and the imported system of colonial law such as English law. In his ruling, Justice Bosire discussed the issue of the conflict of laws by referring to the case of *Kenward v Kenward* (1950).⁵⁸ He stated that when a person marries another person from a tribe with particular customs, the consideration is not the more civilised or progressive systems of law, rather, the fact that they submitted themselves to the customary law of the person that they married. He reflects that customary law was relevant and deserved some precedence because it was established by the practice of a custom over an extended period.⁵⁹

In analysing the *SM Otieno* case, Van Doren asserts that ‘common law reflects Western values, and in Kenya, there is at least some unconscious aspiration toward those values’.⁶⁰ The *SM Otieno* case brings out the conflict of the plurality of law, and Van Doren’s summation is incorrect in as far as it alludes to colonial law as a choice of legal system sought by Kenya. In fact, colonial law was a legal system that was forcibly introduced and applied in Kenya during the colonial times and the laws imported were not in any way a reflection of the African community. It could not be an ‘unconscious aspiration’, merely a forced reality. Further, the pervasive nature of common law in the political system of governance and social structure ensured that it was almost impossible for any colony to divorce itself from this legal system after independence. Common law practice corrupted customary law so much that it became nearly impossible to determine what authentic African customs and norms are, due to the repugnancy clause. In Van Doren’s analysis of the contradiction of laws, he states that ‘the

⁵⁸ *Kenward v Kenward* (1950) 2 All England Reports 295 310.

⁵⁹ *Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters and 5 Others* (1985) Civil Appeal 123 of 1985. Justice Bosire quotes JA Nyarangi in his ruling on the Court of Appeal Case.

⁶⁰ J van Doren ‘Death African Style: The Case of S M Otieno’ (1988) 36 *American Journal of Comparative Law* 347.

urbanisation and industrialisation of Kenya will lead to a lack of consensus on values'.⁶¹ This reflection holds true in so far as there is a concerted effort towards the modernization and development of the country but conflicts with the nature of customary law. Also, the courts are hard pressed to preserve the essence of customary law while striving to ensure that its patriarchal nature does not infringe on the rights of women.

Juma contends that the *SM Otieno* case⁶² was a 'missed opportunity'⁶³ because the lawyers failed to present very pertinent issues on the flexibility of customary law. They failed to show that the 'nature of customary law [had] considerably changed and modified rules were often applied to deal with the changed circumstances'.⁶⁴ Juma also reflects the case offered an opportunity to illustrate the integration of human rights in an African customary law system. He contends that the case is perceived as a conflict of systems of law and the supremacy of one system, and this did not have to be the case. In dealing with the question of home, Juma contends that the widow's lawyers could have argued that there were Luo customs that allowed for burial in places other than the ancestral home. The lawyers for both parties failed to illustrate that research carried out of the Luo customs show that there were different considerations made when establishing burial sites, thereby submitting the ability of customary law to evolve and adapt as it was meant to do. Customary law is a 'living law' in so far as it adapts to meet the needs of the community it serves. On the haste of the lawyers affirming either of the systems of law, that is customary law or colonial law, Juma writes as follows:

⁶¹ J van Doren (n 60 above) 349.

⁶² *SM Otieno* case (n 44 above).

⁶³ Juma (n 30 above) 64.

⁶⁴ As above.

[S]erious issues such as the precise content of Luo customary law and its future in the legal system, the position of women in a changed environment and the application of international treaties [that] Kenya is a party, and the overall issues of burial rights were not properly canvassed.⁶⁵

Most importantly, this case would have presented a platform in which customary law could have been re-evaluated as a legal system that could be modern and reflective of the ideals of the Kenyan people thus permanently and irrevocably establishing it as equal systems of law to colonial law.

5.2.2 Constitutions of Kenya before 2010

In Kenya, the concept of the Constitution was introduced by the British. With the introduction of territorial borders and the conception of the state, there arose a need for a system of governance that the colonial administrators understood, as customary law, although fully cognizant of the African people, was foreign to the colonisers. The pre-existing forms of governance were displaced by the Western political and legal structures. The Independence Constitution of Kenya 1963⁶⁶ was a politically negotiated instrument, which is unlike the nature of a Constitution which should be an organic instrument formulated to serve the people it governs.

There was distrust amongst the Kenyan community and tribal leaders who felt that the colonial administration was deferring to certain tribes in exclusion of others.⁶⁷ This led to division amongst the African leaders who were negotiating the independence Constitution and the creation of two separate factions- Kenya African National Union (KANU) and Kenya African Democratic Union (KADU).⁶⁸ During the negotiations, which took place in London, the British ministers seemed to be concerned more with the interests of minority tribes and the

⁶⁵ As above.

⁶⁶ Constitution of Kenya 1963.

⁶⁷ Y Ghai & J Ghai 'Kenya's Constitution: An instrument for change' (2001) Katiba Institute Kenya 10.

⁶⁸ Ghai (n 67 above) 11.

fate of the Europeans in Kenya. These were issues that were not opposed by KANU but by KADU whose African leaders were more focused on issues of regionalism (*majimbo*) which dealt with issues of land, parliament and security.⁶⁹

The 1963 Constitution⁷⁰ was envisioned as a tool that would bring about democratic change and bring forth the dawn of African nationalism. Instead, it became a document that strengthened the colonial law, policy and doctrine and further pigeonholed African culture. The 1963 Constitution submitted miscellaneous gains. On the one hand, it introduced many democratic structures such as an elected parliament and an executive government headed by a Prime Minister, an independent judiciary and the public service. However, on the other hand, it contained various provisions that were designed to protect the interest of the minorities in land ownership and division of the natural resources. It introduced a self-governing regional government whose purpose was to ensure that all the communities have representation in the state. The regions were divided by the ethnic presence of communities. However, after independence, the then Prime Minister⁷¹ vested more power in the executive government and particularly his role. With the Kenya Amendment Act⁷² many of the provisions on ‘democracy, power-sharing and human rights’⁷³ were amended. Further amendments made by his successor,⁷⁴ reverted Kenya to a one-party state with all the power centralised within the Presidency. He combined the offices of the prime minister and the governor general and created the office of the president with considerable power. He also abolished the regional government

⁶⁹ As above.

⁷⁰ Constitution of Kenya (n 66 above).

⁷¹ Jomo Kenyatta was the Prime Minister of Kenya from 1963-1964. After amending the 1963 Constitution, he became the President of the Republic of Kenya from 1964 to 1978.

⁷² Kenya Amendment Act 28 of 1963.

⁷³ Ghai (n 67 above)10.

⁷⁴ Jomo Kenyatta was succeeded by Daniel Arap Moi who was the Country’s president from 1978-2002 when he resigned.

with the Third Amendment⁷⁵ and created a central government that operated on a national level. He systematically demolished any accountability mechanisms by diminishing the powers of the judiciary with the Second Amendment⁷⁶ and removed any civilian political control of security forces putting them under his control. Further, he perpetuated tribalism and ethnic division by perpetuating armed conflicts between tribes, engaging in extra-judicial killings and engineering ‘militarization of politics’.⁷⁷ This led to a polarisation of tribes on ethnic lines and weakened nationalism.

Due to the number of changes that were made to the Constitution, there was a need to draft a new Constitution that took into consideration not only the amendments but also the global and African movement towards the realisations of rights and freedoms of the Kenyan people.

There were 29 amendments to the Constitution which continued throughout the tenure of the second President of Kenya. However, in the 1990’s there was a rise in the clamour for change and democracy. The most significant amendment was the Constitution Amendment Act⁷⁸ which reverted Kenya from a single party state to a multi-party democracy. The impetus for Constitution reform began in earnest in the 1990’s. The end of the Cold War and the emergence of the ideologies of the new world order around global governance jolted most African governments to the reality of having to address their political and social problems. The Commissioning of the Kenya African National Union (KANU) Review Committee was geared towards the review of the Constitution and the amendments that had significantly altered it. The new social movement known as the Citizen’s for Constitutional Change, which comprised

⁷⁵ Third Amendment Act 16 of 1965.

⁷⁶ Constitution of Kenya (n 65 above), Chapter 10.

⁷⁷ Ghai (n 66 above) 11.

⁷⁸ Constitutional Amendment Act 12 of 1991.

of various non-governmental organisations, secular and religious groups, further intensified the pressure for democratic reform. In 1995, the government conceded to the pressure and announced its intention to draft a Constitution with the aid of international experts. This, however, did not come to pass. After mass action initiated by civil society, a group of Parliamentary political parties formed the Inter-Parties Parliamentary Group (IPPG) in 1997 to spearhead reforms and ensure free and fair elections in the General Elections of 1997. The following year in 1998, the then President Moi undertook to assure that there would be a concerted effort towards remaking the Constitution.⁷⁹ The Constitution of Kenya Review Commission (CKRC) was formed in the year 2000 and began its work by collecting views of the Kenyan people through public hearings in the 210 constituencies. The official draft of the CKRC report,⁸⁰ popularly referred to as the ‘Ghai Draft’, was released in September 2002. However, due to the dissolution of Parliament for the General elections, the report was not tabled for discussion, and the General Elections of 2002 were held under the old Constitution.

The new government commissioned the continuation of the constitutional review process through the National Constitutional Conference (NCC) which presented the second draft known as ‘A Proposed New Constitution of Kenya (2005),’⁸¹ popularly referred to as the ‘Wako draft’. This was subjected to a referendum process which resulted in the rejection of the proposed Constitution. After the post-election violence that took place in the country following the 2007 General Elections, two legislations were passed to continue the Constitutional review

⁷⁹ P Lumumba & L Franceschi *the Constitution of Kenya. 2010: an introduction commentary* (2014) 42.

⁸⁰ The CKRC Official Draft ‘The Report of the Constitution of Kenya Review Commission’ http://www.katibainstitute.org/Archives/images/sampledata/CKRC_official_draft.pdf (accessed on 14 July 2016).

⁸¹ The Popular Version of the Proposed New Constitution 14 September 2005 <http://www.katibainstitute.org/Archives/images/4-The%20%20Popular%20Version%20of%20the%20Wako%20Draft%20-%20Final%20with%20Drawings-14th%20Sept%202005.pdf> (accessed 14 July 2016).

process, the Constitution of Kenya Review Act (2008),⁸² and the Constitution of Kenya (Amendment) Act (2008).⁸³ The Constitution of Kenya Review Act established the Committee of Experts which was tasked with reviewing the contentious issues raised by the Parliamentary Select Committee (PSC) and developing a ‘harmonised draft’⁸⁴ Constitution. The Committee of Experts published the Harmonized Draft on 17 November 2009. This was revised and the Revised Harmonised Draft was subjected to a referendum process. Kenyans approved this draft, and it was promulgated into law as the Constitution of Kenya, 2010 on 4 August 2010.

One of the major gains of the Constitution of Kenya, 2010 was the Bill of Rights provided for in Chapter IV of the Constitution. It was a significant improvement from the repealed Bill of Rights in the old Constitutional dispensation. The Bill of Rights enshrines civil and political rights provided for in the International Covenant on Civil and Political Rights (ICCPR) and economic, social and cultural rights derived from the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Bill of Rights ‘enjoys priority over any other countervailing considerations [...] [and] it ought to be instructive concerning the determination of what the policy guidelines for development in Kenya should be’.⁸⁵ These rights are not provided by the state but belong to every individual. This clause further affirms that human rights are inherent to every person, an affirmation of the position of human rights under international law. The values and the principles enshrined in the Constitution compel the government to ‘promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications

⁸² Constitution of Kenya Review Act (2005) Cap 3A.

⁸³ Constitution of Kenya (Amendment) Act of 2008 Act 2 of 2008.

⁸⁴ ‘About the CoE process’ <http://www.katibainstitute.org/Archives/index.php/coe-process/about-the-coe-process> (accessed on 14 July 2016).

⁸⁵ Lumumba & Franceschi (n 78 above) 128.

libraries and other cultural heritage'.⁸⁶ This is obviously a bid to maintain and develop the nation's culture. Concerning the concepts of equality and non-discrimination, the Constitution is clear in the protection that it affords by guaranteeing the right to non-discrimination in addition to human dignity.

5.2.3 Constitution of Kenya 2010

With the entry into force of the Constitution of Kenya 2010,⁸⁷ matters relating culture and diversity were clearly captured in various provisions of the Constitution. The institution of woman-to-woman marriage, which was established as a valid institution under customary law, was subjected to uncertainty under the Constitution. Provisions such as Article 11(2) espoused the promotion of culture as a protected right, indicating that the Constitution intended to promote the customs of the ethnically diverse Kenyan society. Woman-to-woman marriage can be considered to be one of these customs, as it has been proven to be a long-standing and widely accepted cultural practice with varied benefits under customary law. However, the provisions of Article 45(2), which defined marriage as being between a man and a woman, seemingly contradict the recognition of woman-to-woman marriage, thus raising the question of the intention of the provision in the Constitution.

Article 2(1) of the Constitution of Kenya reiterates its supremacy in the Republic of Kenya.⁸⁸ The Constitution, therefore, supersedes all other written laws, including customary law as espoused in Article 2(4) which renders 'any law, including customary law' that may be inconsistent as invalid. Herein lies the basis of the challenge to the recognition of customary woman-to-woman marriage, given that the Constitution of Kenya defines marriage as between only a man and a woman.

⁸⁶ Ghai (n 66 above) 21.

⁸⁷ The Constitution of Kenya 2010.

⁸⁸ Constitution of Kenya (n 86 above), Art 2(1).

Article 27 of the Constitution of Kenya provides for the fundamental right of all persons to be considered equal and not to be discriminated against. It states that ‘every person is equal before the law and has the right to equal protection and equal benefit of the law’.⁸⁹ It protects the right of both women and men to equal opportunities in all spheres of life. The non-discrimination clause provides as follows:

The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.⁹⁰

This provision does not contain an exhaustive list. The list provided is an outline of the identified areas of discrimination but presents an opportunity to expand it to other identified areas of discrimination. The right to freedom from discrimination on the basis of marital status protects the right of persons who have taken part in woman-to-woman marriages under customary law.

The Constitution provides the right to marry in the Article 45, which relates to family. The clause states that family is the ‘natural and fundamental unit of society and the necessary basis of social order and shall enjoy the recognition and protection of the state’.⁹¹ It goes further to enshrine the right to marry a person of the opposite sex and that all parties are entitled to equal rights during and after the dissolution of the marriage.⁹² In part, Article 45(2) states:

Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.⁹³

This Article recognises the importance of the institution of marriage as well as the protection of equality of the parties in the marriage. Although this Article is a reflection of Article 16 of

⁸⁹ Constitution of Kenya (n 86 above), Art 27(1).

⁹⁰ Constitution of Kenya (n 86 above), Art 27(4).

⁹¹ Constitution of Kenya (n 86 above), Art 45(1).

⁹² Constitution of Kenya (n 86 above), Arts 45(2) & (3).

⁹³ Constitution of Kenya (n 86 above), Art 45(2).

the Universal Declaration of Human Rights and section 15(3) of the Constitution of South Africa, it departs from the spirit of these two documents by limiting the right of persons to only getting married to persons of the opposite sex. The Universal Declaration provides that marriage is essential to the creation of families and family life as the basis of social order.⁹⁴

The right to marry grants parties' equal rights in the marriage. Section 3 of the Marriage Act 2014 states that marriage is a voluntary union. This means that there should be some form of consent between the two parties to enter into the union. This is reflected in the essential requirements of a customary marriage as discussed in the preceding Chapters of the research. Further, section 3(2) states that spouses have equal rights in the marriage. This implies that there is a choice that is granted to parties to enter into the marriage of their own free will. However, there are certain obligations that accrue during the marriage created by the legal implications of marriage. These obligations are based on the presumption of marriage as a contract between two parties to act with the utmost good faith during the marriage. Upon dissolution, matters of marriage settlement such as the division of matrimonial property and maintenance of spouses and children will inevitably arise.

Further, section 6 of the Marriage Act identifies the types of marriages that may be registered in Kenya. This also compels the parties who want to enter into a marriage to conform to the regulations of marriages celebrated in accordance with section 6(1). This limits the types of marriages to those enumerated in the Act. Woman-to-woman marriages, despite being celebrated under customary law are inconsistent with the Marriage Act and the Constitution. Where does this leave woman-to-woman marriages and other marriages that may not conform with the provisions of the Marriage Act or the Constitution?

⁹⁴ Universal Declaration of Human Rights <http://www.un.org/en/universal-declaration-human-rights/> (accessed 8 August 2017).

One of the solutions would be the adoption of language that is more permissive and considerate of various forms of marriage that may be performed that may not conform to the predetermined formats. This would ensure the ease of recognition of marriages such as the woman-to-woman marriage. Another solution would be the enactment of legislation according to Article 45(4) of the Constitution. This would ensure a more substantive and encompassing legislation that provides recognition for different forms of marriage. Another challenge that would need to be dealt with, would be the seeming inconsistency created by Article 45(2) of the Constitution. A challenging and arguably difficult solution, would be the amendment of Article 45(2) to more inclusive language.

During the Constitutional review process, the section that relates to marriage was amended multiple times in the different drafts that were presented. In the CKRC draft (2002), the wording resembled that of the Universal Declaration as well as the South African Constitution and established that any person over the age of eighteen years had the right to marry based on the free consent of the parties.⁹⁵ This issue was highly contentious during the review of the document as there was the fear that it would bring about the recognition of same-sex marriages.⁹⁶ In the Bomas Draft (2004), the clause was amended and was very clear in providing that not only could a person only marry another of the opposite sex, it further elaborated that a person could not marry a person of the same-sex.⁹⁷ This wording persisted in

⁹⁵ Art 38(3)(a) Report of the Constitution of Kenya review commission

http://katibainstitute.org/Archives/images/sampledata/CKRC_official_draft.pdf (accessed 8 August 2017).

⁹⁶ This was alluded to in the CKRC ‘Research, drafting and technical support committee referendum report’ (2005)

http://katibainstitute.org/Archives/images/CKRC/CK/Special%20Working%20Documents/Revised%20Referendum%20Report%20_28-12-05_.pdf (accessed 8 August 2017).

⁹⁷ W Maina AG’s cure for Bomas excess in uncertainty’ *Nation* 27 August 2005

<http://www.nation.co.ke/lifestyle/1190-78970-dli5b6z/index.html> (accessed 8 August 2017). The writer of the editorial in the *Nation* newspaper identifies that the Wako draft in an attempt to proscribe same sex marriages in the draft constitution, inadvertently bans woman-to-woman marriages which provide an important social

the Referendum Draft (2005) which was rejected during the 2005 referendum process.⁹⁸ The wording substantially changed in the Committee of Experts Harmonized Draft (2009). This draft deleted the provision that a person could not marry a person of the same-sex and replaced the clause with wording that an adult had the right to marry a person of the opposite sex.⁹⁹ It further enshrined the right of every adult to establish a family. Although this provision was ultimately removed in the Revised Harmonised Draft (2010), and the word person replaced with an adult, to ensure that child marriages were fully eliminated, the wording on opposite sexes persisted. Article 45(4) directs Parliament to enact legislation that recognises marriages concluded under

any tradition, or system of religious, personal or family law; any system of personal and family law under any tradition, or adhered to by persons professing a particular religion, to the extent that any such marriages or systems of law are consistent with this Constitution.¹⁰⁰

This provision recognises the legitimacy of the application of customary law. Any provision of African customary law must however be consistent with the Constitution or be considered as null and void and to the extent of its inconsistency, invalid.¹⁰¹ Where there are any inconsistencies, the Courts apply the doctrine of severance as expounded upon, in the

function. He posits that there is a confusion between sex, marriage and family life and this will lead to the destruction of the cultural institution of woman-to-woman marriages.

⁹⁸ OO Okioti 'Clergy can take heart in one thing: they stood by their convictions' *Nation* 20 August 2010 <http://www.nation.co.ke/oped/Opinion/Clergy-can-take-heart-in-one-thing-taking-their-stand/440808-993804-format-xhtml-k8ujygz/index.html> (accessed 8 August 2017). The clergy alleged that the Committee of Experts 'allowed homosexuality when they unilaterally deleted the clause: "A person shall not marry another person of the same sex" (i.e. Art 41(3) Bomas Draft and Arts 42(3)2005 Wako Draft).

⁹⁹ Harmonised draft Constitution of Kenya <http://katibainstitute.org/Archives/images/17-11-2009%20Harmonized%20Draft%20Constitution.pdf> (accessed 8 August 2017).

¹⁰⁰ Proposed Constitution of Kenya 23 February 2010 <http://katibainstitute.org/Archives/images/23-02-2010%20Proposed%20Constitution%20of%20Kenya%20Submitted%20to%20PSC%20by%20CoE.pdf> (accessed 8 August 2017).

¹⁰¹ Constitution of Kenya (n 86 above), Art 2(4).

Canadian context, in the case of *Schachter v Canada*.¹⁰² This rule provides that where ‘only a part of a customary law or requirement violates the Constitution, only the offending portion should be declared to be of no force or effect’.¹⁰³ Article 45(4) exists within the paradigm of Article 45 and therefore the adoption of any legislation must be consistent with the Constitution and specifically Article 45(2). Since the provision on ‘marriage’ related to persons of the opposite sex, this arguably renders all forms of same-sex marriages within the realm of customary law invalid under the Constitution.

In 2016, the Protection of Traditional Knowledge and Cultural Expressions Act¹⁰⁴ was passed to direction in the manner through which culture, custom and cultural heritage is to be promoted and protected by the government. In section 3, the Act directs that any person

dealing with matters relating to traditional knowledge or cultural expressions shall be guided by the national values and principles of governance set out in Article 10 of the Constitution.

This is a clear directive that there is an imperative to ensure that culture is recognised and promoted. Further, section 5(b) and (c) provide that the national government must ensure the promotion, conservation and protection of traditional knowledge and cultural expressions. To this extent, this Act provides a form of recognition and protection of cultural expressions such as the practice of woman-to-woman marriage. Section 14 provides protection criteria for cultural expressions. It defines the parameters of cultural expressions to include ‘characteristic of a community's cultural identity and cultural heritage and have been maintained, used or developed by such community in accordance with the customary laws and practices of that community’.¹⁰⁵ As discussed in preceding Chapters, the Marriage Act 2014 section 6(1)(c) states that marriages celebrated under customary law should be registered under the Marriage

¹⁰² *Schachter v Canada* (1992) 2 SCR 679.

¹⁰³ *Schachter* case (n 102 above)

¹⁰⁴ Protection of Traditional Knowledge and Cultural Expressions Act 33 of 2016.

¹⁰⁵ Protection of Traditional Knowledge and Cultural Expressions Act (n 104 above), secs 14(6)

Act, further that the provisions of Article 45(4) of the Constitution of Kenya require the enactment of legislation to ensure the recognition of all marriages conducted under any tradition. However, provisions such as section 3(1) of the Marriage Act and Article 45(2) of the Constitution create challenges in the actualization of the recognition of woman-to-woman marriages. Although the Protection of Traditional Knowledge and Cultural Expressions Act seems to be an attempt to do this, the Act does not deal with the recognition of woman-to-woman marriage. Therefore, there needs to be a law or an amendment of existing law (that does not create inconsistency) to ensure that there is a formal recognition of woman-to-woman marriage.

Comparatively, the Constitution of Kenya bears many similarities to the South African Constitution which has been established as one of the most progressive constitutions in the world.¹⁰⁶ However, it somewhat takes a clear departure on matters relating to family and family law. During the review and the referendum process in Kenya, some of the more contentious issues included the provisions on abortion, the definition of family and the entitlement to marriage. There were many interested parties involved in presenting issues that were felt to be fundamental to the Constitution of Kenya.

One of the institutions that contributed to the Constitutional provisions on family and marriage were the religious leaders. They were concerned about the presentation of matters that reflected on the morality of society. Comparatively, the South African Constitution does not attempt to define family or marriage and only provides for marriage as ‘a stand-alone

¹⁰⁶ ‘Eighteen years of the world’s best Constitution’ 11 December 2014

<https://www.brandsouthafrica.com/people-culture/history-heritage/eighteen-years-of-the-world-s-best-constitution> (accessed 20 January 2017). Legal scholars such as Cass Sunstein had been quoted as having said that the South African Constitution was the “most admirable constitution in the history of the world”. Ruth Bader Ginsburg, a US Supreme Court justice, praised it for dealing with modern challenges when she said, “That was a deliberate attempt to have a fundamental instrument of government that embraced basic human rights, had an independent judiciary ... It really is, I think, a great piece of work that was done.”

institution under section 15 on freedom of religion'.¹⁰⁷ The progressive courts of South Africa are uninhibited in the interpretation of marriages as they do not need to take into consideration the definition of marriage. Further, in the interpretation of the bill of rights, the South African Constitution provides that it 'does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill'.¹⁰⁸ This essentially allows the recognition of all forms of marriage including customary marriage in all its manifestations. This is supplemented by the equality provision that grants freedom from discrimination on grounds including sexual orientation. In contrast to Kenya, the contextual reading of Article 45 elucidates various considerations that are necessary to the conceptualization of an African marriage. The first is that family is a natural and essential unit of society and is one of the central value systems of a Kenya society. It is also evident the concept of marriage in Kenya has been presented as heterosexual and therefore any other unions, whether recognised by any other systems of law, if inconsistent with this are invalid.

5.3 Impact of the Constitution of Kenya on woman-to-woman marriage in Kenya

Article 45(2) of the Constitution of Kenya provides that an adult has the right to marry a person of the opposite sex. This led to confusion on the status of the legal recognition of woman-to-woman marriage. The implication of the provision can be read in two ways. The first is that Article 45(2) was intended to prohibit all forms of marriage between persons of the same sex including woman-to-woman marriage. The second view is that the provision was not intended to prohibit the celebration of the customary woman-to-woman marriages but rather to only prohibit marriages of homoerotic same-sex couples. To establish the correct position on the

¹⁰⁷ Lumumba & Franceschi (n 78 above) 209.

¹⁰⁸ Constitution of the Republic of South Africa 1996, sec 39(3).

intention of Article 45(2) of the Constitution, it is necessary to interpret the Constitution of Kenya.

5.3.1 Theories on constitutional interpretation of the Constitution of Kenya

In constitutional legal theory, ‘constitutional interpretation reconsiders the implications of the fundamental legal commitment to faithfully interpret our written Constitution’.¹⁰⁹ There are various approaches to constitutional interpretation. Some of the identified approaches include the literalist or textual, purposive approach and the historical approach.¹¹⁰ In the literalist approach, theorists determine the intention of the framers by considering the literal meaning of the text.¹¹¹ Literalists or textualists examine the text, structure and consider the time that the text was written to understand the document. In this approach, precise definitions of a norm are inferred in the normative text of a constitution, qualified as ‘juridical authentic positive definitions of constitution norms’.¹¹² In the purposive approach, intentionalists¹¹³ examine the

¹⁰⁹ See generally P Bobbitt *Constitutional interpretation* (1991) 22; KE Whittington *Constitutional interpretation: textual meaning, original intent, and judicial review* (1999).

¹¹⁰ See generally J Casey ‘Constitutional interpretation’ in J Casey *Constitutional law in Ireland* (2000) 377; A Barak *Purposive interpretation in law* (2011) 24; DA Strauss ‘Common law and constitutional interpretation’ (1996) 63 *University of Chicago Law Review* 877 935; RH Fallon ‘A constructivist coherence theory of constitutional interpretation’ (1987) 100 *Harvard Law Review* 1189 1286; LH Tribe ‘Taking text and structure seriously: reflections on free-form method in constitutional interpretation’ (1995) 108 *Harvard Law Review* 1221 1303; P Brest ‘The conscientious legislator’s guide to constitutional interpretation’ (1974) 27 *Stanford Law Review* 585 602.

¹¹¹ See generally P Brest ‘The misconceived quest for the original understanding’ (1980) 60 *Boston Law Review* 204 205; Fallon (n 110 above); TC Grey ‘Do we have an unwritten constitution?’ (1975) 27 *Stanford Law Review* 703 706.

¹¹² B Sinani ‘A critical-legal overview of the concept of constitution as the highest legal-political act of the state in the light of constitutional-juridical doctrine’ (2013) 29 *Journal of Legal and Social Sciences of the Faculty of Law of the University of JJ Strossmayer* 2444.

¹¹³ For the views of proponents of purposive interpretation see generally Barak (n 104 above); RR Spano ‘Some theoretical reflections on statutory interpretation with an emphasis on purposive interpretation in law and its limits’ (2010) <http://www.uib.no/filearchive/spano-bergen-june2010.pdf> (accessed 28 August 2017).

intention of those who drafted the Constitution. In this approach, the judge considers the spirit of the Constitution. This may be determined by considering other provisions in the Constitution as well as the historical sources of the provision. The judge must then determine whether purposive interpretation can override the literal meaning of the text.¹¹⁴ In the historical approach, the Constitution is considered a living document. This approach contemplates the Constitution as a document that has the ability to reflect the and adapt to the changing values of the society.¹¹⁵ This is sometimes defined as the originalism or pragmatism approach where pragmatists¹¹⁶ give substantial weight to judicial interpretation and alternative texts. The approach adopted by natural law theorists supports the idea that ‘there is a set of inviolate, unchanging and absolute values of right and wrong which both inform and are superior to, the text of the Constitution’.¹¹⁷

To determine the intention of Article 45(2), this analysis applies the second and third approaches to constitutional interpretation. Purposive interpretation considers the intention of the drafters of the Constitution of Kenya. The Judges must contemplate the prevailing discourses in the society. The intention of the framers can be inferred by the conversations in

¹¹⁴ RR Kelso ‘Styles of constitutional interpretation and the four main approaches to constitutional interpretation in American legal history’ (1994) 29 *Valparaiso University Law Review* 130.

¹¹⁵ See generally *McGee v AG* (1974) IR 284. J Walsh stated that ‘According to the preamble the people gave themselves the Constitution to promote the common good with due observance of prudence, justice and charity so that the dignity and freedom of the individual might be assured ... The judges must therefore as best they can from their training and their experience interpret these rights in accordance with their ideas of prudence, justice and charity. It is but natural that from time to time the prevailing ideas of these virtues must be conditioned by the passage of time.’ See also Brest (n 111 above); Tribe (n 110 above) and Fallon (n 110 above).

¹¹⁶ For the views of proponents of originalism or pragmatists see generally RS Kay ‘adherence to the original intentions in constitutional adjudication: three objections and responses’ (1988) 82 *NorthWestern University Law Review* 226; RA Posner ‘what am I? A potted plant?’ and ‘Bork and Beethoven’ in RA Posner *Overcoming law* (1995) 229 237.

¹¹⁷ For views on proponents of the natural law approach see generally C Sunstein *the partial constitution* (1993) 109; Fallon (n 110 above) 1204; Bobbitt (n 109 above) 20 22.

the media as well as the various dialogues between the CKRC and the COE with the government during the constitutional review process. The judges should also consider the Constitution in its entirety. The will of the Kenyan people is reflected in the Constitution. Principles such as the respect for culture as well as a robust bill of rights indicate that Kenyans were impassioned to ensure that these principles were respected.

With regard to judicial interpretation, the Supreme Court of Kenya, the Court of Appeal and the High Court are the superior courts of the land.¹¹⁸ Article 163(4) grants the Supreme Court of Kenya and the Court of Appeal jurisdiction to interpret the Constitution. Justice Visram states that the Courts have the power to

create common law in a way that achieves the appropriate balance between the requirements of the individual and the whole, and between the rights of the individual and among those rights themselves; between public order and public security, and the rights of the individual and his liberty.¹¹⁹

Justice Alnashir Visram¹²⁰ examines the role and the responsibilities of the Courts of Kenya under the Constitution of Kenya 2010 and states that the Judiciary of Kenya has ‘an extensive mandate against the renewed aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law’.¹²¹ He

¹¹⁸ Constitution of Kenya, Art 162.

¹¹⁹ Justice Alnashir Visram ‘Role and the responsibilities of the Courts of Kenya under the Constitution of Kenya 2010’ (2011) <http://kenyalaw.org/kl/index.php?id=1935> (accessed 29 August 2017).

¹²⁰ The Honourable Justice Alnashir Visram was Justice at the Court of Appeal of Kenya. Justice Visram has held several leadership positions within the Judiciary and is presently the head of the criminal division of the Court of Appeal, chair of the Judiciary’s Rules Committee, and chair of the Mediation Accreditation Committee. He was awarded the 2nd highest national award, Elder of the Burning Spear (E.B.S.) in recognition of distinguished services to the nation. See <https://ismailimail.wordpress.com/2016/01/05/justice-visram-receives-kenyas-2nd-highest-national-award/> (accessed 29 August 2017).

¹²¹ Justice Alnashir Visram ‘Role and the responsibilities of the Courts of Kenya under the Constitution of Kenya 2010’ (2011) <http://kenyalaw.org/kl/index.php?id=1935> (accessed 29 August 2017).

maintains that Courts at all levels play a crucial role in the interpretation of provisions of the Constitution.¹²² The Supreme Court can thus, offer an interpretation of Article 45(2) in line with its advisory opinion jurisdiction on the intention of Article 45(2) of the Constitution of Kenya, clarifying the scope of the provision and the intention of the provision. What interpretive approach would, however, be most suited for this purpose?

5.3.2 Applied constitutional interpretation of Article 45(2) of the Constitution of Kenya

As mentioned above, this thesis adopts constitutional interpretation to infer the intention of Article 45(2). This analysis considers the view that purpose of the provision was not to prohibit woman-to-woman marriage. In analysing this contention, this research considers a purposive interpretation as well as the approach that the Constitution of Kenya is a living document that reflects the will of the Kenyan people.

The spirit and character of the Constitution of Kenya embodies the respect for the diverse cultural heritage of Kenya and the promotion and protection of all customs and cultures. This includes the promotion of the customary right of woman-to-woman marriage. The preamble of the Constitution describes the people of Kenya as being proud of their ‘ethnic, cultural and religious diversity’.¹²³ This illustrates the pride and commitment the Kenyan people have for their diverse culture and ethnic heritage. The respect for this is an essential part of the acknowledgement of the will of the Kenyan people.

Article 11 of the Constitution recognises culture as the foundation of the Kenyan people and the nation. It grounds culture as the genesis of the communities in Kenya and identifies its importance to the fabric of the Kenyan people. Article 11(1)¹²⁴ of the Constitution further recognises culture as a foundation of the nation and establishes it as a reflection of ‘cumulative

¹²² Visram (n 121 above) 12.

¹²³ Preamble.

¹²⁴ Constitution of Kenya (n 118 above), Art 11(1).

civilisation'.¹²⁵ Article 11(3) provides that parliament should pass legislation that compensates communities for the use of their culture.¹²⁶ Although this is not a direct reference to the application of culture, it serves as a testament to the importance that is attached to the culture and heritage of Kenyans. It places an obligation on the state to 'promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage'.¹²⁷

Article 27¹²⁸ of the Constitution enshrines the principle of equality and freedom from discrimination. It grants protection against discrimination on grounds 'race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth'.¹²⁹ Culture is identified as a ground for protection. The identification of culture illustrates that it is a ground that was contemplated in the formulation of the Constitution.

Article 44 protects the right to participate in cultural life, enjoy 'culture and the right to 'form, join and maintain cultural and linguistic associations and other organs of civil society'. This provision apportions the enjoyment of customary practices and in turn customary law, to all persons who would want to ascribe to cultural life. Considering that majority of the Kenyan people belong to one many of the ethnic tribes that co-exist and that most live a part of their cultural heritage in some way or form, it is not implausible that most people will want to apply some customary law. In particular, most Kenyans who belong to an African ethnic tribe will gravitate towards culture when entering into marriages. Marital rites have been a preserve of customary practice before and after colonisation. This is evident by the preservation of the

¹²⁵ As above.

¹²⁶ Art 11(3)(a)

¹²⁷ Constitution of Kenya (n 118 above), Art 11(2)(a).

¹²⁸ Constitution of Kenya (n 118 above), Art 27.

¹²⁹ Constitution of Kenya (n 118 above), Art 27(4).

application of customary law in marriage and matters related to it. Any person who chooses to enter into a woman-to-woman marriage is exercising their constitutional right to participate in cultural life further illustrating the seeming inconsistency within the Constitution. Article 44(2)(a) confers the right to enjoy the person's culture. In its strictest meaning, Article 45(2) could give rise to the violation of a constitutional right should a person want to enter into a woman-to-woman marriage.

The Constitution clearly places great importance on culture and its expression. It acknowledges that the state must ensure that all Kenyans can take part in traditional celebrations. As marriage is considered a celebration of culture and woman-to-woman marriage is a cultural practice, Article 45(2) could not have intended to prohibit the enjoyment of this customary rite.

The Kenyan Courts seem to be by persuaded by this reasoning as well as they have continued to adjudicate on matters regarding woman-to-woman marriages. In the case of *Monica Jesang Katam v Jackson Chepkwony and Selina Jemaiyo Tirop* (2011),¹³⁰ the Judge reflected on the validity of woman-to-woman marriage under customary law and established this through scholarly precedent.¹³¹ The Judge discusses under the inferences of law, the intention of the Constitution of Kenya 2010. He states that Article 11(1) enshrines the principles of culture as the foundation of the nation.¹³² Though he applies the Constitution retroactively, it can be inferred that the intention of the Judge is to emphasise the importance of culture in the fabric of the Kenyan community and the necessity to uphold the cultures of different tribes.

¹³⁰ *Monica Jesang Katam v Jackson Chepkwony and Selina Jemaiyo Tirop* (2011) Succession Cause 212 of 2010.

¹³¹ *Monica Jesang Katam* case (n 130 above) 21 22.

¹³² *Monica Jesang Katam* case (n 130 above) 23.

In the case of *Agnes Kwamboka Ombuna v Birisira Kerubo Ombuna* (2014),¹³³ the Court of Appeal was moved to make a judgment on four substantive issues. This analysis focuses on the Judge's ruling on the first, second and fourth issues. The first ground was that the appellant who was in a woman-to-woman marriage, was a co-wife of the respondent, the second was that the High Court did not properly consider the custom exercised by both the appellant and the respondent (both were from the Kisii tribe), and the fourth issue was that the appellant lacked the capacity to contract a woman-to-woman marriage.

The Judge contended that there was only one principal issue, namely 'whether the appellant and the respondent were both married in a woman-to-woman marriage, according to Kisii custom.'¹³⁴ In this matter, the Court of Appeal considered the institution of woman-to-woman marriage as it applied to the facts of the case. The Court described the purpose of a woman-to-woman marriage as being the perpetuation the lineage of 'woman-husband'¹³⁵ but contended that the Constitution of Kenya of 2010 invalidated the aim of this marriage without challenging the existence and validity of the cultural practice. The Court also asserted the principle of equality of both the man and the woman in Article 27. The Court established the legitimacy of customary practice amongst the Kisii tribe including the practice of woman-to-woman. This indicates that the Court was cognizant that these marriages exist and that they enjoy cultural acceptance and validity under customary law.

This analysis also contemplates view that the intention of the Article 45(2) was the prohibition of marriage between homosexual couples. In 2006, the Government of Kenya stated that it did not contemplate woman-to-woman marriage as a form of homosexual marriage. This is apparent in the comments made by the State during its second periodic review

¹³³ *Agnes Kwamboka Ombuna v Birisira Kerubo Ombuna* (2014) Civil Appeal 106 of 2011.

¹³⁴ *Agnes Kwamboka Ombuna case* (n 133 above).

¹³⁵ *Agnes Kwamboka Ombuna case* (n 133 above).

under the ICCPR. Kenya submitted its second report in 2004, 25 years after Kenya submitted its initial report.¹³⁶ In 2005, the Human Rights Committee (HRC) concluded its consideration of Kenya's report. In his presentation to the HRC, the Attorney General,¹³⁷ who was the head of the Kenyan delegation, noted that the report reflected the progressive strides that Kenya had undergone to reform its legal system including multi-party democracy and constitutional review 'guided by respect for the universal principles of basic human rights, gender equality and democracy'.¹³⁸ When questioned on the status of women with regard to discrimination in marriage, inheritance and adoption, the Attorney General contended that polygamy was recognized under customary law in Kenya. Further, when questioned about the laws against homosexuality, he prevaricated on the question by stating that 'homosexuality was not an issue per se' although the practice was abhorred by the customs, ethnic communities and churches.

In 2006, the government of Kenya submitted its comments on the concluding observations of the HRC.¹³⁹ On the issue of harmonization of marriage legislation, the government noted that *inter alia* that African customary marriages were valid under Kenyan law. The government of Kenya reflected that marriage contracted under the Marriage Act of 1962¹⁴⁰ were monogamous and that the parties to the marriage had to be 'biologically a man and a woman',¹⁴¹ but distinguished that customary marriage was potentially polygamous. On

¹³⁶ 'Consideration of reports submitted by states parties under Article 40 of the covenant: Second periodic report Kenya' (2004) CCPR/C/KEN/2004/2.

¹³⁷ The Attorney General was Amos Wako who served in this capacity for 20 years from May 1991 to August 2011.

¹³⁸ Press release 'Human rights committee concludes consideration of Kenya's report on compliance with covenant on civil and political rights' HR/CT/658 <https://www.un.org/press/en/2005/hrct658.doc.htm> (29 August 2017).

¹³⁹ Human Rights Committee 'Comments by the Government of Kenya on the concluding observations of the Human Rights Committee' (17 July 2006) CCPR/C/KEN/CO/2/Add.1

¹⁴⁰ Marriage Act Cap 150 (Repealed).

¹⁴¹ Human Rights Committee (n 139 above) para 13.

the legal recognition of woman-to-woman marriage, the government of Kenya stated as follows:

Depending on the customs involved, woman to woman marriages are also valid but these have different arrangements from same sex marriages as practiced in other countries. These are commonly practiced by wealthy women who are not able to get children and so they either marry a woman who already has children of her own or encourage her to get children who will then belong to the barren woman. These marriages are seen as a way of obtaining e.g. sons who may not be available to single women through adoption.¹⁴²

From this statement, it is clear that the government of Kenya did not contemplate woman-to-woman marriage as being a form of homosexual same-sex marriage. The comment noted that woman-to-woman marriages were a recognised customary practice that had significant import to the communities that practised these marriages. Further, the Government of Kenya seemed to accept that woman-to-woman families are acceptable as the purpose of the institution is to propagate and raise children.

Chapter 6 explores in greater detail the impact of the global sex discourse on the constitutional review process. However, the media and the Churches of Kenya played a major role in the misperception of the implication of the legal recognition of marriages between same-sex couples culminating in language that implied an apparent prohibition on all forms of same-sex marriage. During the review process, the Churches of Kenya were one of the most vocal institutions in their campaign against the Constitution.¹⁴³ Amongst some of the challenges they

¹⁴² As above.

¹⁴³ Kenyan law review experts rule out rights for homosexuals' *The Nation* 19 October 2009.
<http://humanrightshouse.org/noop/page.php?p=Articles/12138.html&d=shdbylgzokyw>.

raised, were claims that the Constitution of Kenya permitted the recognition of same-sex marriages.¹⁴⁴ This led to the language limiting its application to different-sex couples.

5.4 Impact of the Marriage Act on woman-to-woman marriage in Kenya

The Marriage Act 2014 unlike the Constitution of Kenya 2010, was formulated with the intention of streamlining family law in Kenya. It derives its definition of marriage from the Constitution. However, despite this, it is very clear on particular elements of customary law and provides for various elements of customary law marriage thus recognizing and validating customary marriage as recognized forms of marriage in Kenya.

Section 3(1) of the Marriage Act defines marriage as the ‘voluntary union of the man and the woman whether in a monogamous or polygamous union’.¹⁴⁵ This section seems to adopt the definition of marriages provided in Article 45 of the Constitution of Kenya. It is interesting to note that the definition also includes polygamous unions, which are considered a part of customary law. The Act seems to attempt to integrate the three systems of law namely constitutional, customary and statutory law. This raises various inconsistencies, an issue that is endemic throughout the Act. The recognition of polygamous union was initially not supported by women legislators during the debate of the Marriage Bill as they regarded its inclusion as a way for men to have multiple relationships.¹⁴⁶ It was apparent during the discussion of the bill that the parliamentarians were keen to retain certain cultural practices indicative of a patriarchal structure such as the retention of multiple wives.¹⁴⁷ Further, the Act does not require the first

¹⁴⁴ AM Wanga ‘The Kenyan constitutional referendum of 4th August 2010: A case study’ Democracy International https://www.democracyinternational.org/sites/default/files/PDF/Publications/2011-04-28_kenyareferendum.pdf (accessed on 14 July 2016).

¹⁴⁵ Marriage Act (n 54 above), sec 3(1)

¹⁴⁶ F Karimi & L Leposo CNN ‘new Kenya law legalizes polygamy; women’s group applauds it’ 1 May 2014 <http://edition.cnn.com/2014/05/01/world/africa/kenya-polygamy-law/> (accessed 20 January 2017).

¹⁴⁷ Karimi (n 146 above).

wife to give consent should the husband want to acquire additional spouses.¹⁴⁸ It is evident that the Act acknowledges the cultural practices and adopts certain proclivities such as patriarchy in keeping with this idea of inclusion of culture and tradition. In the spirit of inclusion, the definition of marriage should not have been limited to a man and a woman, but rather should have adopted more inclusive marriage to encompass unions such as woman-to-woman marriage.

Article 6(1)(c) further illustrates the spirit of inclusion of traditional cultural norms and practices by allowing the registration of ‘customary rites relating to any of the communities in Kenya’.¹⁴⁹ The Marriage Act was drafted by Kenyan legislators in line with the view that it should be a document that reflected the nature of Kenyan marriages. It was inclusive and sought to harmonise the various systems of family law.¹⁵⁰ The recognition of customary rites indicates that the document sought to integrate cultural practices of marriage. Woman-to-woman marriage is a customary practice that by this provision, should enjoy recognition. It is also an indication that woman-to-woman marriage may have been envisioned as being an important customary rite. Section 12(a)(i) seems to raise inconsistencies when read with section 6. The provision of section 12(a)(i) voids marriage where ‘either party was and has ever since remained incapable of consummating it’.¹⁵¹ This would raise certain questions as to the viability of customary marriages such as woman-to-woman marriages, but also to those marriages where consummation may be impossible due to a medical condition. The act of consummation has

¹⁴⁸ While the Marriage Bill was being negotiated in Parliament, initial drafts included provisions requiring the husband to inform the wife (or wives) about any additional spouses. The male members of parliament voted this section out. See Karimi (n 146 above).

¹⁴⁹ Marriage Act (n 54 above), sec 6(1)(c).

¹⁵⁰ DJ Ochiel ‘highlights of the Marriage Act, 2014’ 20 May 2014
<http://kenyalaw.org/kenyalawblog/highlights-of-the-marriage-act-2014/> (accessed 20 January 2017).

¹⁵¹ Marriage Act (n 54 above), sec 12(a)(i).

long been regarded as a requisite issue to the validity of marriage, and this notion is discussed at length in Chapter 2 on the elements of marriage. Traditionally, lack of consummation did not create any complications in recognition of woman-to-woman marriage as it was well understood that this form of customary marriage had different rationales that did not include sexual relations between the parties. Woman-to-woman marriages were still valid despite the inability to consummate the union. This, however, raises further challenges as to the actual purpose of the inclusion of customary practices and whether woman-to-woman marriage can be brought under the ambit the Act. This provision seems to indicate that woman-to-woman marriage may not have been envisioned in the Act, an issue that would be unfathomable as woman-to-woman marriage has always been widely practised in Kenya.

Part V of the Act, however, becomes a key element in the motivation that all aspects of customary law on marriage were envisioned in the formulation of the Marriage Act. This part of the Act deals with marriage under customary law. Section 43(1) provides that ‘a marriage under this part shall be celebrated by the customs of the communities of one or both of the parties’.¹⁵² The incorporation of customary law recognises that parties have a right to enter into the institution of marriage under a system of law of their choosing. It also illustrates the importance of the recognition of customary practices and the system of customary law. Culture, custom and tradition are identified as an integral part of the fabric of the Kenyan society. This is evidenced by its inclusion the preamble of the Constitution as well as its reiteration in various parts of the Constitution. Section 43(2) identifies the payment of dowry as a requisite of the recognition of a customary marriage. The payment of dowry is an essential aspect of woman-to-woman marriage, just as any other customary marriage. This section further illustrates the importance of traditional practices and their application for the validity of the marriage.

¹⁵² Marriage Act (n 54 above), sec 43(1).

The Marriage Act tries to adhere to the provisions of the Constitution by defining marriage to be between a man and a woman. However, it is abundantly clear that the Act recognises the importance of culture and tradition and integrates these as integral to the Act. Woman-to-woman marriage has, in part, been codified through the incorporation of various provisions on customary marriage. Other inconsistencies may be read as arising from the Act's intention of observing the Constitution. It is clear that the Constitution considers culture, tradition and custom as part of the fabric of the Kenyan society. It can be intimated that the Constitution, while trying to evade the influence of the Western concepts of same-sex marriage, has unfortunately given rise to inconsistencies that have subsequently pervaded other relevant laws such as the Marriage Act. It is therefore submitted that a purposive reading of the Constitution and Marriage Act should lead to the inevitable conclusion that it was not the intention of both documents to invalidate woman-to-woman marriage as evidenced by the multiple provisions protecting the incorporation of Kenya's diverse cultural beliefs and customary law practices.

5.5 Conclusion

The plurality of Kenya's systems of law is a testament to the growth and development of the country. The recognition of pre-colonial African political systems and customary law practices as part of a developing legal system illustrates that Kenya and its diverse communities were certainly capable of self-governance and robust political organisation. The advent of colonisation and its impact on the codification of law as well as the integration of British common law served to develop already pre-existing legal foundations. Formal integration of instruments like the Constitution has firmly established Kenya as a progressive and dynamic country, capable of development of law at a global level.

The historical development of the Constitution, though fraught with numerous challenges illustrates the capability of Kenya to integrate multiple systems of law. It also serves

as a reflection of the growth of Kenya's legal competencies in various aspects. The inclusion of customary law is an ode to the country's pride in its diverse cultural heritage. It is also a testament to the reluctance of the state to adopt systems that may not be in keeping with its cultural diversity. The Constitution of Kenya has numerous provisions that place culture as an important value of Kenyan communities. It has also been clearly established that the Constitution's reverence for the cultural heritage of the Kenyan people coupled with the events that culminated in the inclusion of Article 45(2), can only be purposively interpreted have no intention of proscribing woman-to-woman marriage.

With regards to the Marriage Act, it has been illustrated that the seeming inconsistencies in document can only be attributed to an attempt to make it compliant with Constitution, stemming from an erroneous understanding that the Constitution prohibits all forms of same-sex marriages. It is evident that the Act was designed to coalesce the multiple Marriage laws that existed. It is also clear that the Constitution and the Marriage Act intended to enshrine the various elements of customary marriage law and practice. Woman-to-woman marriage was intended to remain as much a legally valid marriage as all the other legally recognised marriages. The seemingly uncertainty created by Article 45(2) about the validity of woman-to-woman marriage in Kenya falls away when the provision is interpreted purposively taken into consideration the context of the Constitution itself and the historical circumstances surrounding the inclusion of Article 45(2). The right to marry as established by Article 45(2) of the Constitution and section 3 of the Marriage Act illustrates that this entitlement can and should be enjoyed by all. However, challenges in the wording of Article 45(2) of the Constitution and section 3(1) of the Marriage Act elucidate the need for more permissive language that caters to the recognition of other forms of marriage such as woman-to-woman marriage. The solution may lie in Article 45(4) which provides an avenue for legal recognition of all forms of marriage celebrated in Kenya.

It is apparent that there were other issues that were raised that led to the wording of this provision. In the period between 2000 and 2010, there was an exponential increase in global discourse about homosexuality and same-sex marriages. These discourses, directly and indirectly, influenced the social context in Kenya on family, relationships and marriage resulting in a departure of issues of culture and family with those of Western ideals and norms and Western conceptualization of family as pertained to same-sex relationships and marriages. Some of these debates are discussed in the next chapter.

CHAPTER 6: IMPACT OF THE GLOBAL DISCOURSE ON SAME-SEX MARRIAGE ON THE RECOGNITION OF WOMAN-TO-WOMAN MARRIAGE IN KENYA

6.1 Introduction

Although there is hardly any documented evidence of homoeroticism¹ in woman-to-woman marriages in Kenya, these marriages have nonetheless been compared and equated to same-sex marriages of the West. The purpose of this Chapter is not to offer a comparative analysis of the two institutions, but rather to offer insight as to the effect of the global discourse on the recognition of woman-to-woman marriage by outlining the similarities that led ultimately to the provisions of Article 45(2) of the Kenyan Constitution. In preceding Chapters, the thesis analysed the institution of woman-to-woman marriage, its rationales, recognition in pre-colonial Kenya and challenges arising from the plurality of legal systems introduced through colonization. The later Chapters have also canvassed the conversations around the Constitutional and statutory challenges raised by Article 45(2) and have offered an analysis of the existing social and political climate leading up to the provision that marriage can only be

¹ See generally JG Younger *Sex in the ancient world from A to Z* (2005) 80; American Psychological Association *APA Dictionary of Psychology* (2015); American Psychological Association 'Answers to your questions: For a better understanding of sexual orientation and homosexuality' (2008) <http://www.apa.org/topics/lgbt/orientation.pdf> (accessed 15 August 2017); GM Herek 'Homosexuality' in AE Kazdin (ed) *Encyclopaedia of psychology: volume 8 set* (2000). Younger defines homoeroticism as the 'erotic attraction between members of the same sex, either male-male or female-female'. The APA dictionary of psychology defines sexual orientation as 'enduring sexual attraction to male partners, female partners, or both and may be heterosexual, same sex (gay or lesbian), or bisexual. Herek in the Encyclopaedia of psychology defines homosexuality as 'patterns of same-sex romantic and emotional bonding, identities or communities based on same-sex desires and a shared culture created by those communities. There is often a confusion of the concept of homoeroticism and homosexuality. Whereas homoeroticism is an attraction that may or may not be acted upon, homosexuality is the personal identification with a particular sexual orientation.

between a man and a woman, seeming prohibiting woman-to-woman marriages. The aim of this Chapter is to illustrate that although same-sex marriages and woman-to-woman marriages are fundamentally dissimilar, globalization and its effects on Kenya cannot be ignored; and, further, that the discourse on family and the right to marry illustrates the importance of the recognition of all forms of family formed through recognised marriages. This recognition could be instrumental in the campaign towards the legal statutory recognition of woman-to-woman marriage in Kenya. This Chapter also seeks discuss the effect of the global discourse of sexual identity in the larger global arena, to prevent further erroneous comparisons between woman-to-woman marriage and other forms of same-sex marriage.

The comparison of the two institutions has happened due to the pervasive influence worldwide, as well as in the mind of Kenyans, of a globalising discourse that has homogenised same-sex intimacy as being tied at the waist with same-sex marriage.² The similarities and differences between these two institutions of marriage have been discussed in greater detail in Chapter 2. It is against this background that the apparent prohibition of woman-to-woman marriages in Article 45(2) of the Constitution of Kenya 2010 has to be understood. This Chapter analyses same-sex marriage as an institution originating predominantly in the West which is contemplated as the public celebration of non-heterosexual identities and compares it to the institution of woman-to-woman marriages in Africa which envisions the propagation of lineage as its primary rationale. The Chapter also analyses the role of the global discourse on same-sex marriages on the apparent prohibition of woman-to-woman marriages in Kenya.

Further, the Chapter analyses Nigeria and Uganda with a view of illustrating the negative effects of prohibition of same-sex marriage in these countries. Nigeria was identified

² J Chamie & B Mirkin 'Same-sex marriage: A new social phenomenon' 37 *Population and Development Review* 529. Same-sex marriage is defined as marriage between two persons of the same-sex nothing that this institution is a development of the 21st century.

for discussion because, although woman-to-woman marriages are recognized under customary law and the Nigerian courts seemingly recognize the differences between woman-to-woman marriages and same-sex marriages of the West, the courts still prohibit the recognition of woman-to-woman marriages. Also, in Nigeria, the Same-Sex Marriage (Prohibition) Act was passed in 2014 effectively prohibiting all homosexual same-sex marriages. In Uganda, on the other hand, there are no documented woman-to-woman marriages. Instead, Uganda has a well-documented history of same-sex homosexual relationships in pre-colonial Africa in the Buganda Kingdom. In 1995, the Constitution of Uganda was amended to include a direct prohibition on same-sex marriage. This prohibition is a reflection of the impact of the discourse on same-sex marriages in the West on Uganda.

The Chapter also analyses South Africa, the only country in Africa that has statutory recognition of customary marriages and statutory provisions for the legal recognition of same-sex marriage, as well as judicial precedents on the evolving nature of the family. The analysis on the West and South Africa provides an avenue through which the evolved family formed in woman-to-woman marriage can be appreciated and creates a potential justification for the legal recognition of woman-to-woman marriages in Kenya.

6.2 Impact of globalization and the global sex discourse on sexualities

Globalization, often in the form of the globalising of Western concepts and understandings, has had a manifest impact on the development of morality, sensibilities, and even the adoption of legislation in countries across the world. It is argued here that the global sex discourse, specifically as far as it related to same-sex relations, has had an impact on the formulation of marriage legislation in Kenya and has contributed to the apparent prohibition of same-sex marriage.

Homosexuality, as documented in Africa, was not constructed on the basis of sexual identity.³ Mbisi reflects that ‘African societies have never historically had a “gay” identity or a pathologized “homosexual” category’.⁴ Same-sex erotic or sexual relationships in Africa were ‘a consistent logical feature of African societies and belief systems’.⁵ Amory defines homosexuality in broader terms as ““same-sex erotics, practised by many people in many different historical contexts[that] do not always necessarily lead to the emergence of a [“gay”] identity””.⁶ This definition better reflects the same-sex erotic relationships in Africa. The idea of identity as expressed in definitions of homosexuality is an import from the West. The idea of homosexuality was developed in the West in the 19th century to ‘control social relations while labelling those engaged in same-sex relations as deviant’.⁷ The categorization of being ‘gay [arose as] a political identity, which [came] from Western struggles for civil rights in the 1960s’.⁸ The gay rights movement in the West arose as a ‘public collective identity’⁹ with a distinct political and cultural characterization. This identity gained traction and became widespread in the 1990’s due to the globalization of the same-sex discourse.

To begin contextualizing the impact of the globalised sex discourse on woman-to-woman marriages, it is important to first situate the discourses on globalisation and its effects

³ See generally T Mbisi ‘The lies we’ve been told: On (homo)sexuality in Africa’(2011) 58 *Africa Today* 54 77; M Epprecht ‘Sexuality, history, Africa’ (1999) 114 *American Historical Review* 1258 1272; M Epprecht ‘The making of “African Sexuality”: early sources, current debates’ (2010) 8 *History Compass* 768 779; S Nyanzi ‘Dismantling reified African culture through localized homosexualities in Uganda’ (2013) 15 *Culture, Health & Sexuality: An International Journal for Research, Intervention and Care* 952 967; D Amory ‘Homosexuality in Africa: Issues and debates’ (1997) 35 *Journal of Opinion* 5 10.

⁴ Mbisi (n 3 above) 55.

⁵ S Murray & W Roscoe (eds) *Boy-wives and female husbands: Studies of African homosexualities* (1998) iv.

⁶ Amory (n 3 above) 5.

⁷ Mbisi (n 3 above) 56.

⁸ As above.

⁹ J Gamson ‘Must identity movements self-destruct? A queer dilemma’ (1995) 42 *Social Problems* 391.

on legal systems around the world. Although there is no accepted definition, globalization is considered as one of the characteristics of the contemporary world and has been defined as the ‘growing interpenetration of states, markets, communications and ideas across borders’.¹⁰ There are various theories proposed concerning globalization and its effect on legal systems. One theory posited is that of global governance.¹¹ Global governance is the consideration of the impact of societal changes and the diversification of laws on the evolution of law.¹² The theory of global governance holds that although law may originate from a singular state, the similarity of norms in many states creates a singularity where these similar norms are accepted and applied by different states. The effect of the application of similar norms lead to the decentralization of the law and the acceptance of the application of these global laws leading to an evolution in the legal structures of a particular state.¹³

Human rights were initially contended as being matters under the domestic jurisdiction of a state.¹⁴ However, human rights are now considered as part of international law with universal application.¹⁵ Stychin proposes that through the globalization of human rights, the progressive nature of states can be established by observing the integration of human rights norms in the state.¹⁶ Stychin further states that there has been ‘globalization in the discourse

¹⁰ A Brysk *Globalization and human rights* (2002) 1.

¹¹ B Santos & CA Rodriguez-Gavarito ‘Law, politics and the subaltern in counter-hegemonic globalization’ in B Santos & CA Rodriguez-Gavarito (eds) *Law and globalization from below: Towards a cosmopolitan legality* (2005) 5.

¹² Santos & Rodriguez-Gavarito (n 11 above) 6 7.

¹³ As above.

¹⁴ R McCorquodale & R Fairbrother ‘Globalization and human rights’ (1999) 21 *Human Rights Quarterly* 739.

¹⁵ See generally H Steiner & P Alston *International human rights in context* (1996) 118 165; AH Robertson & JG Merrills *Human rights in the world: an introduction to the study of the international protection of human rights* (1989) 286 303; M Dixon & R McCorquodale *Cases and materials on international law* (1995) 191 278.

¹⁶ CF Stychin ‘Same-sex sexualities and the globalization of the human rights discourse’ (2004) 49 *McGill Law Journal* 952.

around same sex sexualities'.¹⁷ Altman supports this view stating that globalization has affected the ways in which sex is viewed, adjudicated, packaged, and practised worldwide.¹⁸ Stychin proposes that the discourse on the universality of rights, and more specifically, the inclusion of gay rights as human rights, has generated a heated debate about the recognition of identities in the global context.¹⁹

Stychin theorises a dual approach to the discourse on the globalisation of same-sex identities. The contention is based on the idea that on one hand globalization of same-sex identities is based on human rights and on the other hand globalization of same-sex identities is based on the global recognition of same-sex sexualisation as identities. On human rights, gay rights are considered to be grounded in communitarian claims of the right to self-determination.²⁰ The recognition of global same-sex identities is based on the idea that there are 'multiple and intersecting identities; the development of a discourse by which international legal standards become part of the "essence of a people"'.²¹ Stychin contends that the success of the discourse depends on the interlinkage of the global sex discourse with the recognition of protection of human rights for individuals based on international human rights standards.²² Reflecting on the inference on international case precedent by the courts in South Africa, Binnie noted that there was 'mutual admiration among courts of last resort on the subject of human rights issues [which] suggests that in parallel with the globalization of economies, and

¹⁷ Stychin (n 16 above) 952.

¹⁸ M Anderson 'Global sex (review) on Dennis Altman 'Global Sex (2001) 216' (2002) 11 *Journal of the History of Sexuality* 487 488.

¹⁹ Stychin (n 16 above) 954.

²⁰ As above, 956.

²¹ As above.

²² Willian Ian Corneil Binnie QC is a former puisne justice of the Supreme Court of Canada who served from 1998 to 2001. He gave the key note address on Constitutional interpretation at the third National Bar Conference held on the 6-8 October 1995. The theme was contemporary constitutional law and legal education.

globalization of information systems, we are also witnessing the globalization of human rights'.²³

Altman supports the theory proposed by Stychin that the global sex discourse in the West has evolved as a reflection of the pervasive influence of globalisation.²⁴ He proposes that increase of the interaction of countries through the growth of the consumer society has had a marked impact on the spread of the conversation on homosexuality.²⁵ Altman observes that sex in societies is regulated through 'religious and cultural prohibitions, ceremonies and rules, through legal, scientific, hygiene and health policies; through government restrictions and encouragements'.²⁶ Altman also reflects that the global sex discourse takes place in the international domain through issues such as the 'legalization of gay marriage, the women's rights movement, the gay rights movement, and the push for anti-discrimination laws to include sexual orientation'.²⁷

Altman theorises that globalization ensures that states do not remain insular but instead look outward to the impact of exogenous influences in the consideration of domestic issues. He cites Peter Drucker who argues that to better understand how indigenous forms of sexuality can be preserved within a global culture and economy, it is necessary to observe the world economies as well as different cultural and political contexts.²⁸

²³ WC Binnie 'Constitutional interpretation' (1995) 8 *Advocate* 105.

²⁴ D Altman *Global sex* (2001) 2.

²⁵ D Altman 'On global queering' (1996) 2 *Australian Humanities Review* 1.

²⁶ Altman (n 24 above) 3.

²⁷ As above, 49.

²⁸ As above, 50.

Katyal²⁹ suggests that preoccupation of the West with engendering definitions of global sexual identities detracts from the contemporary human rights discourse.³⁰ International human rights discourse in human rights courts as well as various social movements have focused on the universality of sexual identities. Katyal discusses the pervasive effects of the discourse on sexual or gay identity as potentially becoming a discourse throughout the world. The decision by the United Nations Human Rights Committee to adopt principles of non-discrimination on the basis of sexual orientation in *Toonen v Australia* (1994)³¹ illustrated the pervasive nature of the discourse on gender identity in the international human rights discourse. Further, the progressive South African Constitution protecting the rights of sexual minorities once again illustrate the inclusion of gay identities in contemporary human rights discourse in Africa. As discussed in Chapter 5, the global discourse on sexuality found its way to Kenya and inevitably influenced the formulation of the Constitution. It is clear that there needs to be some analysis of the extent, positive or negative, on the impact of the global sex discourse in Africa and particularly in Kenya.

With regard to the theoretical approaches discussed by Stychin and Altman, the global sex discourses in Europe and the Americas have evolved towards the legal recognition of same-sex marriage through the organic considerations of the role of the family and the importance of the institution of marriage, including the importance of the legal recognition of same-sex marriage.

6.3 Impact of global discourses on same-sex marriage in identified African countries

Same-sex marriages – as observed, celebrated and increasingly legally recognised in the West and in South Africa – have been erroneously equated with the African institution of woman-

²⁹ S Katyal 'Exporting identity' (2002) 14 *Yale Journal of Law and Feminism* 97.

³⁰ Katyal (n 29 above) 119.

³¹ *Toonen v Australia* (1994) UN Doc CCPR/C/50/D/488/1992.

to-woman marriage. The equation of same-sex marriages and woman-to-woman marriages is evident from the misconceptions presented by politicians and the media during the debates on the Constitution of Kenya 2010, as well as judicial views expressed in some of the decisions by Nigerian courts. The impact of the discourse on same-sex marriage has been reflected in Africa with the prohibition of same-sex marriage in Article 45(2) of the Constitution of Kenya and the in Nigeria, through the Same-Sex Marriage (Prohibition) Act.³²

Although there may be incidence of woman-to-woman marriage amongst the Buganda in Uganda, it is not widely documented. The Constitution of Uganda³³ provides for a direct prohibition on marriage between persons of the same sex.³⁴ Analysing the debates that took place during the drafting of the Constitution in Uganda, clearly, shows that the intention of legislators was to prohibit same-sex marriages as they had been conceptualized in the West.

Analyses of Nigeria shows similar threads. Kenya's situation reflects the challenges espoused in both these jurisdictions.

6.3.1 Impact of global discourses on same-sex marriage in Nigeria

Nigeria is one of the countries in Africa where the customary practice of woman-to-woman marriage takes place. As discussed in Chapter 3 concerning woman-to-woman marriage in West Africa, the phenomenon is well documented in both Northern³⁵ and Southern Nigeria.³⁶ In 2014, Nigerian President Goodluck Jonathan signed into law the Same-Sex Marriage

³² Same-sex Marriage (Prohibition) Act of 2014 <http://www.lawnigeria.com/LawsoftheFederation/Same-Sex-Marriage-Prohibition-Act,-2014.html> (accessed 9 August 2017).

³³ Constitution of Uganda 1995.

³⁴ Constitution of Uganda 1995, Art 31(2)(a).

³⁵ CK Meek 'The northern communities of Nigeria' (1925) 209 210.

³⁶ A Talbot *Communities of the Niger Delta* (1932).

(Prohibition) Act.³⁷ The law prohibits marriage contracts or civil unions entered into by persons of the same sex.³⁸ It also prohibits the solemnization of same-sex marriages in places of worship.³⁹ Further, it defines marriage in Nigeria as being only between a man and a woman⁴⁰ and provides definitions for civil unions.⁴¹ It also provides a penalty of 14 years imprisonment for any person who enters into such a union.⁴²

However, despite the direct prohibition of same-sex marriages in Nigeria, woman-to-woman marriages were conducted in the communities that provide for this form of marriage in Nigeria.⁴³ The Nigerian situation of express prohibition differs from Kenya in a number of ways. There is no express prohibition in the Constitution of Kenya 2010. Article 45(2) provides for the right for an adult to marry a person of the opposite sex based on the free consent of the parties. Further, the definition of marriage as provided in the Marriage Act 2014,⁴⁴ makes no express prohibition of any other form of marriage. The variety in formulation of the laws illustrates that the intention of the legal drafting of Article 45(2) in Kenya was not to offer any form of direct prohibition on marriage.

³⁷ Same-sex Marriage (Prohibition) Act, 2014 <http://www.lawnigeria.com/LawsoftheFederation/Same-Sex-Marriage-Prohibition-Act,-2014.html> (accessed 9 August 2017).

³⁸ Same-sex Marriage (Prohibition) Act (n 37 above), sec 1(1).

³⁹ As above, sec 2(1).

⁴⁰ As above, sec 3.

⁴¹ As above, sec 7.

⁴² As above, sec 5(1).

⁴³ O Omoteye & MT Akinlade 'Legal implications of Same-Sex Marriage (Prohibition) Act, 2013 on customary "female husband marriage" or "woman-to-woman marriage" in Nigeria' (2016) 6 *International Journal of Advanced Legal Studies and Governance* 24.

⁴⁴ Marriage Act 4 of 2014, secs 3(1).

The prohibition expressed in the Nigerian law speaks to the Western construction of same-sex marriages in Nigeria.⁴⁵ The Same-Sex Marriage (Prohibition) Act prohibits the registration of homosexual clubs and societies⁴⁶ as well as public demonstrations of same-sex amorous relationships.⁴⁷ This clearly indicates that the intention of the law is to prohibit loving relationships between two persons of the same sex.

In Nigeria, the definition of customs is provided in the Evidence Act,⁴⁸ as well as in the Ekiti State High Court Law.⁴⁹ The Evidence Act also provides that customs may be adopted as law through judicial notice or by proof of evidence of the custom.⁵⁰ It goes further to state the manner in which judicial notice may be taken through evidence or as an established matter of fact.⁵¹ It limits the application of custom where it is contrary to public policy or where it is not in accordance with the rules of natural justice, equity and good conscience.⁵² In the case of *Kharie Zaidan v Fatima Khalil Mohssen* (1973),⁵³ the Supreme Court established customary law as a system of law, which was not common law or a law enacted by legislature, but nevertheless enforceable and binding to parties subject to it.⁵⁴ The courts in Nigeria have established that customary law is recognized and observed by communities whether or not it is

⁴⁵ AN Nwazuke & CA Igwe 'A critical review of Nigeria's Same Sex Marriage (Prohibition) Act' (2016) 45 *Journal of Law, Policy and Globalization* 1.

⁴⁶ Same-sex Marriage (Prohibition) Act (n 35 above), sec 4 (1).

⁴⁷ Same-sex Marriage (Prohibition) Act (n 35 above), sec 4 (2).

⁴⁸ Evidence Act 2011, sec 2(1).

⁴⁹ Ekiti State High Court Law 2010, sec 42.

⁵⁰ Evidence Act (n 49 above), sec 16(1).

⁵¹ Evidence Act (n 49 above), secs 17, 18(1) & (2), 73(1).

⁵² Evidence Act (n 49 above), sec 18(3).

⁵³ *Kharie Zaidan v Fatima Khalil Mohssen* (1973) 11 SC 1.

⁵⁴ *Kharie Zaidan* case (n 53 above), para 5.

‘barbarous or mild’.⁵⁵ The Matrimonial Causes Act 1970⁵⁶ has no provisions for these types of marriages and the Customary Court Edict 1978⁵⁷ in some Nigerian states have declared woman-to-woman marriages repugnant. Concerning the repugnancy clause or whether a matter was contrary to natural justice, the courts established that it has to be proved by anyone who is interested in the matter or adversely affected by it.⁵⁸

The courts in Nigeria, however, seem conflicted on the matter of the legal recognition of woman-to-woman marriages as the Courts indicate that woman-to-woman marriages are a recognised customary practice in some communities in Nigeria but do not recognise these marriages in precedents set on the institution.⁵⁹

In the case of *Meribe v Egwu* (1976),⁶⁰ the Supreme Court had to pronounce on whether a child born in a woman-to-woman marriage to a childless woman who was still married to a man, was the child of the man (the husband of the childless woman) or *female husband* (the childless woman). The summary of the facts of the case are that Nwanyiokoli, who was in polygamous marriage to Chief Cheghekwa, married her niece Nwanyiocha, in order to get children, Nwanyiokoli could raise as her heirs. Nwanyiocha and Chief Cheghekwa had children whom Nwanyiokoli raised as her own. She also lived with Nwanyiocha and provided for her as the *female husband*, although they lived in the Chief’s homestead. Upon the death of Nwanyiokoli, one of her sons from the woman-to-woman marriage performed the burial rites

⁵⁵ Omoteye (n 43 above) 26.

⁵⁶ Matrimonial Causes Act 18 of 1970.

⁵⁷ Customary Court Edict 1978, secs 22(a).

⁵⁸ In the Omoteye article (n 41 above) 26, the authors cite various cases that establish these rules of application such as *Owoniyan v Omotosho* (1961) 1 All NLR 304 at 309; *Bello v Gov; Kogi State* (1997) 9 NWLR (Pt. 521), 496 CA; *Osulu v Osolu* (1998) 1 NWLR (Pt. 535) 532 CA; *Okene v Orianwo* (1998) 9 NWLR (Pt. 566) 408 CA; *Okonkwo v Okagbue* (1994) 9 NWLR (PT. 368) 391.

⁵⁹ Omoteye (n 43 above) 37.

⁶⁰ *Meribe v Egwu* (1976) LPELR-1861 (SC)

as her recognized son. He inherited her land and worked on it from 1937 until 1971. Meribe, a child of the eldest son of Chief Cheghekwa by another wife, trespassed on the land claiming that he inherited the property upon the death of his father. He claimed that he had inherited Nwanyikoli (the *female husband*) under levirate customs of the tribe. The Supreme Court held that the essential requirements for a valid marriage are that it must be conducted between a man and a woman. The Court also held that woman-to-woman marriages were abhorrent in decent society and should be considered repugnant as provided for in section 14(3) of Evidence Act.⁶¹

In the case of *Helen Odigie v Iyere Aika* (1985),⁶² the matter before the High Court was whether a child born in a woman-to-woman marriage belonged to the *female husband*. The High Court held that the custom of a woman marrying a woman was repugnant stating that the custom was ‘odious’, ‘atrocious’, ‘ugly’ and against ‘public policy’.⁶³ The Judge alleged that the institution deprives the biological parents of the child, who may or may not want the child, and giving the child to a childless man or woman as if the child was a ‘chattel’.⁶⁴

In another case, *Okonkwo v Okagbue* (1994),⁶⁵ the matter before the Supreme Court was the legitimacy of children of a woman-to-woman marriage. The facts of the case were that Nnanyelugo Okonkwo, who died in 1931 was survived by five sons and two sisters, Mrs Lucy Okagbue and Mrs Victoria Obiozo. They were both married but had no children. Upon the death of their husbands, both sisters returned to their late brother’s household. In 1968, both sisters married Rose on behalf of their late brother Nnanyelugo Okonkwo without the knowledge of their nephews. The woman-to-woman marriage between the sisters and Rose

⁶¹ *Meribe* case (n 60 above).

⁶² *Helen Odigie v Iyere Aika* (1985) NBCL 51.

⁶³ Full quote provided in Omoteye (n 43 above) 38.

⁶⁴ As above.

⁶⁵ *Okonkwo v Okagbue* (1994) 9 NWLR (PT 368) 391.

produced six offspring who bore their late brother's surname of Okonkwo. The son of Nnanyelugo Okonkwo and his four brothers filed a case in the lower court that they were the only legitimate offspring of the deceased and that the children of the woman-to-woman marriage between their aunts and Rose, belonged to their deceased husbands and not their father. The sisters and Rose alleged that the woman-to-woman marriage they performed under Onitsha native law and custom was recognized by Onitsha customary law and therefore their six children were legitimate heirs of their late brother Nnanyelugo Okonkwo.

The Supreme Court held that the marriage between the sisters and Rose was conducted 32 years after the death of their brother and therefore could not have been valid as a dead person cannot marry a living person. On the validity of the woman-to-woman marriage between the sisters and Rose, Justice Uwais relied on the precedent set in *Meribe v Egwu* (1976)⁶⁶ that marriage between two women is repugnant to natural justice, equity and good conscience. Finally, on the legitimacy of the children born in the woman-to-woman marriage, the Supreme Court held that the children were not legitimate heirs of the deceased as he could not be said to have procreated 32 years after his death.⁶⁷

In a fourth case, *Ojukwu v Agupusi* (2014)⁶⁸ before the Court of Appeal in Nigeria, the matter before the court was not about woman-to-woman marriage but on whether children born after the death of a person can be said to belong to the deceased. Although the Court held that the plaintiff had no *locus standi* to bring the matter before the Court of Appeal, the Court still considered the issue of legitimacy of children born in woman-to-woman marriages.⁶⁹ The Court of Appeal stated that it considered the 'contemporary morality, aspirations, expectations and

⁶⁶ *Meribe* case (n 60 above).

⁶⁷ *Okonkwo* case (n 56 above) 305 306.

⁶⁸ *Ojukwu v. Agupusi* (2014) LPELR-22683(CA)

⁶⁹ Omoteye (n 43 above) 43.

sensitivity of the people of this country and the consensus opinion of civilized international community which we share',⁷⁰ in making determinations on matters of custom. The Court further reflected that the world resembled a global village due to the technological developments and that culture needed to reflect the changing times without compromising on Nigeria's values and code of ethics.⁷¹

These four cases indicate that the courts recognize customary law as a source of law in Nigeria but are still persuaded by the statutory provisions of the Evidence Act that contain the repugnancy clause. It would appear that although woman-to-woman marriage is recognized as a legitimate custom under customary law and a custom that is still performed by different communities, the courts are not willing to separate the issue of the legal recognition of woman-to-woman marriage and that of the recognition of same-sex marriage. It also clear that the Court considers the views of the international community when making its decisions particularly on matters of customary law. However, in *Ojukwu v Agupusi* (2014), Justice Agube lamented as follows:

Talking of international community, the "civilized world" is now encouraging same-sex marriages and unnatural behaviours but we need not copy them to our detriment, as it would appear that we are even now paying the bitter price of modernity and Westernization.

In analysing this decision, Omoteye⁷² states that the Judge is wrong to extrapolate global sex discourse of the West as having an impact on the recognition of woman-to-woman marriage. Omoteye contends that woman-to-woman marriage was conducted for the purposes for male progeny for women who could not bear male offspring, which is something distinct from same-sex marriages in the West where some of the motivations of these marriages are for sexual

⁷⁰ *Ojukwu* case (n 68 above), para 8.

⁷¹ *Ojukwu* case (n 68 above), para D.

⁷² Omoteye (n 43 above) 44.

relations.⁷³ Omoteye further opposes the collation of African woman-to-woman marriages with Western same-sex marriages, maintaining that same-sex marriage in the West could be considered to be repugnant to natural justice, equity and good conscience and within the scope of the Same-Sex Marriage (Prohibition) Act, 2014, but insisting that woman-to-woman marriages exclusively for legitimacy and kinship of children is not repugnant to natural justice and falls outside the scope of the 2014 Act.

This position presents a clear departure from the Kenyan situation, where the Kenya courts have distinguished customary law and the practice of woman-to-woman marriage from the statutory provisions of marriage in the Marriage Act 2014.⁷⁴ However, Nigeria illustrates the challenge posed when there is no express separation between the two forms of marriages through legal provisions, a fate Kenya may suffer if woman-to-woman marriages do not receive unambiguous legal recognition.

6.3.2 Impact of global discourses on same-sex marriage in Uganda

The global sex discourse had a direct impact on the constitutional review process in Uganda leading to the prohibition of same-sex marriage. This is a situation that is mirrored in Kenya where the global sex discourse had an impact on the drafting of Article 45(2) of the Kenyan Constitution.

There is documentation supporting same-sex relationships in pre-colonial Africa in the Buganda Kingdom.⁷⁵ Mwanga, the *Kabaka* of the Buganda Kingdom in the late 19th century, was reported to have had homosexual relationships.⁷⁶ The theologian and anthropologist Faupel

⁷³ As above.

⁷⁴ See generally woman-to-woman marriage cases in Kenya discussed in Chapter 4.

⁷⁵ R Rao 'Remembering Mwanga: same-sex intimacy, memory and belonging in postcolonial Uganda' (2015) 9 *Journal of Eastern African Studies* 2.

⁷⁶ Rao (n 75 above) 2.

documented Mwanga's homosexuality denigrating it and alluding to it being his downfall.⁷⁷ Historian Henri Médard also alludes to situational homosexuality in *Kabaka's* court.⁷⁸ Tamale also notes that it was widely known that *Kabaka* Mwanga was homosexual.⁷⁹

Although seldom documented, there appears to have been a form of customary same-sex marriage that took place between two men in Uganda. The Lango tribe was a Nilotic community in Uganda where men assumed the status of women and were treated as women.⁸⁰ The men who had taken on women roles were married and regarded as wives.⁸¹ It is difficult to posit whether it is the history of homosexual relationships in Uganda that may have led to the moral discussion that prevailed in the 2000's as it would seem that *Kabaka* Mwanga's sexuality was seldom discussed in the news.⁸²

The Constitution of Uganda, 1995,⁸³ was amended in 2005 to include the prohibition of same-sex marriages.⁸⁴ During the drafting of the Constitution, the Constituent Assembly limited their scope of the discussion on marriage as being between a man and a woman.⁸⁵ Sexual orientation was also not included as a protected ground and the matter was never raised in the Constituent Assembly Proceedings for discussion.⁸⁶ The Constituent Assembly discussed

⁷⁷ JF Faupel *African holocaust: the story of the Uganda martyrs* (1965) referenced in Rao (n 73 above) 2.

⁷⁸ H Médard, Henri 'L'homosexualité au Buganda, une acculturation peut en cache une autre (Homosexuality in Buganda, One Acculturation Can Hide Another).' (1999) *Hypothèses* 1 169 174.

⁷⁹ S Tamale 'Out of the Closet: Unveiling Sexuality Discourses in Uganda.' (2003) *Feminist Africa* 2.

⁸⁰ C Stewart '21 varieties of traditional homosexuality' 30 January 2014 <https://76crimes.com/2014/01/30/21-varieties-of-traditional-african-homosexuality/> (accessed 9 August 2017).

⁸¹ Stewart (n 80 above).

⁸² Rao (n 75 above) 8.

⁸³ Constitution of The Republic of Uganda 1995.

⁸⁴ Constitution of The Republic of Uganda, Art 31(2)(a).

⁸⁵ JD Mujuzi 'The absolute prohibition of same-sex marriages in Uganda' (2009) 23 *International Journal of Law, Policy and the Family* 277 278.

⁸⁶ Mujuzi (n 85 above) 280.

whether the prescribed age for marriage should be 18 years.⁸⁷ This is similar to the discussions between the Parliamentary Select Committee (PSC) and the Committee of Experts (CoE) during the drafting of the Constitution of Kenya 2010 in a bid to prohibit child marriage.⁸⁸ Another matter that was discussed by the Constituent Assembly in Uganda on the constitutional provisions on marriage, was the particular wording that ‘marriage shall be entered into with free consent of the intending parties’.⁸⁹ The Constituent Assembly members discussed the motivation for the words and elaborated that the motivation of the drafting of the provision was to ensure that there was no avenue for men to marry men or women to marry women or any form of homosexual marriage.⁹⁰ Mujuzi⁹¹ speculates that the reason for the discussion and express prohibitive wording culminated from the increased visibility of the gay movement in Uganda.⁹² President Yoweri Museveni had also been vocal in expressing his negative views of the gay community calling for the arrest of gays in the country in 1999.⁹³ Mujuzi also suggests that Ugandan print media, the Church’s position on homosexuality and the State’s disapproval of homosexuals and same-sex relationships further perpetuated the negative perspectives towards same-sex relationships and marriage.⁹⁴ Further, he contends that the discourse and developments in jurisprudence on the elimination of all forms of discrimination against people

⁸⁷ Mujuzi (n 85 above) 281.

⁸⁸ Committee of Experts on Constitutional Review ‘Final report of the committee of experts on constitutional review’ (2010) <http://katibainstitute.org/Archives/images/11-10-2010%20CoE%20Final%20Report.pdf> (accessed 9 August 2017).

⁸⁹ Draft Constitution of Uganda, Art 60(2).

⁹⁰ Statements made by Mr Haruna Sebi and Miss Nabafu documented in the Proceedings of the Constituent Assembly (Official Report, Content), 8 September 1994, 1977 1978.

⁹¹ Mujuzi (n 83 above) 281 282.

⁹² As above.

⁹³ As above.

⁹⁴ As above.

in same-sex relationships from different international bodies compounded the negative sentiment in Uganda leading to the prohibition.⁹⁵

The Constitutional Review Commission was constituted during the Presidential Elections Campaigns in 2001 with a mandate to undertake the review of the Constitution of the Republic of Uganda, 1995. In the report of its findings, the Commission recommended an amendment to Article 31 on marriage to expressly prohibit the recognition of marriage between persons of the same sex.⁹⁶ The Commission did not seek the views of the Ugandan people on this matter despite the fact that this was part of the Commission's mandate.⁹⁷ Mujuzi posits that this may be because the Commission did not regard the issue of same-sex marriage as a contentious enough to seek the views of Ugandans.⁹⁸ After discussions between Legal and Parliamentary Affairs Committee of the Parliament of Uganda and the government, the amendment to Article 31(2)(a) of the Constitution was accepted.

It is clear that a number of factors influenced the amendment to the Constitution of Uganda 1995. The global discourse on same-sex marriage was widely reported in the local news and newspapers polarizing opinions on the issues and although the perceptions of the Ugandan people were not expressly sought, they were clearly evident in the decisions of the Constituent Assembly. This is reflected in Kenya with the Committee of Experts(CoE), the Churches and State actors engaging in the same-sex discourses during the Constitutional review process.

⁹⁵ As above.

⁹⁶ The Report of the Commission of Inquiry (Constitutional Review) (2003), para 2.

⁹⁷ Mujuzi (n 85 above) 284.

⁹⁸ As above.

6.4 Impact of global discourses on same-sex marriage in Kenya

With the enactment of the Constitution of Kenya 2010, and particularly Article 45(2), the recognition of woman-to-woman marriage became uncertain, as it became entangled in the discourse around homosexuality and the recognition of same-sex marriages in Kenya.

In Kenya, the issue of same-sex marriages and the polarized opinions of Kenya's legislature was extremely evident during the constitutional review process. The initial drafts of the Constitution stated that an adult has the right to marry a person of the opposite sex based on free consent of the parties and granted equal rights to parties at the time of marriage and at its dissolution.⁹⁹ This proposed position sparked a heated debate about morality in the country and the matter was in all likelihood further exacerbated by the marriage of two Kenyan men in London in 2009.¹⁰⁰ When asked by British Members of Parliament to recognise and protect the rights of persons of different sexual orientation in the Constitution, Otiende Amollo, a member of the committee of experts, stated as follows:

On several occasions, some British MPs have approached us on the gay matter. They wanted us to include homosexuals and lesbian rights in the draft. But we have told them that such a thing cannot happen because if we did so, a majority of Kenyans will reject the draft during the forthcoming referendum.¹⁰¹

⁹⁹ 'New law shuts door to gay weddings' *The Nation* 18 November 2009. <http://www.nation.co.ke/news/1056-688058-jk0qvpz/index.html> (accessed 9 August 2017).

¹⁰⁰ See generally 'Two Kenyan men wed in London' *The Nation* 17 October 2009. <http://www.nation.co.ke/news/1056-673614-jkpmrsz/index.html> (accessed 9 August 2017); M Karanja 'A family scarred by homophobia' *The Nation* 22 October 2009 <http://www.nation.co.ke/news/1056-675940-jko6pjz/index.html> (accessed 9 August 2017); X Rice 'Kenya launches gay survey while homosexuality remains illegal' *The Guardian* 29 October 2009 <https://www.theguardian.com/world/2009/oct/29/kenya-launches-gay-survey> (accessed 9 August 2017); Darian 'Marriage of Kenyan gay couple in the UK spark controversy' 21 October 2009 <http://loldarian.blogspot.co.za/2009/10/marriage-of-kenyan-gay-couple-in-uk.html> (accessed 9 August 2017).

¹⁰¹ 'Kenyan law review experts rule out rights for homosexuals' *The Nation* 19 October 2009. <http://humanrightshouse.org/noop/page.php?p=Articles/12138.html&d=shdbylgzokyw> (accessed 9 August 2017).

It was notable the matter of same-sex marriage and that of the rights of homosexual persons were dealt with as a singular issue. Various religious leaders from both the Christian and Muslim communities in Kenya also vehemently opposed the same-sex marriage, with the Anglican Archbishop of Kenya stating that the union was ‘abnormal’ and contrary to African traditions.¹⁰² Sheikh Mohammed Dor, a nominated Member of Parliament and Muslim leader, stated that same-sex marriages were ‘un-African’ and requested the government to not condone it.¹⁰³ Mr Amollo contended that the committee of experts received a memorandum with 5,000 signatures from various religious groups saying that they would not support the proposed Constitution if it included rights for the homosexual communities. At the same forum, Mr Amollo said that ‘majority of Kenyans are opposed to same-sex marriage and anything to do with homosexuals and lesbians’,¹⁰⁴ further illustrating that the committee of experts was considering the matter of rights for homosexual persons and same-sex marriage as overlapping and closely intertwined issues.

During the constitutional review process, amongst other issues that took precedence in the arguments against the proposed Constitution was the assertion by members of the religious community that the wording in the draft constitution dealing with the right to marry would allow for the recognition of same-sex relationships. This contention was first raised in the CKRC Draft¹⁰⁵ which was the first draft after the change in the political dispensation in Kenya. Popularly referred to as the Ghai Draft, it relied in part on the formulation of the Constitution

¹⁰² As above.

¹⁰³ As above.

¹⁰⁴ As above.

¹⁰⁵ The CKRC Official Draft ‘The report of the Constitution of Kenya Review Commission’ http://www.katibainstitute.org/Archives/images/sampledata/CKRC_official_draft.pdf (accessed 9 August 2017).

of South Africa of 1996.¹⁰⁶ Section 38(3)(a) of this draft provided that ‘[e]very person who is at least eighteen years of age (a) has the right to marry, based on the free consent of the parties’.¹⁰⁷ This Article was a reflection of the right to marry as enshrined in Article 16¹⁰⁸ of the Universal Declaration and in the Constitution of South Africa 1996, the right is provided indirectly through the prohibition clause of section 9¹⁰⁹ of the Constitution of South Africa 1996. The provision in the Ghai draft was construed as being ambiguous and alleged to be protecting ‘gay marriage’.¹¹⁰

In the subsequent draft in 2005, ‘A Proposed New Constitution of Kenya (2005)’,¹¹¹ also known as the Wako draft, the wording changed to ‘[a]n individual has the right to marry a person of the opposite sex’,¹¹² and this formulation remained the same in all the subsequent drafts before the Constitution of Kenya 2010.¹¹³ The National Council of Churches of Kenya

¹⁰⁶ C Murray Kenya’s 2010 Constitution’

http://www.iapo.uct.ac.za/usr/public_law/staff/Kenyas%202010%20Constitution.pdf (accessed 14 July 2016)

¹⁰⁷ CKRC draft (n 105 above), Art 38(3)(a).

¹⁰⁸ Universal Declaration (n 34 above), Art 16 (1) states that ‘Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution’.

¹⁰⁹ Constitution of South Africa 1996, sec 9 (1)(3) of provides that ‘[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

¹¹⁰ Murray (n 106 above) 20.

¹¹¹ The Popular Version of the Proposed New Constitution (Wako draft) 14 September 2005

<http://www.katibainstitute.org/Archives/images/4-The%20%20Popular%20Version%20of%20the%20Wako%20Draft%20-%20Final%20with%20Drawings-14th%20Sept%202005.pdf> (accessed 14 July 2016).

¹¹² Wako draft (n 111 above) 13.

¹¹³ There were a number of drafts of the Constitution before its promulgation in 2010. There were two processes that occurred in the constitutional review process in Kenya. The first process was a commission set up in 2000, the Constitution of Kenya Review Committee (CKRC) which was followed by the National Constitutional Conference (Bomas) 2003-2004. The CKRC produced the Draft Constitution popularly referred to as the Ghai

(NCCCK)¹¹⁴ was convinced that homosexual persons were attempting to devalue the traditional and religious belief system by advocating for their rights and particularly for the right to freedom from discrimination and protection from homophobic abuses.¹¹⁵ LGBT persons in Kenya began to organise in social movements in the late 1990's. However, their first public event was only at the World Social Forum in 2007.¹¹⁶ The LGBT community marked International Day against Homophobia on 17 May 2010, which was attended by both civil society organisation and government agencies such as the Kenya National Commission on Human Rights (KNCHR) and the University of Nairobi, a state-funded public university.¹¹⁷ These events were reported in the local newspapers and led to a public outcry against LGBT persons in the country.¹¹⁸

draft in 2002 while the Bomas conference produced a revised CKRC draft (Bomas draft) in 2004. The Kenyan Parliament took over the drafting process in 2005 and set up a Parliamentary Select Committee (PSC) which revised the Bomas draft. In 2005 the parliament adopted the draft from the PSC popularly known as the Wako draft. After the contentious 2007 elections, the National Accord set up the Committee of Experts (CoE) set up in 2009 which reconsidered the earlier drafts and created a Harmonized draft in 2009. After public consultations, the CoE produced the Revised Harmonized Draft in 2010. This was presented to the PSC and comments were made. The comments were incorporated and the Proposed Constitution of Kenya was presented and adopted by the Parliament in 2010. The document was presented to the public and submitted to a referendum in August 2010. The Constitution of Kenya 2010 was then promulgated on 27 August 2010. Katiba Institute 'About drafts' <http://www.katibainstitute.org/Archives/index.php/drafts/about-drafts> (accessed 15 August 2017).

¹¹⁴ National Council of Churches of Kenya (NCCCK) is a body made up of protestant churches and Christian organizations registered in Kenya and is the largest council of churches in the world.

¹¹⁵ C Karongo 'NCCCK says no to push for gay marriages' *Capital News* 11 May 2012 <http://www.capitalfm.co.ke/news/2012/05/nccck-says-no-to-push-for-gay-marriages/> (accessed 15 August 2017).

¹¹⁶ E Buchanan 'LGBT in Kenya: 'government needs to stop violent anti-gay attacks' *IB Times* 28 September 2015 <http://www.ibtimes.co.uk/lgbt-kenya-government-needs-stop-violent-anti-gay-attacks-1521533> (accessed 15 August 2017).

¹¹⁷ C Coward 'IDAHO day event and a lesbian blessing in Kenya contrast to the 14-year sentence given in Malawi' 21 May 2010 <http://changingattitude.org.uk/archives/314> (accessed 15 August 2017).

¹¹⁸ See generally The world social Forum 2007: A Kenyan perspective <http://www.cadtm.org/The-World-Social-Forum-2007-A>; Kenya Human Rights Commission 'Outlawed amongst us' <http://www.khrc.or.ke/mobile-publications/equality-and-anti-discrimination/70-the-outlawed-amongst->

After the promulgation of the Constitution in August 2010, Article 45(2) became the yardstick against which the Marriage Act would enforce the recognition of marriages in Kenya. Woman-to-woman marriage, seemingly, would no longer receive *de facto* recognition by the courts, as the Constitution of Kenya 2010 is the supreme law of the Republic and stipulates that ‘any law, including customary law, that is inconsistent is void to the extent of the inconsistency’.¹¹⁹ As part of customary law, women-to-woman marriages must be in line with the Constitution – including its prohibition of same-sex marriage.

However, the Constitution of Kenya 2010 not only deals with same-sex marriages, it also contains provisions that underline the importance of the promotion of culture and human rights in the country. The first provision for the protection and promotion of culture is found in the preamble of the Constitution of Kenya, and other provisions in the Constitution such as Article 11, Article 27(4), Article 42(a) and Article 156 offer opportunities to challenge whether Article 45(2) was intended to prohibit woman-to-woman marriage. The preamble to the Constitution illustrates the importance of culture and espouses that there must be ‘pride in our ethnic, cultural and religious diversity’.¹²⁰ This can only be achieved if all areas of culture are recognised as being part of the fabric of society. This is particularly true of customary law as it is the most elaborate way of applying and enjoying cultural heritage.¹²¹ Whereas it may

[us/file.html](#) (accessed 14 July 2016); M Karanja ‘A family scarred by homophobia’ *The Nation* <http://www.nation.co.ke/News/-/1056/675940/-/uo2gna/-/index.html> (accessed 15 August 2017); M Ringa ‘Kenya: law review experts rule out rights for homosexuals’ *Daily Nation* 18 October 2009 <http://allafrica.com/stories/200910190050.html> (accessed 15 August 2017); L Barasa ‘PM Orders arrest of gay couples’ *Daily Nation* 28 November 2010 <http://allafrica.com/stories/201011290110.html> (accessed 15 August 2017); P Benja ‘Bishop: gays more dangerous than terrorists’ *The Standard* 23 July 2012 <https://www.standardmedia.co.ke/?articleID=2000062448> (accessed 15 August 2017).

¹¹⁹ Constitution of Kenya 2010, Art 2(1).

¹²⁰ Constitution of Kenya (n 119 above), Preamble.

¹²¹ See generally SH Somjee ‘The heritage factor in the Constitution’ (2001) 29 KECKRC <http://www.commonlii.org/ke/other/KECKRC/2001/29.html> (accessed 15 August 2017); M Mwangola

not be possible to realise all areas of customary law fully, it is unconscionable to disregard all of it. There are many areas of customary law that can still be applied. One of these issues is the issue of marriage and, in particular, the recognition of same-sex marriages.

Article 20 of the Constitution binds the courts to ‘develop the law’,¹²² where it does not give effect to a fundamental right or freedom and further reinforces this by compelling the courts to adopt an interpretation that favours the enforcement of the right or freedom. It is, therefore, the constitutional prerogative of the courts to ensure that there is a development of legislation that affords persons with the right to fully realise customary law as part of their culture and cultural heritage. Although it is true that aspects of customary law constitute ‘gender discrimination’,¹²³ the human rights provisions in the Constitution (in particular, equal protection and non-discrimination) anticipate and curtail any potential discrimination. Within the framework of the Constitution, as a whole, customary law contributes to the development of law that allows for the full enjoyment of a person’s cultural heritage and being.

It is, therefore, my conclusion that, although Article 45(2) read in isolation may seem to infer a prohibition of woman-to-woman marriages, the intention of the Constitution as a whole (including Article 45(2)) was not to limit or legitimise the application of customary law pertaining to these marriages. The protection and promotion of culture and the protection of human rights have been clearly entrenched in the Constitution. This conclusion is arrived at on the basis, substantiated above and more extensively in Chapter 5, that the prohibition of same-

‘Constitution and culture-what it means to Kenyans’ *The Star* 4 October 2014.

<http://allafrica.com/stories/201410060153.html> (accessed 15 August 2017); D Akoth ‘culture practice has changed under the new Constitution’ *The Standard* 9 September 2015

<https://www.standardmedia.co.ke/article/2000175723/culture-practice-has-changed-kenya-under-the-new-constitution> (accessed 15 August 2017).

¹²² Constitution of Kenya (n 119 above), Art 20.

¹²³ YP Ghai ‘South African and Kenyan systems of devolution: a comparison’ in N Steytler & Y Ghai (eds) *Kenyan-South African dialogue on devolution* (2016) 50.

sex marriages was intended for Western-inspired same-sex marriages and not the customary woman-to-woman marriages in Kenya.

6.5 Evolution of discourse on the right to family and right to marry

The discourse of same-sex marriage in the West had an impact on the perception of the Kenyan people about and legal provisions on the right to marriage and formation of family. It is clear that, in respect of marriage, the drafting of the Constitution of Kenya 2010 was strongly influenced by the discourse reflecting an increased acceptance of same-sex marriages in many countries of the Global North. The legislators were apprehensive that the phrasing of Article 45(2) without offering clear definitions of the persons who could enter into a legally binding marriage would inadvertently be understood as legalising the 21st century manifestation of same-sex marriage in the Global North.

Currently, there is still no uniform internationally recognized definition of the term family.¹²⁴ The diversity of family forms ‘vary immensely from era to era, region to region, state to state, and culture to culture’.¹²⁵ In Africa, family forms depend on cultural and religious beliefs, which vary over time, and have evolved from the pre-modern era to the modern era.¹²⁶

The discourse in the West on same-sex marriage did not only revolve around sexual orientation but also around the concept of family.¹²⁷ In charting the evolution of the recognition of same-sex marriages through constitutional amendments, statute and precedents set by the courts, it appears that there is a dynamic and fluid concept of family in the West. Understanding

¹²⁴ E Okon ‘Towards defining the “right to family” for the African child’ (2012) 12 *African Human Rights Law Journal* 376.

¹²⁵ Okon (n 124 above) 376.

¹²⁶ See generally Okon (n 124 above) on defining the family.

¹²⁷ See generally GJ Gates ‘Marriage and families: LGBT individuals and same-sex couples’ (2011) 25 *Marriage and family*. <https://www.princeton.edu/futureofchildren/publications/docs/MarriageandFamily.pdf> (accessed 9 August 2017) 68.

the issues of regulation of same-sex marriages in the West may assist in proposing recommendations to the challenges being experienced in Kenya.

6.6 Concurrence between the legal recognition of same-sex marriages and customary law marriages in South Africa

South Africa is the only country in Africa that provides legal recognition of all forms customary marriages as well as legal recognition of same-sex homosexual marriages illustrating that it is possible to achieve recognition of both forms of marriage in Africa. The Constitutional Court has also made significant rulings on the recognition of evolved families. South Africa is an illustration that it is possible for countries in Africa, and particularly Kenya, to recognise all forms of marriage both heterosexual or homosexual. It also shows the positive integration of the global sex discourse on sexualities in Africa.

In Kenya, South Africa has been noted as the standard of reference due to shared interests in the constitutional dispensation as well the unique challenges of the application of customary law.¹²⁸ The Constitutional Court of South Africa held that the definition of marriage under common law was unconstitutional as it did not confer the same benefits to same-sex couples as it did to heterosexual couples.¹²⁹ The Legislature passed the Civil Unions Act¹³⁰ recognizing same-sex partnerships and marriages in South Africa in 2006. The statutory recognition of customary marriages was also provided under the Recognition of Customary Marriages Act 1998.¹³¹ It was unclear what the impact of the recognition of same-sex marriages would have on customary law marriages in South Africa.

¹²⁸ Ghai (n 123 above).

¹²⁹ Constitutional Court decision in the case of *Minister of Home Affairs and Another v Fourie and Another* 2006 1 SA 524 (CC).

¹³⁰ Civil Union Act 17 of 2006.

¹³¹ Recognition of Customary Marriages Act 120 of 1998.

The developments in law leading up to the statutory provisions on the recognition of same-sex marriage are contextually important towards the development of non-discriminatory legislation in Kenya. The co-existence of statutory and customary provisions on marriage in the South African legal system illustrates the possibility for the two systems to co-exist in Kenya as well.

The inclusion of sexual orientation in the listed prohibited grounds of discrimination in the 1996 Constitution of South Africa,¹³² presented an opportunity to advance the rights of the lesbian, gay, bisexual and transgender (LGBT) persons in South Africa. The particular provisions on equality and non-discrimination allowed the latitude of seeking various points of interpretation from the South African courts. In one of the earliest court decisions after the 1996 Constitution, the Constitutional Court upheld the provisions on equality and stated that it was unconstitutional to exclude the registrations of a same-sex life partner as a dependent from a medical scheme. ‘The decision in *Langemaat v Minister of Safety and Security* (1998)¹³³ (*Langemaat* case) made strides towards the recognition of gay and lesbian partnerships’.¹³⁴ In the *Langemaat* case,¹³⁵ the applicant had lived with her lesbian partner since 1986. They owned a home, shared finances and were co-dependants for one another, each naming the other as a dependent on the policies that they had taken. The applicant applied to register her partner under Polmed, the SAPS medical aid scheme, as she was a captain in the police service. The medical aid scheme refused her application on the basis that her partner was identified as a dependent. The term ‘dependent’ was reserved for the legal spouse or children of the applicant. The applicant moved to the Constitutional Court to seek a declaration that the policy

¹³² Constitution of the Republic of South Africa Act 108 of 1996.

¹³³ *Langemaat v Minister of Safety and Security* 1998 3 SA 312 (CC).

¹³⁴ R Louw ‘*Langemaat v Minister of Safety and Security* 1998 3 SA 312 (T): a gay and lesbian victory but a constitutional travesty’ (1999). 15 *South African Journal on Human Rights* 393.

¹³⁵ *Langemaat* case (n 133 above).

regulations contravened the provisions of the Constitution of South Africa 1996 and were consequently invalid. The Court in its ruling defined a dependant as ‘one who relies upon another for maintenance’.¹³⁶ The Court noted that the ‘stability and permanence’¹³⁷ of the applicant’s relationship with her partner was not any different from those of opposite-sex couples. The Court concluded that partners in same-sex unions had a duty to one another and deserved recognition as a family.

In contrast, the definition of a dependant was established in the Kenyan case of *Millicent Njeri Mbugua v Alice Wambui Wainana* (2008),¹³⁸ discussed in Chapter 4. The definition in the case is clear and establishes criteria of a spousal link between the parties. Therefore, to be considered a dependant in Kenya, the party has to be married and the children to have a direct family relationship with the primary party. Although this was a case of woman-to-woman marriage, the Kenyan courts established that the applicant was not a dependant for the case even though the applicant lived with the deceased and the wife and depended fully on the wife of the deceased and was her dependent as her ‘wife’ in the woman-to-woman marriage.

In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (1999)¹³⁹ (*National Coalition for Gay and Lesbian Equality* case), the South African Constitutional Court dealt with the issue of the ability of a spouse to immigrate to live with their South African partner. The decision of the Constitutional Court granted gay and lesbian partners the ability to obtain a permit to live with their spouse regardless of their nationality or permanent residence. The Constitutional Court dealt with the issue of family and marriage and the elements that constitute a family. The Court held that the implication of section 25(5) of

¹³⁶ J Roux ‘Langemaat v Minister of Safety & Security & others’ 1998 19 *Industrial Law Journal* 241.

¹³⁷ Roux (n 136 above) 241.

¹³⁸ *Millicent Njeri Mbugua v Alice Wambui Wainana* (2008) Civil Appeal 50 of 2003.

¹³⁹ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (1999) 3 BCLR 280 (C).

the Aliens Control Act¹⁴⁰ that gays and lesbians lack the inherent humanity to have families or have their family lives protected was an invasion of their dignity.¹⁴¹ The provisions of the Act were held to be unconstitutional and ‘unanimously acknowledged that gays and lesbians do indeed constitute a family’.¹⁴²

In *Satchwell v The President of the Republic of South Africa and Another* (2002),¹⁴³ the Constitutional Court of South Africa held that a life-partner in a same-sex partnership was entitled to the same financial benefits as a spouse in a heterosexual marriage. The applicant and her partner produced evidence of being in a committed and permanent relationship with one another although they were not married. The Constitutional Court established that the definition of the word ‘spouse’ did not include a same-sex partner and inferred the judgment in the *National Coalition for Gay and Lesbian Equality* case¹⁴⁴ that marriage was only one form of a life partnership. The Constitutional Court reflected that there were other forms of life partnerships including tribal same-sex marriages between powerful women and women who were unable to have children (woman-to-woman marriage) presenting it as another form of life partnership. The Constitutional Court also considered the issue of discrimination and determined that withholding benefits from a partner in an established permanent committed same-sex relationship constituted unfair discrimination on the basis of sexual orientation.

Minister of Home Affairs v Fourie and Another (2006)¹⁴⁵ (*Fourie* case), is a landmark case in South Africa where the Constitutional Court held that same-sex couples had the right

¹⁴⁰ Aliens Control Act 96 of 1991.

¹⁴¹ *National Coalition for Gay and Lesbian Equality* case (n 139 above).

¹⁴² R Louw ‘Gay and lesbian partner immigration and the redefining of family: national coalition for gay and lesbian equality v minister of home affairs’ (2000) 16 *South African Journal on Human Rights* 313.

¹⁴³ *Satchwell v The President of the Republic of South Africa and Another* 2002 9 BCLR 986 (CC).

¹⁴⁴ *National Coalition for Gay and Lesbian Equality* case (n 139 above).

¹⁴⁵ *Minister of Home Affairs v Fourie and Another* 2006 3 BCLR 355 (CC)

to marry. It paved the way for the Civil Union Act (2006) granting same-sex couples the right to marry. The applicants (two lesbian women) challenged the provisions of the Marriage Act that excluded them from celebrating their love and commitment to one another. They also contended that the exclusion was a result of the common law provisions that defined marriage in South Africa as being between a man and a woman.

This case established that marriage was a unique institution because it conferred intangible benefits to the people who entered into it.¹⁴⁶ The Constitutional Court urged the South African Parliament to ‘accord to same-sex couples a public and private status equal to that which heterosexual couples achieve from being married’.¹⁴⁷ The Court suspended the declaration of invalidity of the Marriage Act for one year after this ruling to grant the South African Parliament time to review the provisions of the Act. Failure to amend the Act within the stipulated time frame would have led to the Act automatically being changed to allow same-sex couples to enter into a legal marriage.¹⁴⁸

In analysing the rationale for the ruling, the Judge Sachs discussed a number of issues and referred to some of the cases discussed. On the matter of family, the Judge noted that due to political and socio-economic development, there has been transformation of family relationships as well as marked changes in the societal and legal perceptions on the composition of family.¹⁴⁹ Judge Sachs discusses the legitimacy of children in marriage and contends that although children born in a marriage are presumed to belong to the husband, both parents have a responsibility to the children whether they are married or not.¹⁵⁰ Judge Sachs also deals with

¹⁴⁶ P De Vos ‘A judicial revolution? The court-led achievement of same-sex marriage in South Africa’ (2008) 4 *Utrecht Law Review* 162.

¹⁴⁷ *Fourie* case (n 145 above), para 81.

¹⁴⁸ De Vos (n 146 above) 166.

¹⁴⁹ *Fourie* case (n 145 above), para 52.

¹⁵⁰ *Fourie* case (n 145 above), para 67.

the individual arguments against same-sex marriages. On the issues of marriage being for the purpose of procreation, he holds that this argument demeans other heterosexual couples who are unable to bear children, couples who are no longer desirous of sexual relations or those who have adopted children and contends that same-sex marriages cannot be defeated by the claim to procreation in marriage.¹⁵¹ On the issue of the religious context of marriage, he stated that to put the interpretation of religious texts within the purview of the Constitutional Court would be ‘unconscionable’ and would cause deep ‘schisms’ within religious bodies.¹⁵² On the matter of international law recognition of only heterosexual marriages, he contends that the Universal Declaration and other international law instruments enumerate that family is the natural and fundamental unit of society and that although international instruments protected heterosexual marriages, it does not exclude the recognition of same-sex marriages.¹⁵³ On the matter of family law pluralism, the Judge contends that the Constitution of South Africa “‘does not prevent” legislation recognising marriages or systems of family or personal law established by religion or tradition’.¹⁵⁴

Although the cases above were based on the recognition of a homosexual relationships, the discourse of the evolution of the family unit offers an alternative platform through which there can be recognition of other forms of marriage. The cases establish that the concept of family has evolved from its traditional heterosexual construction. The ruling in the *Langemaat* case¹⁵⁵ noted that stability, permanence and provision provided by marriage, can be established in any form of family unit regardless of the sex of the parties. The traditional construction of marriage was challenged further in the *National Coalition for Gay and Lesbian Equality* case,

¹⁵¹ As above, para 86.

¹⁵² As above, para 92.

¹⁵³ As above, para 105.

¹⁵⁴ As above, para 108.

¹⁵⁵ *Langemaat* case (n 133 above).

where Justice Ackermann discussed the evolution of the concept of family.¹⁵⁶ He indicated that there has been a shift in family relationships in South Africa citing Sinclair and Heaton,¹⁵⁷ who in 1995 asserted that ‘differences in language, race, cultural habit historical experience and self-definition’¹⁵⁸ create varying expectations for family and marriage in South Africa. He noted that although the law in South Africa at the time of his ruling only recognized conjugal relationships between persons of the opposite sex as marriages, there were other forms of life partnership that was different from marriage that was also recognized in law.¹⁵⁹ Further, he noted that there was an overlap between discrimination based on sexual orientation and discrimination on the basis of marital status.¹⁶⁰ Justice Ackermann concurred with the views of the Canadian Supreme Court in the case of *Canada (Attorney General) v Mossop* (1993)¹⁶¹ that procreation was not necessary to the concept of family because this would mean that childless couples, single parents or adoptive families would not be considered as families which would be demeaning to these couples.¹⁶² He reflected further that same-sex couples are capable of forming family units that may be nuclear or extended and can enjoy and benefit from family life.¹⁶³ He reiterated that the protection of same-sex marriage by the government did not disparage the traditional institution of marriage, a view also held by the Canadian Supreme Court.¹⁶⁴ With referenced the judgment in *Mossop*,¹⁶⁵ he noted that it was possible to encourage

¹⁵⁶ *National Coalition for Gay and Lesbian Equality case* (n 139 above).

¹⁵⁷ JD Sinclair *Law of marriage* (1995) 7.

¹⁵⁸ Sinclair (n 157 above) 7.

¹⁵⁹ *National Coalition for Gay and Lesbian Equality case* (n 139 above), para 36.

¹⁶⁰ As above, para 40.

¹⁶¹ *Canada (Attorney General) v Mossop* (1993) 1 SCR 554.

¹⁶² *Mossop case* (n 161 above), para 51 52.

¹⁶³ *Mossop case* (n 161 above), para 53(a) (viii).

¹⁶⁴ *Mossop case* (n 161 above), para 56.

¹⁶⁵ As above.

the institution of family ‘without rejecting other less traditional family forms’,¹⁶⁶ and that both traditional and non-traditional ‘equally advance true family values’.¹⁶⁷ Justice Ackerman also referenced the decision of the Supreme Court of Canada in *Miron v Trudel* (1995),¹⁶⁸ which recognised that legislatures intervene in various situations where relationships are interdependent and permanent and these interventions acknowledge that the family unit is evolving.¹⁶⁹ Justice Ackerman contended that the family units formed in same-sex partnerships are different from heterosexual partnerships and treating them equally could lead to discrimination.¹⁷⁰ Justice Ackerman instead recommended that legal recognition of the individual nature of the two different types of partnerships would provide equal protection for the family units formed.¹⁷¹

With respect to woman-to-woman relationships in Kenya, the institution can still be viewed as giving rise to a family unit. This unit may differ from the family unit in a heterosexual marriage, but is still deserving of equal legal protection.¹⁷² The legislature in Kenya can look to South Africa and the advancements made in the Constitutional Courts on the need to recognise all forms of customary marriages contracted between two consenting adults including woman-to-woman marriages.

The cases cited above illustrate that the concept of family is changing in Africa. The recognition of non-binary units in the formation of family demonstrates that families fulfil an important role in the community regardless of its form -whether same-sex partnerships or

¹⁶⁶ *Mossop* case (n 161 above), footnote 76.

¹⁶⁷ As above.

¹⁶⁸ *Miron v Trudel* (1995) 2 SCR 418.

¹⁶⁹ *Mossop* case (n 161 above), footnote 76.

¹⁷⁰ *Mossop* case (n 161 above), para 84.

¹⁷¹ As above.

¹⁷² Louw (n 142 above) 313.

woman-to-woman marriages and that there is need for legal protection of all forms of marriages that give rise to family units

6.7 Conclusion

Africa has been noted to be resistant to the recognition of rights based on sexual orientation and gender identity.¹⁷³ Unfortunately, the issues of sexual orientation are conflated with matters of family and same-sex marriage. As discussed earlier in the Chapter, woman-to-woman marriages in Kenya have often been equated to the same-sex marriages of the West leading to challenges in legal recognition of woman-to-woman marriages.

Kenya ratified the African Charter in 1992.¹⁷⁴ Article 18 of the African Charter provides that the ‘family is the natural unit and basis of the society. It shall be protected by the State which shall take care of its physical health and moral’.¹⁷⁵ It creates an obligation on the state to protect all forms of family in the society. The African Commission on Human and Peoples’ Rights (African Commission) was tasked with the oversight and interpretation of the Banjul Charter in 1987. Although the African Commission has dealt with matters on with sexual orientation and gender identity,¹⁷⁶ it is yet to make any substantive decisions on the concept of family, and particularly with regard Africa’s varied forms of family drawn from African customs and statutory marriages. The Commission has however, shown signs that it is open to a broader conception of marriage and the family beyond the traditional forms as evidenced by its decisions on the prohibition of discrimination on the basis of sexual orientation and the grant of observer status to CAL.

¹⁷³ AM Ibrahim ‘LGBT rights in Africa and the discursive role of international human rights law’ (2015) 15 *African Human Rights Law Journal* 263 281.

¹⁷⁴ African Charter on Human and People’s Rights (African Charter) OAU Doc CAB/LEG/67/3Rev.5 adopted 27 June 1981.

¹⁷⁵ As above, Art 18.

¹⁷⁶ See generally (n 173 above).

Kenya has already begun this progressive realization of woman-to-woman marriage through the cases adjudicated in the Courts. It is important that this discourse be developed to encompass the African concept of family and the recognition of its importance of the propagation of culture

CHAPTER 7: CONCLUSION

7.1 Introduction

This thesis sought to answer the fundamental question whether woman-to-woman marriages are legally recognised marriages in contemporary Kenya in the face of Article 45(2) of the Constitution of Kenya 2010, which provides that adults have the right to marry (only) persons of the opposite sex. In framing the research questions, the thesis sought to establish that woman-to-woman marriages existed and enjoyed recognition in pre-colonial Kenya. After colonization, with the introduction of codification and the consequent plurality introduced into the legal system, woman-to-woman marriage continued to enjoy *de facto* recognition but only appeared to obtain *de jure* recognition through court precedents. With the advent of constitutional reform and the consolidation of statutes on marriage, the fate of the legal recognition of woman-to-woman marriage became even more uncertain. In 2010, the Constitution of Kenya was adopted, stipulating in Article 45(2) that every adult has the right to marry a person of the opposite sex. In 2014, upon the consolidation of marriage legislation, the Marriage Act 2014 reiterating the position in the Constitution, provided that the institution of marriage was the preserve of persons of the opposite sex, reinforcing the apparent prohibition of the legal recognition of woman-to-woman marriage.

Chapter 7 presents the main conclusion of the thesis and ties together the research by providing a summary of the analyses presented in the Chapters. It also submits an analysis of the proposed legal position of woman-to-woman marriages in Kenya. In conclusion, the Chapter advances a number of measures that may be implemented to ensure the legal recognition of woman-to-woman marriages in Kenya, as well as recommendations for further

areas of research that can be undertaken to further elaborate on the institution of woman-to-woman marriage.

7.2 Summary of findings

This thesis sought to interrogate the legal position of woman-to-woman marriages by setting out the problem statement and identifying research questions that when answered, would establish a position on the legal recognition of woman-to-woman marriages in Kenya. The thesis answered these research questions through interrogations carried out in Chapters.

Chapter 2 began by delineating the construction of marriage in Africa from the construction of marriage in the West. It established that woman-to-woman marriages were a form of customary marriage that shared certain similarities with the traditional institution of marriage in the West. Some of these similarities in the rationales for the institutions of marriage included the need for procreation, formalization of personal bonds and securing a functional family unit. The Chapter analysed the similarities and differences between woman-to-woman marriage and same-sex marriages of the West due to the conflation of the two forms of marriage. The analysis exemplified that the fundamental difference between the two institutions was also the justification for its establishment. Woman-to-woman marriages were entered into predominantly for the purpose of propagation of lineage and kinship, whereas same-sex marriage was the celebration of homosexual identities in formalized relationships. The Chapter also established that the state had a role to play in the regulation of institutions of marriage.

Chapter 3 advanced an in-depth examination of woman-to-woman marriages in pre-colonial Africa. It assessed the rationales of woman-to-woman marriage as a form of customary marriage and demonstrated the prevalence of the institution in communities in West, East and Southern Africa. Woman-to-woman marriages were shown to be recognized forms of marriage in pre-colonial Africa that were important to the perpetuation of lineage and kinship. Woman-

to-woman marriages also provided a platform where women could appropriate male gender roles allowing them to inherit property, produce heirs, achieve economic empowerment and secure companionship.

Chapter 4 observed the colonial and post-colonial effects of colonization on customary law and the regulation of the institution of marriage in Kenya. It analysed the impact of constitutional and statutory provisions on marriage from colonization to post-colonial Kenya culminating in the Marriage Act 2014. The Chapter established that woman-to-woman marriages were still practiced in post-colonial Kenya and received *de facto* recognition in communities. It also ascertained the *de jure* recognition of woman-to-woman marriage in post-colonial Kenya through various precedents established by the Kenyan Courts.

Chapter 5 sought to determine the impact of the constitutional provisions on woman-to-woman marriage in Kenya. It established the Constitution as the supreme law of Kenya, which makes any law inconsistent with it and invalid to the extent to the inconsistency. The Chapter also charted the constitutional review processes culminating in the adoption of the Constitution of Kenya 2010. The Chapter highlighted various theories of constitutional interpretation and provided a comprehensive analysis on Article 45(2) of the Constitution. The analysis ascertained that a purposive interpretation of Article 45(2) of the Constitution, taking into account the internal context of the Constitution itself, in terms of various provisions on the right to culture and the importance of culture, as well as the historical context that influenced the wording of Article 45(2), leads to the conclusion that the provision was not meant to prohibit the recognition of woman-to-woman marriages, but rather was targeted towards the prohibition of *homosexual* same-sex marriages.

Chapter 6 sought to determine the impact of the global sex discourse on the Constitution of Kenya and the recognition of evolved forms of family. It substantiated the impact of the global sex discourse by exploring its role in the constitutional review process in Kenya. The

Chapter revealed that the views of the Church and the media's portrayal of the discourse on same-sex marriage in the West had a significant impact on the drafting of the Constitution and particularly Article 45(2) of the Constitution of Kenya. It analysed various countries in Africa to determine the negative consequences of the impact of the global sexualities discourse on the legal recognition of woman-to-woman marriage.

7.3 Summary of legal position of woman-to-woman marriages in Kenya

This thesis arrives at the conclusion that the purposive reading of the Constitution leads to the inevitable conclusion that Article 45(2) was not intended to proscribe the cultural practice of woman-to-woman marriage in Kenya.

In arriving at this conclusion, this thesis makes three main submissions on the legal position of woman-to-woman marriages in Kenya. The first is that Article 45(2) was not intended to prohibit all forms marriage between persons of the same sex. It was constituted as a reaction to the pervasive global sex discourse in an attempt to ensure prohibition of homosexual same-sex marriages in Kenya. The second is that family is an important foundation of marriages in Africa. Recognition of the different forms of families, including the concept of family discussed in international case law can incentivise the Kenyan Courts and the Kenyan government, to provide express legal recognition of all forms of customary marriage including woman-to-woman marriage. Third, marriage provides a family unit where children are legitimized. It is in the best interests of the child to recognize all forms of marriage including woman-to-woman marriages. International law can be used to determine the evolution of society, the evolving concept of family and the best interests of the child through the creation of precedent in case law. The Kenyan courts have benefited in the past by applying case precedent from other international courts and treaty bodies. By observing societal evolution through case precedent, law can be formulated to ensure express legal recognition of woman-to-woman marriage.

As to the first proposition, purposive interpretation of the Constitution illustrates that Article 45(2) was not intended to prohibit woman-to-woman marriages. It established that the Constitution of Kenya, through the preamble, illustrates the pride and commitment of the Kenyan people have in maintaining their diverse culture and ethnic heritage. The respect for this is an essential part of the acknowledgement of the will of the Kenyan people. Throughout the Constitution, various provisions espouse the importance of culture and customs in Kenya. Article 11, 27 and 44 promote the recognition of culture, promotion of all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage'.¹ It is clear that the intention of the Constitution of Kenya is to promote aspects of culture and customs of the diverse ethnic representation of Kenya. Woman-to-woman marriage has been established as a form of customary marriage that enjoys recognition of a number of communities in Kenya and plays an important political, social and economic functions. The motivations of the institution empower the women in these marriage by re-evaluating women's roles in family, marriage, community and society. On this basis, Article 45(2) of the Constitution cannot be interpreted to envisage the prohibition of woman-to-woman marriages.

The intention of Article 45(2) was the prohibition of the legal recognition of unions between homosexual couples. During the constitutional review process in the 2000's and the subsequent referendum processes, the country was divided on whether to vote for the adoption of Constitution during the referendum in 2010. As discussed in Chapter 5, the Churches of Kenya were vocal in their campaign against the Constitution basing their opposition on three contentious issues. These were the recognition of Kadhi's courts, the alleged legalisation of

¹ Constitution of Kenya, Art 11(2)(a)

abortion and the recognition of same-sex marriages.² The contention that the Constitution would permit same sex marriages was based on the early draft of the Constitution and in particular, the *Ghai* draft.³ It is clear that the intention of the drafters was to rectify the mischief of the legal recognition of same-sex marriages and ensured that the language provided marriage to be between persons of the opposite sex. Chapters 5 and 6 also discuss the impact of the global sex discourse on the apparent prohibition of same-sex marriage in Kenya. The reports of marriage between two Kenyan men in Britain in 2009 further exacerbated the homophobic sentiment in Kenya and created a need for the legal drafters to allay the fears of the people of Kenya that same-sex marriage would eventually become legally recognized in Kenya. This amongst other factors discussed above, led to the formulation of Article 45(2) of the Constitution of Kenya.

The recognition of marriage as one of the fundamental foundations of family provides an avenue by which woman-to-woman marriage can receive unambiguous legal recognition in Kenya. As discussed in Chapter 6, there are two theories on the construction of family. The first is that “the family” is a social and legal construct, the aim of which is to privilege certain relationships within society’.⁴ This definition of family established it as an institution that is formed by societal need and potentially evolves or changes with the society. As a legal construct, it is subject to the provision, protection and regulation of the law.

² See generally Chapter 5 on the opposition to the Constitution of Kenya 2010; See also AM Wanga ‘The Kenyan constitutional referendum of 4th August 2010: A case study’ Democracy International retrieved at https://www.democracyinternational.org/sites/default/files/PDF/Publications/2011-04-28_kenyareferendum.pdf

³ As above.

⁴ L Hodson ‘Family values: the recognition of same-sex relationships in international law’ (2004) 22 *Netherlands Quarterly oh Human Rights* 34.

The second proposition is that international law has broadly defined the concept of family not only in a heteronormative context.⁵ Definitions of family are intrinsically linked to the norms represented in the traditions and cultures of a society and that recognition of non-heteronormative constructions of family challenge the basic fabric of a society.⁶ The family is therefore a reflection of the traditions and cultures of a society. The reluctance by international judicial agencies such as the ECtHR and the Human Rights Committee (HRC) to recognize non-heteronormative forms of family and to relegate its construction and regulation to municipal laws is an ‘abdication of responsibility’.⁷ The reluctance of regional human rights bodies to define non-heteronormative families indicates the heterosexist nature of international treaties and related documents.⁸ The reluctance of treaty bodies to offer protection for family construct is a form of discrimination.

This thesis challenges the heteronormative presumption of families by reflecting on the emerging international norms on the evolved interpretation of the family by various Courts in Europe and America. The ECtHR in contemplating the provisions in Article 8 and 11 of the European Convention, adopted a broad and expansive definition of the family ‘that reflects many of the social and legal developments’.⁹ The ECtHR established that a family can comprise of the relationship between ‘illegitimate child and father... child and adoptive parents...’,

⁵ Hodson (n 4 above) 34.

⁶ As above, 35.

⁷ As above.

⁸ As above. Hodson notes that although the ICCPR, the ECHR and the ACHPR’s all define the family as the basic unit and foundation of the society, the language denotes a presumption of heterosexual union. He reflects on Art 23(2) of the ICCPR which provides the right for all men and women to marry and found a family as heterosexist in its construction. He also notes that the Art 18 of the African Charter defines the family as the ‘custodian of morals and traditional values’, and states that the interpretation of this language conveys the heteronormative construction of treaties and conventions on marriage and family.

⁹ Hodson (n 4 above) 38.

grandparents and even an uncle with whom the child had had frequent contact'.¹⁰ The recognition of the various relationships that form families indicates that the Courts have noted the evolution towards a more inclusive comprehension of families. In Africa, as discussed in Chapter 2, families were not limited to the affinity between the family members, but rather the affiliation to lineages.

A family can be founded between two persons of the same sex. In woman-to-woman marriages, *female husbands* and their wives were considered the legitimate parents of children born of these marriages. The contention of the ECtHR and the IACHR that discrimination on the choice of partner is unacceptable¹¹ also illustrates the interlinkages between international human rights norms and the right to found a family. The protection and promotion of this right through case precedent of the ECtHR and the IACHR illustrates that the protection and promotion of the family is in the realm of international law and not just municipal law. The ECtHR has held further that due to the social changes to the institution of marriage brought about by developments in the fields of medicine and science, gender cannot be determined based on biology.¹² The Council of Europe Parliamentary Assembly has also stated that the role of the state is to establish an enabling environment in which its citizens can establish family units that 'can develop in safety, solidarity and respect for fundamental rights'.¹³

Article 2(5) states that the 'general rules of international law shall form part of the laws of Kenya'.¹⁴ Further, Article 2(6) states that 'any treaty or convention ratified by Kenya shall

¹⁰ As above.

¹¹ See generally *Atala Riffo and Daughters v Chile* (2012) Inter-American Commission on Human Rights Case 12.502; Hodson also discussed a number of cases on this issue at the ECtHR Hodson (n 21 above) 40 41.

¹² The European Court was considering the issue of transgender and transsexual rights to family. See generally *Goodwin v United Kingdom* (2002) Application 28957/95.

¹³ Parliamentary Assembly of the Council of Europe on family policy (1988), Recommendation 1074.

¹⁴ Constitution of Kenya, Art 2(5).

form part of the law of Kenya'.¹⁵ These provisions clearly express the intention of the Constitution to consider and apply the general rules of international law. Chapter 4 of the African Charter sets out the applicable principles. Article 60 provides various international human rights instrument that advance principles of international law.¹⁶ Article 61 of the Charter envisages the consideration of foreign law through the application general established legal norms and principles of law.¹⁷ The government of Kenya therefore has a responsibility to ensure that its citizens can found a family that enables them to fully enjoy their customs and cultural heritage. Kenyan courts have benefitted from the application of international case precedent and the application of international principles set out in ratified international human rights treaties and conventions. Woman-to-woman marriages are a cultural rite that provide an avenue where women can enjoy freedom from discrimination based on their sex. The application of the principles of law established in the IACHR and the ECtHR as well as other foreign law could benefit the Courts by establishing a basis for the recognition of different forms of family.

As to the third proposition, the thesis contends that the family provides an avenue to realise the best interest of the child. Children born in woman-to-woman marriages should have

¹⁵ As above, Art 2(6).

¹⁶ African Charter on Human and Peoples' Rights, Art 60. This provision states as follows: 'The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members'.

¹⁷ African Charter on Human and Peoples' Rights, Art 61. This provision states as follows: 'The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine'.

stable families which can be achieved through legal recognition of woman-to-woman marriage in Kenya.

Article 18 of the Africa Charter places a duty on the State to ensure that the promotion of the family ‘which is the custodian of morals and traditional values recognized by the community’.¹⁸ Further, the African Charter obliges states to protect the ‘rights of the woman and the child as stipulated in international declarations and conventions’. Kenya is a state party to the Convention of the Rights of the Child¹⁹ and has domesticated the Convention through the Childrens Act.²⁰ The family of a child can be through ‘parenthood (natural or adoptive); blood relationship; acquisition of parental responsibility in respect of the child...significant relationship akin to a family relationship resulting from psychological and emotional attachment’.²¹ The rights to family for a child provided in international instruments presuppose the existence of a family.²² The State should consider ‘parental or family care and protection of the child from the premise of the right of the child to a family’²³ to ensure that in fulfilling its duty to care for the child, it fulfils its obligations to provide a family where the child can be nurtured. As the Court held in the South African case of *in re Certification of the Constitution of the Republic of South Africa* (1996),²⁴ although constitutions are reluctant to define family rights due to the varied ways a family can be constituted, the recognition of the right of the child to family can be interpreted as a constitution directly affirming the right to family life.²⁵

¹⁸ African Charter, Art 18.

¹⁹ UN Convention on Rights of the Child adopted on 20 November 1989.

²⁰ Children Act 8 of 2001.

²¹ E Okon ‘Towards defining the ‘right to a family’ for the African child’ (2012) 12 *African Human Rights Law Journal* 389.

²² Okon (n 21 above) 390.

²³ As above, 381.

²⁴ *In re Certification of the Constitution of the Republic of South Africa* (1996) 10 BCLR 1253 (CC).

²⁵ Okon (n 21 above) above, 392.

In this ruling the South African court established two precedents. The first is that there are various ways in which a family can be constituted and that constitutions, in protecting the right to nurture a child in the family, establish a constitutional right to family.

The Constitution of Kenya 2010 has various provision on the rights of a child. It defines a child as an individual who is below 18 years.²⁶ Article 14(4) and 15(3) guarantees the right to citizenship of children.²⁷ Article 21(3) provides a duty on the State to ensure that the needs of vulnerable groups including children are addressed. Article 53 provides that every child has the right *inter alia* to ‘parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not’.²⁸ This provision can be interpreted as providing the right to family for a child. It is clear that the Constitution of Kenya recognize that a family can be formed whether the parents are married or not. Further the Children Act places a duty on the Government and the family to ensure the survival of the child.²⁹

Although the Constitution of Kenya does not expressly define the term family, it is clear that the family is considered the ‘natural and fundamental unit of society and the necessary basis of social order’.³⁰ The preamble reiterates the commitment of the Kenyan people to ‘nurturing and protecting the well-being of the individual, the family, communities and the nation’³¹. Further the Constitution of Kenya protects the right to privacy of information relating

²⁶ Constitution of Kenya, Art 260.

²⁷ Constitution of Kenya, Art 14(4) Any child found in Kenya under the age of 8 years old is presumed to be a citizen of Kenya by birth; Constitution of Kenya, Art 15(3) provides that any child who is not a citizen but is adopted by a Kenyan may apply for Kenyan citizenship.

²⁸ Constitution of Kenya, Art 51(e).

²⁹ Children Act (n 20 above), sec 4.

³⁰ Constitution of Kenya, Art 45(1).

³¹ As above, preamble.

to their family,³² and compels the Parliament to enact legislation that recognises family law including family law under any tradition.³³

The Constitution of Kenya recognises the various forms of family including those of woman-to-woman marriage as the families formed in these marriages offer a nurturing environment for the child. The Constitution also does not limit the formation of the family as only being between a man and a woman and further interpretation of the Children Act illustrates that the dominant feature is the right to family for the child. The Constitution creates an imperative on the State to enact legislation that recognises family law under traditional customs. The Protection of Traditional Knowledge and Cultural Expressions Act³⁴ was passed in 2016 and recognizes and promotes the right to cultural expression. Although, it does not implicitly protect and promote the right to the recognition of all forms of customary marriage, the Marriage Act provides for the recognition through registration of customary marriages rites celebrated in accordance with the Marriage Act.³⁵

7.3 Recommendation and fields for further research

This thesis identifies three main stakeholders; the legislature; the judiciary and the executive, and proposes measures through which unequivocal recognition of woman-to-woman marriage in Kenya may be achieved.

The first proposition is that the legislature should amend Article 45(2) of the Constitution of Kenya 2010. The provision should be amended to clarify what forms of same-sex marriages are prohibited. The text proffered should illustrate that the prohibition only extends to homosexual (homosexual) same-sex marriages. A similar clarification was made in

³² As above, Art 31(c).

³³ As above, Arts 45(4) (a) &(b).

³⁴ Protection of Traditional Knowledge and Cultural Expressions Act 33 of 2016.

³⁵ Marriage Act 4 of 2014, sec 6(1).

the Constitution of Uganda as discussed in Chapter 6. Although this recommendation offers the easier and more direct route for clarification, it is also the most difficult and unlikely route ahead. The process of amendment of the Constitution is quite rigorous. Chapter 16 of the Constitution of Kenya regulates the manner in which the Constitution can be amended. Articles 256 and 257 respectively provide that the Constitution can be amended through either a parliamentary initiative or a popular initiative. Amendment by parliamentary initiative requires the introduction of a Bill in either house of parliament.³⁶ The subject matter of the Bill should only pertain to the amendment of the Constitution³⁷ and the public must be allowed to engage with the Bill.³⁸ The popular initiative may be through a general suggestion or a formulated draft Bill which must be signed by at least one million registered voters,³⁹ and submitted to the Independent Electoral and Boundaries Commission (IEBC).⁴⁰

The Constitution of Kenya is still a young document, having only been enacted in 2010. Arguments against the amendment of the Constitution contend that it is still too early for the document to undergo amendment.⁴¹ The other assertion is that the process of amending the Constitution would be too ‘expensive, long-drawn [and] intricate’.⁴² Another assertion is that opening up the Constitution through amendment would open the door for many other subsequent (perhaps undesirable) amendments.⁴³

³⁶ Constitution of Kenya, Art 256(1)(a).

³⁷ As above, Art 256(1)(b).

³⁸ As above, Art 256(2).

³⁹ As above, Arts 257(1) & (2).

⁴⁰ As above, Art 257(4).

⁴¹ P Bowry ‘is it time to amend Kenya’s Constitution?’ *Standard digital* 22 April 2015 <https://www.standardmedia.co.ke/article/2000159271/is-it-time-to-amend-kenya-s-constitution> (retrieved 8 September 2010).

⁴² Bowry (n 41 above).

⁴³ As above.

The second proposition is that the judiciary -- through constitutional interpretation -- may clarify the intention of Article 45(2) and effectively establish the legal recognition of woman-to-woman marriage. This is a more likely and feasible option than legislative reform. Constitutional interpretation of Article 45(2) has been elaborated in Chapter 5 and earlier in this concluding Chapter. The superior Courts in Kenya, the Supreme Court and the Court of Appeal, all have the constitutional mandate to interpret the Constitution by virtue of Article 163(4) of the Constitution. The Courts have already offered a number of interpretations of provisions in the Constitution of Kenya 2010 through various precedents.⁴⁴ As discussed in Chapter 5, the Court applied purposive interpretation in the *Monica Jesam* case establishing woman-to-woman marriage as an expression of cultural rite in the Nandi community. As discussed in Chapter 6, the prevailing Western discourse on same-sex marriage and the subsequent discourses in Kenya by the Kenyan parliament, legal scholars, religious leaders and moralists about the follies of recognition of same-sex marriages led to the formulation of Article 45(2). The Court should clarify that the intention of Article 45(2) was not to prohibit the recognition of woman-to-woman marriage and other forms of customary law marriages, as these are an expression of culture and custom protected by the Constitution of Kenya. This can be done through further strategic public interest litigation of on-going woman-to-woman marriage that may further enumerate the prevalence of this institution. Further, applications for

⁴⁴ See generally *Monica Jesang Katam V Jackson Chepkwony & another* (2011) Succession Cause 212 of 2010 where the High Court interpreted Article 11(1) on woman-to-woman marriage stating that the form of marriage was an expression of culture under Nandi customary law; *Samson Kiogora Rukunga v Zipporah Gaiti Rukunga* (2011) Succession Cause 308 of 1994 The High Court interpreted Article 60(f) stating that the Article provided for the elimination of gender discrimination and allowed a married daughter to inherit land from her father's estate; *C. M.S v I.A.K Suing through Mother and Next Friend C.A. O.* (2008) Constitutional Application No. 526 of 2008 where the High Court interpreted Article 53(2) and ruled that DNA testing would be conducted if it is in the best interest of the child.

judicial interpretation of Article 45(2) may also lead to directions on the scope of application of the provision, which does not include woman-to-woman marriage.

The third proposition is targeted at the executive. As discussed in Chapter 5, the Protection of Traditional Knowledge and Cultural Expressions Act 2016 places the responsibility of matters relating to culture on the county government,⁴⁵ and the national government,⁴⁶ to promote all forms of culture and cultural expression. The county and national government must take the requisite steps to ensure that woman-to-woman marriage receives legal recognition in the promotion of this form of marriage as a cultural rite. The Protection of Traditional Knowledge and Cultural Expressions Act also provides that there should be regulations enacted to facilitate the implementation of this Act.⁴⁷

The larger civil society also has a role to play in the legal recognition of woman-to-woman marriage. These stakeholders include relevant non-governmental organizations (NGO's) as well as traditional leaders. NGO's must ensure that the woman-to-woman marriages, as a recognised form of customary marriage, enjoy the same recognition that other forms of marriages enjoy in Kenya. This can be achieved through sensitization of the Kenyan community on the on-going celebration of woman-to-woman marriages by certain tribes in Kenya as well as the importance of the promotion of culture and cultural practises. NGO's can also ensure that legal recognition of woman-to-woman through strategic litigation in Kenyan Courts. Traditional leaders can also lobby the relevant duty bearers on the unequivocal recognition of all forms of traditional marriages including woman-to-woman marriages.

There are opportunities for further research on the institution of woman-to-woman marriages. Further research can be conducted on the extent to which woman-to-woman

⁴⁵ Protection of Traditional Knowledge and Cultural Expressions Act 2016, sec 4(1).

⁴⁶ As above, sec 5.

⁴⁷ As above, sec 43.

marriages are actually practiced in modern-day Kenya. Empirical research can be carried out to determine the experience and motivation of the parties involved and the communities who participate in this practice. As alluded to in Chapter 1, there have been empirical studies that have already been conducted on the reasons why women enter into woman-to-woman marriage. It may also be interesting to gather more data on the nature of the relationships between the women who undertake the marriages, and particularly the extent to which sexual orientation and gender identity play a role in the motivation to enter into these unions. In-depth, anthropological and ethnographic qualitative research on woman-to-woman marriages would be uniquely beneficial as it would offer a clear basis on the genesis and the nature of these marriages. It would also be beneficial for there to be research into the psychological impact of woman-to-woman marriages on the children who are born into these marriages specifically their ability to understand the purpose of these forms of marriage and how these children integrate into a society that predominantly recognizes heteronormative marriages. Research into the occurrence of woman-to-woman marriage in other countries such as Nigeria, would offer insight on the perplexing position of the Nigerian courts on the legal recognition of woman-to-woman marriages.

Finally, as a final area of consideration, it is quite possible that the woman-to-woman marriages are not marriages are all. They may be in fact another form of same-sex union that maybe better explored as under the paradigm of institutions created under African customary law. Due to the construction of the marriages in some communities such as the Nandi who refer to the *female husband* as ‘grandmother,’ it is apparent that there are other ways in which woman-to-woman marriage can be evaluated without the institution being referred to as a marriage. It would be interesting to see the interrogation of woman-to-woman marriage as a purely African institution and the research situated within African philosophy and customary law.

In conclusion, it is anticipated this thesis has contributed to legal scholarship by offering insight on the institution of woman-to-woman marriage and constructively presenting a legal position on the recognition of woman-to-woman marriage in Kenya.

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