

An Argument for the Continued Validity of Woman-to-Woman Marriages in Post-2010 Kenya

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Abstract

Woman-to-woman marriage is a form of customary marriage between two women, predominantly found in Africa. These customary marriages have been and to some extent still are conducted by various communities across Africa, including in Kenya. Communities such as the Kamba, Kisii, Nandi, Kikuyu and Kuria practise woman-to-woman marriages for a variety of reasons. The legal status of woman-to-woman marriages in Kenya is uncertain due to the provisions of article 45(2) of Kenya's Constitution of 2010 and section 3(1) of the Marriage Act of 2014, which stipulate that adults only have the right to marry persons of the opposite sex. However, a holistic and purposive reading of the constitution, taking into consideration its recognition of culture and the protection of children as important values in Kenyan society, and considering the historical context within which the provisions concerning same-sex marriages were included, leads to the conclusion that these provisions were not intended to proscribe the cultural practice of woman-to-woman marriage in Kenya. The constitutional validity of woman-to-woman marriage opens the door to a more expansive and fluid understanding of "family" in Kenya.

Keywords

Woman-to-woman marriage, African customary law, constitutional interpretation, legal plurality, same-sex marriage

INTRODUCTION

Woman-to-woman marriage is a form of African customary marriage between two women, predominantly found in Africa. These customary marriages have been and to some extent still are conducted by various communities across Africa, including in Kenya. The advent of Kenya's 2010 Constitution (the Constitution)

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introduced an apparent prohibition of the recognition of woman-to-woman marriage in Kenya. This article seeks to provide a background to the evolution of woman-to-woman marriage in Kenya and to consider the compatibility of this form of marriage with the Constitution. It argues that a holistic, purposive and historically-informed interpretation of the Constitution leaves room for the continued existence of woman-to-woman marriage in Kenya.

EARLY EVOLUTION OF WOMAN-TO-WOMAN MARRIAGE IN KENYA: THE PRE-COLONIAL PERIOD

Woman-to-woman marriage was a widely recognized custom in pre-colonial Kenya, practised by at least five communities¹ and recognized by almost all other Kenyan communities.²

Although this article uses the term “woman-to-woman marriage”, in line with not only early anthropological writing,³ but also more modern scholarship,⁴ the authors are aware that this English term is an oversimplified and inadequate attempt to capture an array of complex, varied and deeply culturally-embedded phenomena. Closer attention to the vernacular terms used in the various relevant communities is revealing; the purpose behind discussing the vernacular terminology is to illustrate that woman-to-woman marriages in various communities were undertaken for specific reasons reflected in the terminology used. In some communities, woman-to-woman marriages were undertaken for only one reason, whereas, in others, the reasons for these forms of marriage varied. Among the Nandi, for example, woman-to-woman marriage is referred to as *kitum chi tolah*. *Kitum* means “celebration”, indicating 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.⁵ 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 as “the wife of our property”, symbolizing recognition 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.⁶ While there is no formally recognized term for woman-to-woman marriage among the Kikuyu, it is generally referred to as *uhiki*, meaning a marriage between a wealthy *muhikania* [female husband]⁷ and *muhiki* [wife].⁸ Among the Kikuyu, when an older woman is either barren or her husband dies before they have had any children, the *muhikania* pays *ruracio* [dowry] in order to receive *irathimo* [blessings] from the elders. Among the Kuria, these marriages have different names,

¹ See E Cotran *Casebook on Kenya Customary Law* (1987, Nairobi University Press) at 30; RS Oboler “Is the female-husband a man? Woman / woman marriage among the Nandi of Kenya” (1980) 19/1 *Ethnology* 69 at 69; WN Njambi and WE O’Brien “Revisiting woman-woman marriage: Notes on Gikuyu women” (2000) 12/1 *National Women’s Studies Association Journal* 1 at 23.

² JR Cardigan “Woman-to-woman marriages: Practices and benefits in sub-Saharan Africa” (1998) 29/1 *Journal of Comparative Family Studies* 89 at 90.

³ See Cotran *Casebook*, above at note 1 at 30; MJ Herskovits “A note on ‘woman marriage’ in Dahomey” (1937) 10/3 *Africa* 335 at 341; EJ Krige “Woman-marriage, with special reference to the Lovedu: Its significance for the definition of marriage” (1974) 44/1 *Africa* 11 at 11.

⁴ See JB Ojwang and E Kinama “Woman-to-woman marriage: A cultural paradox in contemporary Africa’s constitutional profile” (2014) 4 *Verfassung und Recht in Übersee* 427; S Wieringa “Women marriages and other same-sex practices: Historical reflections on African women’s same-sex relations” in R Morgan and S Wieringa (eds) *Tommy Boys, Lesbian Men and Ancestral Wives: Female Same-Sex Practices in Africa* (1st ed, 2005, Jacana Media (Pty) Ltd) 281 at 281; B Greene “The institution of woman-to-woman marriage in Africa: A cross-sectional analysis” (1998) 37/4 *Ethnology* 395 at 399.

⁵ J Sitati “Customary law: Woman to woman marriage and constitutionality of return of dowry” (August 2016), available at: <http://docplayer.net/47601884-Customary-law-woman-to-woman-marriage-and-constitutionality-of-return-of-dowry.html> (last accessed 9 March 2016).

⁶ *Eunita Anyango Geko and Another v Philip Obungu Orinda* [2013] misc civil appln no 1 of 2013.

⁷ 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 *rakhadi* [grandmother].

⁸ Njambi and O’Brien “Revisiting woman-woman marriage”, above at note 1 at 3.

depending on the rationale for the marriage. After the payment of the dowry, the wife 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 to bear male heirs. It is known as *nyumba ntune* where the woman bore a male child who died in infancy and she did not bear another male child. She therefore marries another woman to beget a male heir.⁹ Among the Kamba, women who marry other women to bear children are termed *lweto*. The marriage is, therefore, known as a *lweto marriage* to signify the parties to the marriage.

The term *female husband*, although used widely to describe the partner who pays the bride wealth in woman-to-woman marriage, has been fraught with contention over the assignation of the male gender. Anthropologists such as Leakey¹⁰ and Mackenzie¹¹ use the term when describing woman-to-woman marriage in the Kikuyu culture. Oboler uses the term to describe the woman who becomes the “social and legal father of her wife’s children”.¹² The term is also employed by Evans-Pritchard¹³ and Herskovits,¹⁴ illustrating instances where the woman who pays the bride wealth and assumes a gender-defined role of being the male is assigned the characteristics of the male in the community as the *female husband*. Despite the obvious linkages of the woman’s role in procuring the marriage and the gender aspect of having acquired male characteristics, there are instances where women take pride in being women who can take wives and do not see it necessary to appropriate the male gender. Krige¹⁵ and Amadiume¹⁶ 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.¹⁷ 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:

“[T]he term ‘*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.”¹⁸

⁹ D Lubanga “Officer evicts woman married to another from her land” (3 June 2016) *Daily Nation*, available at: <<https://www.nation.co.ke/counties/nandi/Woman-married-to-another-evicted-from-her-land/3444806-3231168-101efpb/index.html>> (last accessed 3 September 2019).

¹⁰ LS Leakey *The Southern Kikuyu Before 1903* (1977, New York: Academic Press).

¹¹ F Mackenzie “Gender and land rights in Murang’a district, Kenya” (1990) 17/4 *Journal of Peasant Studies* 609.

¹² Oboler “Is the female-husband a man?”, above at note 1 at 69.

¹³ EE Evans-Pritchard *Some Aspects of Marriage and the Family among the Nuer* (1945, Rhodes-Livingstone Institute) at 36.

¹⁴ Herskovits “A note on ‘woman marriage’”, above at note 3 at 338.

¹⁵ Krige “Woman-marriage, with special reference”, above at note 3 at 11.

¹⁶ I Amadiume *Male Daughters, Female-Husbands: Gender and Sex in an African Society* (1987, Zed Books Ltd) at 91.

¹⁷ *Ibid.*

¹⁸ Njambi and O’Brien “Revisiting woman-woman marriage”, above at note 1 at 15.

RATIONALES FOR WOMAN-TO-WOMAN MARRIAGES IN KENYA

Woman-to-woman marriages are considered a form of African customary marriage in that they arguably meet the requirements for African customary marriages.¹⁹ They were practised in Africa before the advent of colonialism and still exist in modern-day Africa.²⁰ The traditional African marriage was based on the concepts of patriarchy, polygamy and the propagation of lineage, and relegated women to the roles of reproduction and nurturing.²¹ 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 patriarchal construction of the institution of 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.²²

In Kenya, woman-to-woman marriages have various rationales that can be derived from the origins of the vernacular terminology used by the various communities to describe these unions. The use of these traditional terms is a clear indication that woman-to-woman marriages were commonplace in pre-colonial Kenya and were considered an important institution in these communities.

The rationales for woman-to-woman marriage were a key determinant before creating the union. This was true for both the *female husband* and the *wife*, but more so for the society, as the relationship would fulfil a specific function in the community. The rationales for these marriages were accepted for specific and singular purposes, for the propagation of progeny, acquisition of wealth and property or to ensure that inheritance of property is kept within a household or clan.

Enhancing kinship ties within the clan

In certain tribes, woman-to-woman marriages were entered into 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 bride wealth and the roles of women and men in the communities. Kinship ties created in these unions advanced the communities' acceptance of the woman as filling the traditional male role in the community by her taking 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”²³ continue to propagate and arrogate gender roles to African kinship and social, organizational structures that were essentially adaptable in African cultures.

Kinship practices were part of the fabric of cultures in Africa and had characteristics so unique that

¹⁹ See E Cotran *The Law of Marriage and Divorce* (1968, Sweet and Maxwell, London) 141 at 142. According to African custom, unions between two persons, whether of the same or opposite sex must satisfy four main criteria: capacity, consent, payment of marriage consideration (bride wealth) and cohabitation.

²⁰ HN Nyanungo “*Female husbands* without male wives: Women, culture and marriage in Africa” (2014) *BUWA! A Journal on African Women's Experiences* 62.

²¹ S Marks and R Rathbourne “The history of the family in Africa: Introduction” (1983) 24/2 *Journal of African History* 145 at 149.

²² See generally M Nzomo “Women and political governance in Africa: A feminist perspective” (2015), available at: <<https://awsc.uonbi.ac.ke/sites/default/files/chss/arts/awsc/Women%20and%20Political%20Governance%20in%20Africa%20A%20Feminist%20Perspective%20by%20Maria%20Nzomo.pdf>> (last accessed 3 September 2019); N Baraza and N Kabira “Reflections on feminism and development in Africa: The case of Kenya” (2012), available at: <<http://awdflibrary.org/bitstream/handle/123456789/789/1341-4844-1-PB.pdf?sequence=1&isAllowed=y>> (last accessed 3 September 2019); L Adawo et al “History of feminism in Kenya” (2011), available at: <<http://www.nawey.net/wp-content/uploads/downloads/2012/05/History-of-Feminism-in-Kenya.pdf>> (last accessed 3 September 2019). Institutions such as woman-to-woman marriage provided an avenue by which women could not only own property, but also be recognized 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 assume leadership roles in the community.

²³ Greene “The institution of woman-to-woman marriage”, above at note 4 at 399.

some cultures could immediately be identified by the practices they performed.²⁴ Kin relationships within clans, presenting stratified roles of men and women in the household and in society, were fluid. Although woman-to-woman marriage in many communities reflected the usurpation of the male role by the woman, a myriad of gender interactions illustrated that gender roles within communities were quite flexible. “Woman-marriage was a logical outgrowth of creative kinship practices characteristic of African kin structures”.²⁵ Greene writes that these marriages represent “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”.²⁶ 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.²⁷

It would 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 communities’ social and cultural belief.²⁸ While most traditional African communities were patrilineal, enforcing stricter rules of superior masculinities, there were quite a number of matrilineal cultures.²⁹ 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 for understanding woman-to-woman marriage.³⁰ She goes on to reflect that the children in woman-to-woman marriages acquire their social position 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:

“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 genetricem 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.”³¹

Bestowing legitimacy of children and their kinship

In most cases, the offspring of woman-to-woman marriages belonged to the *female husband* and therefore also to the lineage of her father, and not that of the children’s biological father, denoting the shift in the gender roles in this type of marriage. These marriages served to legitimize children in the community and offer direct linkages for these children to certain lineages, whether in patrilineal or matrilineal communities. The issue that arose concerned the lineage and kinship of the children.

²⁴ Cardigan “Woman-to-woman marriages”, above at note 2 at 89.

²⁵ Greene “The institution of woman-to-woman marriage”, above at note 4 at 395.

²⁶ Id at 396.

²⁷ Greene “The institution of woman-to-woman marriage”, above at note 4 at 396.

²⁸ KC Nwoko “Female-husbands in Igbo land: Southeast Nigeria” (2012) 5/1 *Journal of Pan African Studies* 69 at 72.

²⁹ D Meekers “The process of marriage in African societies: A multiple indicator approach” (1992) 18/1 *Population and Development Review* 61 at 71.

³⁰ C Obbo “Dominant male ideology and female options: Three east African case studies” (1976) 46/4 *Africa* 371 at 372.

³¹ Ibid.

O'Brien isolated two major types of *female husbands*: "surrogate *female husbands* and autonomous *female husbands*".³² In some of these marriages, the *female husbands* became "fathers to their heirs and increasing lineages",³³ allowing them to pass down their names to future generations. In many woman-to-woman marriages, the *female husband* is an elderly barren woman. With woman-to-woman marriage in 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 wealth and would choose the genitor who would sire the children with her wife. In some instances, a barren married woman would marry a young girl and allow her husband to have relations with the girl with an aim of bearing children. In this case, the woman is categorized as the surrogate *female husband*. 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 legalized the recognition of children born out of this marriage, who would otherwise have been considered illegitimate in the community and unable to inherit. The *female husband* provided the gender role of a father to the children in the community and, in this way, she could legitimize them.³⁴

Retaining wealth and economic empowerment

A woman in an "ordinary" marriage who does not have any children, or only has daughters, may, upon the death of her husband, enter into a woman-to-woman marriage in order to ensure that the family's real estate (such as land) remains within the lineage. In this marriage, the older women would enter into a marriage with a younger woman, who would, it was hoped, give birth to a son. Woman-to-woman marriages enabled the women to acquire and own property and to confer property on their offspring.

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".³⁵ Woman-to-woman marriages are conducted by women who could not have male children, or by women whose male children have left the homestead and abandoned their mothers. Consequently, they enter the marriage to secure their ability to retain their wealth. As they required assistance, they took wives to support them in managing their homes.³⁶ Woman-to-woman marriage offered the *female husband* the freedom to choose a companion of her choice unlike in the different-sex marriage she had been in previously. She was also able to perpetuate her lineage after the first male child was born to the union.

The specific characteristics with autonomous *female husbands* were that the woman was usually a woman with wealth and she initiated the marriage with the younger woman, who came to be known as the

³² D O'Brien "Female-husbands in southern Bantu societies" in A Schlegel (ed) *Sexual Stratification: A Cross-Cultural View* (1977, New York: Columbia University Press) 109 at 112.

³³ Cardigan "Woman-to-woman marriages", above at note 2 at 94.

³⁴ Nwoko "Female-husbands in Igbo land", above at note 28 at 78.

³⁵ BA Rwezaura *Traditional Family Law and Change in Tanzania: A Study of the Kuria Social System* (1985, Nomos) at 143.

³⁶ Ibid.

“wife” upon the marriage. Cardigan suggests that the institution represented “a strategy that women use to further their social and economic positions in society”.³⁷ In most woman-to-woman marriages, “the motivating drive behind [the marriage was] the desire for prestige and economic power”.³⁸

Fostering freedom and independence

Woman-to-woman marriage fosters freedom and independence for women in most communities, as the customs in patrilineal communities limited 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.³⁹ Some of these marriages were conducted by women who had wealth and were well respected in their communities. A woman’s 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.⁴⁰ One of the roles of a woman in some communities was the propagation of the family through the bearing of children.⁴¹ 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. The wife also enjoyed a measure of social freedom as she was deemed to be in a relationship with a partner who, often, had wealth and held a higher position in the community.

Securing companionship

One of the least discussed rationales for woman-to-woman marriage is the securing of companionship. When the women get married, one of the benefits, and arguably the most overt, is the fact that the parties gain each other’s company. As with most heteronormative marriages, the *female husband* carefully considers and identifies the woman whom she wants to marry. It is unlikely that she would settle on a person she does not like. Although, in some cultures, the *female husband* and her *wife* live in separate houses, these homes are in the same compound and the two can interact freely with one another. In Oboler’s view, this creates a meaningful source of companionship.⁴² This is certainly true among the Kikuyu community, where the need for companionship was openly discussed as one of the reasons for woman-to-woman marriage.⁴³

The *female husband* or, in some instances, the “mother in law”,⁴⁴ usually gains much from the marriage. In addition to wealth and status, she also acquires a helper or helpers (in the case that she marries more than once). The *female husband* is usually an older woman who, upon payment of the bride wealth,

³⁷ Cardigan “Woman-to-woman marriages”, above at note 2 at 89.

³⁸ Ibid. This is particularly true of the form that the institution of “woman marriage” takes in Dahomey (an African kingdom that lasted from the 1600s to the 1800s in the area of present-day Benin).

³⁹ WN Eskridge “A history of same-sex marriage” (1993) 79/7 *Virginia Law Review* 1419 at 1420.

⁴⁰ Cardigan “Woman-to-woman marriages”, above at note 2 at 95.

⁴¹ This is notable in the Kamba community of eastern Africa.

⁴² Oboler “Is the female-husband a man?”, above at note 1 at 73.

⁴³ Njambi and O’Brien “Revisiting woman-woman marriage”, above at note 1 at 5. In one of the interviews that Njambi and O’Brien conducted, their subject spoke openly of her need for a companion in her old age.

⁴⁴ Some communities, such as the Gusii and Kuria, referred to the woman who paid the bride wealth as the “mother in law” because it was assumed that she had a fictitious “son” for whom she was marrying a wife.

obtains a wife who will take care of her and her homestead. This relationship is not one of master and servant as has been previously suggested,⁴⁵ but one of spousal help and appreciation. In many instances, the *female husband* had been married before but, due to unhappiness, opted for divorce.

The stated rationales illustrate that the institution of woman-to-woman marriage was a well thought out and established cultural phenomenon that was important to the community. Kenyan communities, in particular, embraced woman-to-woman marriage as an integral part of customary law and culture.

COLONIALISM AND ITS IMPACT ON WOMAN-TO-WOMAN MARRIAGES

With the advent of colonialism and the codification of law, customary law was severely limited in its application.⁴⁶ Consequently, woman-to-woman marriages became an issue that was dealt with predominantly by the courts.

Colonial laws introduced by the British affected customary law in Kenya, including by reshaping the understanding of marriage. Colonial laws changed the understanding of woman-to-woman marriages and framed them as being “repugnant” to the western ideology of “justice and morality”, leading to the de jure non-recognition of woman-to-woman marriage.

Colonization affected most of Africa, leaving a devastating and enduring effect on the social and cultural structures that existed.⁴⁷ Because most of the colonial administration took place through the enforcement of rules and regulations on the African communities,⁴⁸ new structures needed to evolve to enforce these rules. The introduction of a codified system of law gave rise to more formalized structures. Marriages were regulated by a combination of African and English systems of law. This merger introduced formalism to African marriage and identified forms of marriage acceptable to colonial sensibilities.

The process introduced four distinct marriage systems in Kenya: civil or Christian, African, Islamic and Hindu. These regimes, each with their own rules of marriage, divorce and succession,⁴⁹ wreaked havoc on the pre-colonial system. A further challenge to the application of customary law in Kenya was the Judicature Act,⁵⁰ with provisions concerning the jurisdiction of the High Court and other subordinate courts. It provided that the High Court and all subordinate courts would only apply African customary law in civil cases where one or more of the parties were subject to or affected by it, and if it was not repugnant to justice and morality or inconsistent with any other written law.⁵¹

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 metropolitan law in the colonies where they found “primitive” native legal systems or no legal system at all.⁵²

The East African Marriage Ordinance,⁵³ which was passed in 1902, provided that any native who was married under it would not be subject to customary law, which meant that they had to adhere to the rules of English marriage, including monogamy. On succession issues in such marriages, section 39 provided that the

⁴⁵ R Gray “Sonjo bride-price and the question of African ‘wife-purchase’” (1960) 62 *American Anthropologist* 34 at 34.

⁴⁶ Judicature Act 16 of 1967, sec 3(2).

⁴⁷ E Okon “Towards defining the ‘right to a family’ for the African child” (2012) 12/2 *African Human Rights Law Journal* 373 at 376.

⁴⁸ RE Robinson “The administration of African customary law” (1949) 1 *Journal of African Administration* 158 at 158.

⁴⁹ *Ibid.*

⁵⁰ Above at note 46.

⁵¹ *Id.*, sec 3(2).

⁵² A Phillips “Marriage and divorce laws in east Africa”(1959) 3/2 *Journal of African Law* 73 at 93.

⁵³ Ordinance 30 of 1902.

children of parents who married under the ordinance and died intestate were subject to English law. This ordinance was a law of general application but only provided for Christian forms of marriage. It stipulated that such marriages were monogamous. In 1904, the Native Christian Marriage Ordinance,⁵⁴ 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 succession be applied to all Africans irrespective of religion”.⁵⁵ In *Benjawa Jembe v Priscilla Nyondo*,⁵⁶ 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 Ordinance was passed, converting marriages conducted under native law into legally binding marriages.⁵⁷ In 1931, the Native Christian Marriage Ordinance was replaced by the African Christian Marriage and Divorce Act,⁵⁸ which applied to marriages of Africans when one or both of the parties professed Christianity.

As evidenced in *R v Amkeyo*,⁵⁹ there was general disregard for the application of African customary law, especially in matters where there was a clear tension between customary and colonial law. Cotran terms the conversion of customary law marriages into statutory marriages as “unsatisfactory”,⁶⁰ as the purpose of the traditional marriage ceremonies was to establish a legally valid marriage. In *R v Amkeyo* the validity of customary marriage arose in the context of the common law rule that a wife could not be compelled to testify against her husband. In this instance, the parties had married under African customary law. What is significant in this case is the manner in which the judge dismissed customary marriages, thereby compelling the “wife” to testify against her “husband”. Chief Justice Hamilton stated:

“[T]he 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.”⁶¹

The judge did not consider the payment of bride wealth or any subsequent recognition of a customary marriage as constituting a legally valid marriage. This reflects contemporaneous disparaging attitudes 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*, the judge stated that the matter of determining if the wife could testify against her husband would be infinitely easier if she were considered a “concubine”,⁶² rather than a wife, as the parties had married under customary law. These decisions clearly illustrate the disdainful and dismissive manner in which the Kenyan courts dealt with the recognition of marriage performed under customary law at the height of colonization.

⁵⁴ Ordinance 9 of 1904.

⁵⁵ Kenya Law Resource Centre “History of the law of succession in Kenya”, available at: <<http://www.kenyalawresourcecenter.org/2011/07/history-of-law-of-succession-in-kenya.html>> (last accessed 3 September 2019).

⁵⁶ [1912] 4 EALR 160.

⁵⁷ Native Christian Marriage Ordinance, sec 7.

⁵⁸ Act 51 of 1931.

⁵⁹ [1917] 7 EALR 14.

⁶⁰ E Cotran “Marriage, divorce and succession laws in Kenya: Is integration or unification possible?” (1996) 40/2 *Journal of African Law* 194 at 197.

⁶¹ Bitala & Kakinga Advocates “Registration of customary marriages: 100 years after *R v Amkeyo*” (2017), available at: <https://thedeuteronomy.bitalaadvocates.com/2017/06/23/registration-customary-marriages-100-years-r-vs-amkeyo/> (last accessed 5 January 2018).

⁶² *R v Mwakio* [1932] 14 KLR 133. The judge stated (at 133), “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”.

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 depending 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 courts, the principle of repugnance gained greater prominence and its frequent application led to the non-recognition of woman-to-woman marriages.

However, over time, Kenyan courts progressively began to recognize and appreciate the application of African customary law, as it gradually sought to overcome the challenges arising from customary practices that were not envisioned in English common law. This appears from decisions such as *Maria Gisese w/o Angoi v Marcella Nyomenda* heard by the High Court of Kenya,⁶³ which arose from a dispute over the dissolution of a marriage between a *female husband* and her *wife* performed under Kisii customary law. According to Kisii custom, a widow who had no male offspring could enter into a woman-to-woman marriage with a younger woman after making the arrangement with her parents. The widow, who was the *female husband*, identified a man with whom her *wife* would bear a child; according to custom, any children would then be regarded as the *female husband's* offspring.⁶⁴ In the High Court, the judge ruled that the 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 therefore did not “fit in with modern developments”.⁶⁵ The judge also held that woman-to-woman marriages could not be recognized.⁶⁶ It is apparent that the judge was persuaded that the customary practice of choosing a genitor was a cultural norm that was a prerequisite to the institution of woman-to-woman marriage amongst the Kisii, and that the practice was repugnant to justice and morality. This once again raised the question of the superiority of colonial laws such as the repugnancy clause over customary law. In *Esther Chepkuai v Chepngeno Kobot Chebet and Johannah Kipsang*, the High Court took a different approach and applied African customary law without considering any element of the practice of woman-to-woman marriage to be repugnant to justice and morality.⁶⁷ In deciding this matter, the 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”,⁶⁸ and therefore should be recognized as customary law practice.

In the case of *Re the Estate of Priscilla Nduta Gitwande (deceased)*,⁶⁹ the High Court had to consider succession in a woman-to-woman marriage conducted according to Kikuyu custom. Upon the death of her husband, the surviving spouse entered into a woman-to-woman marriage. The surviving son from the initial marriage argued that the subsequent woman-to-woman marriage was unnatural. At the High Court, the judge had to determine if the marriage was valid. The judge had to consider if the marriage was repugnant to justice and morality and, in case it was not, the judge had to consider if the deceased was a childless widow who had

⁶³ Civil app no 1 of 1981.

⁶⁴ *Ibid.*

⁶⁵ A Wassuna *Averting a Clash Between Culture, Law and Science: An Examination of the Effects of New Reproductive Technologies in Kenya* (masters thesis, McGill University, 1999) at 77.

⁶⁶ *Ibid.*

⁶⁷ [1981] divorce cause no 16 of 1980.

⁶⁸ See E Cotran “Effects of Death on Marriage: Case No.55” in E Cotran *Casebook on Kenya Customary Law* (1987, Nairobi University Press) 185 at 195.

⁶⁹ [2006] Succession Cause no 616 of 1997

married the administratrix to continue her husband's progeny. The judge declared that, as the deceased was not childless, the conditions of woman-to-woman marriage according to Kikuyu customary law had not been met, and held that it was not possible to establish the validity of the marriage under either customary law or the Law of Succession Act.

The challenge of dealing with matters arising 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. Despite these challenges, woman-to-woman marriages gained legal recognition as the courts balanced the interests of justice with the importance of the right to culture.

THE POST-2010 ERA: ARTICLE 45(2) OF THE CONSTITUTION AND SECTION 3(1) OF THE MARRIAGE ACT 2014

Since its promulgation in August 2010, article 45 of the Constitution has become a crucial provision when considering the continued legal validity of woman-to-woman marriage. Its centrality to this discussion requires that it is cited in full:

- “(1) The 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.
- (2) Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.
- (3) Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.
- (4) Parliament shall enact legislation that recognises -
 - (a) marriages concluded under any tradition, or system of religious, personal or family law; and
 - (b) 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.”

Article 45 starts by recognizing the family as the natural and fundamental unit of society. The right to marry is qualified and only extends to marriages between people of the “opposite sex”. It should, however, be noted that the terms “man” and “woman” are not used; and that the framing is permissive (“the right to”) rather than obligatory (as, for example, words such as “shall” or “must” would have suggested). This formulation invites questions about the legal status of woman-to-woman marriage in the post-2010 era. At first glance, the definition of marriage in the Constitution seems to imply that woman-to-woman marriages may no longer be legally valid. In its strictest meaning, adopting a literal interpretation, 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.

This conundrum was taken one step further with the adoption of the Marriage Act of 2014,⁷⁰ which provides in section 3(1): “[m]arriage is the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act”. In addition, section 6(1)(c) provides that a marriage may be registered if it is celebrated, inter alia, in accordance with the customary rites of any of the

⁷⁰ Act No 4 of 2014.

communities in Kenya. This section is important, as it creates an impetus to ensure the registration of all marriages that are performed according to customary law in Kenya. This requires 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. However, because of the provisions of section 3(1), which defines marriage as being between a man and a woman, there is an apparent inconsistency.

Woman-to-woman marriage as a form of customary marriage is seemingly inconsistent with the provisions of both the Constitution and the Marriage Act. Woman-to-woman marriage, seemingly, would no longer receive de facto recognition by the courts, as the Constitution 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”.⁷¹ As part of customary law, woman-to-woman marriages must be in line with the Constitution, including its prohibition of same-sex marriage.

AN ARGUMENT FOR THE COMPATIBILITY OF WOMAN-TO-WOMAN MARRIAGE WITH ARTICLE 45(2) OF THE CONSTITUTION

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.⁷² Article 163(4) of the Constitution grants the Supreme Court and the Court of Appeal jurisdiction to interpret the Constitution. Below are five arguments, based largely on interpretative approaches to the Constitution, to support the authors’ contention that woman-to-woman marriage is compatible with article 45(2) of the Constitution.

A holistic interpretation: Woman-to-woman marriage as part of cultural life and heritage

A holistic interpretation looks at various textual provisions, not in isolation, but in their interrelatedness, affording weight to all of them. An interpretation of the Constitution as a whole, including its provisions dedicated to culture as an important value of Kenyan communities, supports the continued validity of woman-to-woman marriage as part of the cultural life and heritage of Kenyan people.

The Constitution embodies respect for Kenya’s diverse cultural heritage, and promotes and protects all customs and cultures. These references to culture arguably also include 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”. This formulation illustrates the pride and commitment the Kenyan people have for their diverse culture and ethnic heritage. Respect for this is an essential part of the expression by the Kenyan people of their national soul.

Article 11 of the Constitution recognizes culture as the foundation of the Kenyan people and nation, grounding culture as the genesis of Kenyan communities and identifying its importance to the fabric of the Kenyan people. Article 11(1) specifically recognizes culture as a foundation of the nation and authenticates it as a reflection of “cumulative civilisation”. Article 11(3)(a) mandates Parliament to pass legislation that would compensate communities for the use of their culture. Although this is not a direct reference to the application of culture, it serves as a testament to the importance that is attached to Kenyans’ culture and heritage. 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

⁷¹ The Constitution, art 2(1).

⁷² Id, art 162.

cultural heritage”.⁷³ Arguably, woman-to-woman marriages have long been solemnized through traditional celebrations as one of the manifold and diverse ways of expressing culture in Kenya.

Article 27(4) of the Constitution, which enshrines the principle of equality and freedom from discrimination, grants protection against discrimination on grounds of “race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth”. Culture is explicitly identified as a ground worthy of protection.

Article 44(2)(b) of the Constitution protects the right to participate in cultural life, enjoy ones culture and “form, join and maintain cultural and linguistic associations and other organs of civil society”. This provision guarantees the enjoyment of customary practices and in turn customary law, to all persons who would want to ascribe to cultural life. This group represents a large majority of Kenyan citizens, many of whom in some way or form take part in the heritage of the co-existing ethnic tribes. In particular, most Kenyans who belong to an African ethnic group will gravitate towards culture when entering into marriages. Marital rites have been a preserve of customary practice before and after colonization. This is evident from the preservation of the application of customary law in marriage and matters related to it. The authors contend that any person who chooses to enter into a woman-to-woman marriage is exercising her constitutional right to participate in cultural life, guaranteed by article 44(2)(a).

In addition, the Protection of Traditional Knowledge and Cultural Expressions Act,⁷⁴ passed in 2016, recognizes and promotes the right to cultural expression. Although it does not explicitly protect and promote the right to the recognition of all forms of customary marriage, this act provides for the recognition through registration of customary marriage rites celebrated in accordance with the Marriage Act.⁷⁵

There is clearly great constitutional emphasis on culture and the importance of its expression. 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.

A historical interpretation: Woman-to-woman marriage not the “mischief” article 45(2) sought to correct

Between 2000 and 2010, when the Constitution was adopted, there was an explosion in the prominence of the issue of same-sex marriage, exemplified in the legal recognition of same-sex marriages in many parts of the world, including in South Africa in 2006. This discursive shift directly and indirectly influenced the public discourse and political deliberations in Kenya on family, relationships and marriage in the run-up to the adoption of the Constitution.

Same-sex marriages (as observed, celebrated and increasingly legally recognized in the early adopting countries, mainly in the global North) have been erroneously equated with the African institution of woman-to-woman marriage.⁷⁶ This conflation is evident from the misconceptions presented by politicians and the media

⁷³ Id, art 11(2)(a).

⁷⁴ Act 33 of 2016.

⁷⁵ Marriage Act, sec 6(1).

⁷⁶ Although not often or elaborately discussed, there is some indication that sexual fulfilment was, at least partly, a rationale for some woman-to-woman marriages. Authors such as Nkabinde and Morgan, Epprecht, Newell, and Njambi and O’Brien discuss these elements in their work. Nkabinde and Morgan discuss the custom of taking ancestral wives among the *sangoma* [traditional healers] in certain communities in southern Africa; see generally N Nkabinde and R Morgan “[Chapter seven” in Morgan and Wieringa (eds) *Tommy Boys, Lesbian Men*, above at note 4, 231 at 232; M Epprecht “‘Bisexuality’ and the politics of normal in African ethnography” (2006) 48/1 *Anthropologica* 187 at 201; S Newell *The Forger’s Tale: The Search for Odeziaku* (1st ed, 2006, Ohio University Press); and Njambi and O’Brien “Revisiting woman-woman marriage”, above at note 1.

during the debates on the Constitution. The impact of the discourse on same-sex marriage is reflected elsewhere in Africa, including in the prohibition of same-sex marriage in the Constitution of Uganda, 1995, which was amended in 2005 to include the following proscription of same-sex marriages: “[m]arriage between persons of the same sex is prohibited”.⁷⁷

The issue of same-sex marriages and the polarized opinions of Kenya’s legislature were highlighted 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 the parties at the time of marriage and at its dissolution.⁷⁸ This proposed position sparked a heated debate about morality in the country; the matter was in all likelihood further exacerbated by the registration of a civil partnership by two Kenyan men in London in 2009 and local media reports about the event.⁷⁹ In response to pleadings by British members of Parliament that the Constitution should recognize and protect the rights of persons of different sexual orientation, Otiende Amollo, a member of the Committee of Experts, stated: “[o]n 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”.⁸⁰

During this process, the matters of *same-sex marriage* and the *right to non-discrimination* on the basis of sexual orientation were often dealt with as a single issue. Various religious leaders from both the Christian and Muslim communities in Kenya vehemently opposed same-sex marriage. The Anglican Archbishop of Kenya stated that the union was “abnormal” and contrary to African traditions.⁸¹ Sheikh Mohammed Dor, a nominated member of Parliament and Muslim leader, declared that same-sex marriage was “un-African” and requested the government not to condone it.⁸² Amollo remarked 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 homosexual persons.⁸³ He further observed that the “majority of Kenyans are opposed to same-sex marriage and anything to do with homosexuals and lesbians”,⁸⁴ further illustrating that the committee was considering rights for homosexual persons and same-sex marriage as overlapping and closely intertwined issues.

An issue that took precedence in the arguments against the proposed Constitution during the constitutional review process was the assertion by members of the religious community that the wording in the draft constitution dealing with the right to marry would permit the recognition of same-sex relationships. This contention was first raised in the Constitution of Kenya Review Commission (CKRC) Draft,⁸⁵ which was the

⁷⁷ Constitution of The Republic of Uganda, art 31(2)(a).

⁷⁸ D Opiyo “New law shuts door to gay weddings” (18 November 2009) *The Nation*, available at: <<http://www.nation.co.ke/news/1056-688058-jk0qvpz/index.html>> (last accessed 3 September 2019).

⁷⁹ See generally G wa Njenga and G Weru “Two Kenyan men wed in London” (17 October 2009) *The Nation*, available at: <<http://www.nation.co.ke/news/1056-673614-jkpmsz/index.html>> (last accessed 3 September 2019); M Karanja “A family scarred by homophobia” (22 October 2009) *The Nation*, available at: <<http://www.nation.co.ke/news/1056-675940-jko6pjz/index.html>> (last accessed 3 September 2019); X Rice “Kenya launches gay survey while homosexuality remains illegal” (29 October 2009) *The Guardian*, available at: <<https://www.theguardian.com/world/2009/oct/29/kenya-launches-gay-survey>> (last accessed 3 September 2019); Darian “Marriage of Kenyan gay couple in the UK sparks controversy” (21 October 2009), available at: <<http://oldarian.blogspot.co.za/2009/10/marriage-of-kenyan-gay-couple-in-uk.html>> (last accessed 3 September 2019).

⁸⁰ M Ringa “Kenya: Law review experts rule out rights for homosexuals” (18 October 2009) *Daily Nation*, available at: <<http://allafrica.com/stories/200910190050.html>> (last accessed 3 September 2019).

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ [*Ibid.*]

⁸⁴ *Ibid.*

⁸⁵ *Report of the Constitution of Kenya Review Commission: Volume Two - The Draft Bill to Amend the Constitution* (CKRC Official Draft), available at: <http://www.katibainstitute.org/Archives/images/sampled/CKRC_official_draft.pdf> (last accessed 3 September 2019).

first draft after the change in Kenya's political dispensation. Popularly referred to as the Ghai Draft, it relied in part on the formulation of the Constitution of South Africa of 1996.⁸⁶ This draft provided that "[e]very person who is at least eighteen years of age ... has the right to marry, based on the free consent of the parties".⁸⁷ This provision was a reflection of the right to marry as enshrined in article 16 of the Universal Declaration of Human Rights,⁸⁸ but was also incorrectly viewed as being aligned with equality provisions such as section 9 of South Africa's Constitution, which includes "sexual orientation" as a ground for non-discrimination.⁸⁹ The provision in the Ghai draft was criticized for its ambiguity and was alleged to be protecting "gay marriage".⁹⁰

In the subsequent 2005 draft, the Proposed New Constitution of Kenya (2005),⁹¹ also known as the Wako draft, the wording changed to "[a]n individual has the right to marry a person of the opposite sex",⁹² and this formulation remained the same in all subsequent drafts up to the 2010 Constitution itself.⁹³ The National Council of Churches of Kenya (NCCCK)⁹⁴ was convinced that homosexual persons were attempting to devalue the traditional and religious belief system by advocating for their rights, particularly the right to freedom from discrimination and protection from homophobic abuse.⁹⁵

LGBT persons in Kenya began to organize into social movements in the late 1990s. However, the first public event that captured widespread attention was only in 2007, at the World Social Forum.⁹⁶ The LGBT community marked International Day against Homophobia on 17 May 2010, which was attended by both civil society organizations and government agencies such as the Kenya National Commission on Human Rights and the University of Nairobi, a state-funded public university.⁹⁷ These events were reported in local newspapers and led to a public outcry against LGBT persons in the country.⁹⁸ However, despite these events, the woman-to-

⁸⁶ C Murray "Kenya's 2010 Constitution", available at:

<http://www.iapo.uct.ac.za/usr/public_law/staff/Kenyas%202010%20Constitution.pdf> (last accessed 3 September 2019).

⁸⁷ CKRC Official Draft, above at note 85, art 38(3)(a).

⁸⁸ Universal Declaration of Human Rights, art 16(1) states: "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."

⁸⁹ Constitution of South Africa 1996, sec 9(3) provides: "The 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."

⁹⁰ Murray "Kenya's 2010 Constitution", above at note 86 at 20.

⁹¹ "The Proposed New Constitution: Popular version" (14 September 2005), available at:

<<http://www.katibainstitute.org/Archives/images/4-The%20%20Popular%20Version%20of%20the%20Wako%20Draft%20-%20Final%20with%20Drawings-14th%20Sept%202005.pdf>> (last accessed 3 September 2019).

⁹² Id at 13.

⁹³ There were a number of drafts before the Constitution's promulgation in 2010. The constitutional review process followed two processes. The first was the CKRC set up in 2000, which was followed by the National Constitutional Conference (Bomas) in 2003–04. The CKRC produced the draft constitution popularly referred to as the Ghai draft in 2002, while the Bomas conference produced a revised draft (Bomas draft) in 2004. Parliament took over the drafting process in 2005 and set up a Parliamentary Select Committee (PSC), which revised the Bomas draft. In 2005 Parliament adopted the PSC draft, popularly known as the Wako draft (above at note 91). After the contentious 2007 elections, the National Accord set up the Committee of Experts (CoE) in 2009, which reconsidered the earlier drafts and created a Harmonized Draft in 2009. After public consultation, the CoE produced the Revised Harmonized Draft in 2010, which was presented to the PSC for comment. The PSC's comments were incorporated and the proposed constitution was presented to Parliament, which adopted it in 2010. The document was presented to the public and submitted to a referendum in August 2010. The Constitution was then promulgated on 27 August 2010. See Katiba Institute "About drafts", available at: <<http://www.katibainstitute.org/Archives/index.php/drafts/about-drafts>> (last accessed 3 September 2019).

⁹⁴ The 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.

⁹⁵ C Karongo "NCCCK says no to push for gay marriages" (11 May 2012) *Capital News*, available at:

<<http://www.capitalfm.co.ke/news/2012/05/nckk-says-no-to-push-for-gay-marriages/>> (last accessed 3 September 2019).

⁹⁶ E Buchanan "LGBT in Kenya: Government needs to stop violent anti-gay attacks" (28 September 2015) *IB Times*, available at:

<<http://www.ibtimes.co.uk/lgbt-kenya-government-needs-stop-violent-anti-gay-attacks-1521533>> (last accessed 3 September 2019).

⁹⁷ C Coward "IDAHO day event and a lesbian blessing in Kenya contrast to the 14-year sentence given in Malawi" (21 May 2010), available at: https://issuu.com/denisnzioka/docs/identity_magazine_december_2011_issue.

⁹⁸ See generally "The World Social Forum 2007: A Kenyan perspective" (12 February 2007), available at: <<http://www.cadm.org/The-World-Social-Forum-2007-A>> (last accessed 3 September 2019); Kenya Human Rights Commission "The outlawed amongst us", available at: <<http://www.khrc.or.ke/mobile-publications/equality-and-anti-discrimination/70-the-outlawed-amongst-us/file.html>> (last accessed 3 September 2019); Karanja "A family scarred", above at note 79; Ringa "Kenya: Law review experts", above at note 80; L Barasa "PM orders arrest of gay couples" (28 November 2010) *Daily Nation*, available at: <<http://allafrica.com/stories/201011290110.html>> (last

woman marriages discussed in this article were not sexual in nature and therefore are not to be considered in the same vein as the homosexual same-sex marriages that the Kenyan government was trying to forestall.

A purposive interpretation: The imperative of protecting the children supports the constitutionality of woman-to-woman marriages

A purposive approach to interpretation allows for the rigidity of the literal meaning of the text to be attenuated in order to reflect better the purpose to be achieved.⁹⁹ One of the overriding purposes of the Constitution is the protection of vulnerable groups, in particular children. Aimed in major part towards the interests of children, woman-to-women marriages are arguably compatible with this constitutional aim and should therefore pass constitutional muster.

The Constitution has various provision on the rights of a child. It defines a child as an individual who is below 18 years.¹⁰⁰ Articles 14(4) and 15(3) guarantee children's right to citizenship.¹⁰¹ Article 21(3) obligates 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".¹⁰² This provision can be interpreted as providing a child's right to a family. It is clear that the Constitution recognizes that a family can be formed whether or not the parents are married. Further, the Children's Act places a duty on the Government and the family to ensure the child's survival.¹⁰³

Although the Constitution does not expressly define the term family, it is widely considered to be the "natural and fundamental unit of society and the necessary basis of social order".¹⁰⁴ 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". Further, the Constitution protects the right to privacy of information relating to a family,¹⁰⁵ requiring Parliament to enact legislation that recognizes family law including family law under any tradition.¹⁰⁶ The Constitution recognizes the various forms of family, including that of woman-to-woman marriage as the families formed in these marriages offer a nurturing environment for a 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 a dominant feature of the right to family is the best interests of the child. The specificity of article 45(2), granting the right to people of the opposite sex to marry, does not necessarily prohibit people of the same sex from marrying, if such a marriage serves a legitimate purpose that is compatible with the Constitution as a whole.

accessed 3 September 2019); P Beja "Bishop: Gays [sic] dangerous than terrorists" (23 July 2012) *The Standard*, available at: <<https://www.standardmedia.co.ke/?articleID=2000062448>> (last accessed 3 September 2019).

⁹⁹ RR Kelso "Styles of constitutional interpretation and the four main approaches to constitutional interpretation in American legal history" (1994) 29/1 *Valparaiso University Law Review* 121 at 130.

¹⁰⁰ The Constitution, art 260.

¹⁰¹ Id, art 14(4) provides that any child found in Kenya under the age of eight years old is presumed to be a citizen of Kenya by birth. Id, art 15(3) provides that any child who is not a citizen but is adopted by a Kenyan may apply for Kenyan citizenship.

¹⁰² Id, art 53.

¹⁰³ Children Act, sec 4.

¹⁰⁴ The Constitution, art 45(1).

¹⁰⁵ Id, art 31(c).

¹⁰⁶ Id, art 45(4)(a) and (b).

Post-2010 jurisprudence supports the continued validity of woman-to-woman marriages

Post-2010 jurisprudence from the Kenyan courts supports the continued validity of woman-to-woman marriages. Two judicial decisions handed down after the Constitution entered into force have upheld woman-to-woman marriage.

The first came in the case of *Monica Jesang Katam v Jackson Chepkwony and Selina Jemaiyo Tirop*,¹⁰⁷ where the Mombasa High Court reflected on the validity of woman-to-woman marriage under Nandi customary law. The question before the court was whether a *wife* in a woman-to-woman marriage could inherit from her *female husband*. Rejecting various objections, the court held that the *wife* “belonged to [the] household” of the deceased *female husband*, and was entitled to inherit “prior to anyone else”. The legal validity of the marriage was thus manifestly upheld. In coming to this conclusion, the court referred to scholarly writings supporting the existence and acceptance of the institution,¹⁰⁸ and identified the importance attached to culture in the Constitution as a principle to guide interpretation.¹⁰⁹

Although the marriage was entered into in 2006, and the deceased died in 2008, reliance on the Constitution could be justified, since the court’s decision on inheritance was made in 2011, and should therefore have been informed by and aligned with the Constitution. By this logic, the court’s silence on article 45(2) (which was not invoked before it) can be construed as implicit recognition that woman-to-woman marriage is a manifestation of culture that does not violate article 45(2).

The second case is *Agnes Kwamboka Ombuna v Birisira Kerubo Ombuna*,¹¹⁰ in which the question before the Court of Appeal was whether the deceased (the *female husband*) was married to two *wives*, both of whom would be eligible to inherit a plot of land owned by the deceased. The case came before the court because the “second *wife*” did not inherit anything. While the court rejected the “second *wife’s*” claim, it did so on the basis of the evidence and not as a matter of principle. In fact, by rejecting the second *wife’s* claim, the court confirmed that of the first *wife*, recognizing for a second time the legal validity of woman-to-woman marriages.

After its finding on the merits, the court made some remarks in passing. It stated that the original purpose of woman-to-woman marriage was to ensure that property would stay within the *female husband’s* lineage. If the *female husband* had sons from a previous marriage, the need for a woman-to-woman marriage would not arise. The need for lineage only arises when the *female husband* has no children, or has only daughters. Because legislation and the Constitution have embraced the principle of non-discrimination on the basis of sex and gender, there is no longer a need to bring sons (as opposed to daughters) into the world, because the legal basis for giving priority to male children in terms of inheritance no longer exists.¹¹¹

Article 45(2) was not explicitly invoked in either of these cases. This is partly because the parties simply failed to invoke the provision. Both cases concerned succession, with both plaintiffs claiming a stake in the inheritance from a woman-to-woman marriage. Arguments around the invalidation of the institution of woman-to-woman marriage made reference to other provisions of the Constitution. The two courts therefore accepted, albeit only by implication, the constitutionality of woman-to woman marriage.

¹⁰⁷ [2011] succession cause no 212 of 2010.

¹⁰⁸ *Id* at 21 and 22.

¹⁰⁹ *Id* at 23. The Constitution, art 11(1) enshrines the principles of culture as the foundation of the nation.

¹¹⁰ [2014] civil app no 106 of 2011.

¹¹¹ *Ibid*.

An alternative argument: Article 45 and the Marriage Act are not applicable to woman-to-woman marriage

A last line of argument, alternative to the four contentions above, is that the provisions of article 45 and the Marriage Act are not applicable to woman-to-woman marriage, because these “marriages” are not “marriages” as understood under article 45 and the Marriage Act. While it may be argued that these marriages conform with all the formal requirements of customary marriage, they may also be distinguished on the basis of the distinctly different purpose of traditional marriage. A marriage in the traditional sense contains elements of affection and, often, the intention to conceive a family together.

It would serve these institutions better to consider them as “unions” or “arrangements”. As alluded to earlier, some terms used in the vernacular of communities use terms such as *Chi mwandu*, which translates as “the wife of our property”, not “marriage”. Due to the construction of these 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 marriage. Research in this area, focusing on the societal function of woman-to-woman marriages, could yield interesting results in the fields of African philosophy and customary law.

CONCLUSION

Although article 45(2) read in isolation may seem to infer a prohibition of woman-to-woman marriages, the authors consider that the intention of the Constitution as a whole (including article 45(2)) is not to limit or delegitimize the application of customary law pertaining to these marriages. The protection and promotion of culture, and the protection of children’s rights, are important counter-balances that are also clearly entrenched in the Constitution. The authors also argue that the prohibition against same-sex marriage was intended for homosexual same-sex marriages and not the customary woman-to-woman marriages in Kenya.

What are the possible ways forward?

The first possibility is constitutional amendment. This option proposes that article 45(2) of the Constitution be amended to clarify what forms of same-sex marriages are prohibited. The proposed text should illustrate that the prohibition only extends to homosexual (homoerotic) same-sex marriages. 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 amending the Constitution is quite laborious. Articles 256 and 257 provide that the Constitution can only be amended through either a parliamentary or popular initiative. Amendment by parliamentary initiative requires the introduction of a bill in either House of Parliament.¹¹² The subject matter of the bill should only pertain to amending the Constitution¹¹³ and the public must be allowed to engage with the bill.¹¹⁴ A popular initiative may be through a general suggestion or a formulated draft bill, which must be signed by at least one million registered voters¹¹⁵ and submitted to the Independent Electoral and Boundaries Commission.¹¹⁶ The Constitution is still a young document, having only been enacted in 2010. Strong arguments against amending the Constitution are that it is still too early for the document to undergo

¹¹² The Constitution, art 256(1)(a).

¹¹³ Id, art 256(1)(b).

¹¹⁴ Id, art 256(2).

¹¹⁵ Id, art 257(1) and (2).

¹¹⁶ Id, art 257(4).

amendment,¹¹⁷ and that the process of amending the Constitution would be too “expensive, long-drawn [and] intricate”.¹¹⁸ Also, opening up the Constitution through amendment would open the door for many other subsequent (perhaps undesirable) amendments.¹¹⁹ This possibility is therefore not desirable.

The second possibility is that, through constitutional interpretation, the judiciary reconciles article 45(2) with woman-to-woman marriage. This is a more likely and feasible option than constitutional reform. Kenya’s Supreme Court and Court of Appeal both have the mandate to interpret the Constitution by virtue of article 163(4) of the Constitution. Article 20 of the Constitution permits the courts to “develop the law”, 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 legislation is developed that affords persons the right fully to realise customary law as part of their culture and cultural heritage. Through various precedents, the courts have already offered a number of interpretations of constitutional provisions.¹²⁰ With this interpretive background in mind, the courts should recognize that the intention of article 45(2) is not to prohibit the recognition of woman-to-woman and other forms of customary law marriages, as these are an expression of culture and custom already protected by the Constitution. In securing such recognition, public interest litigation will prove essential. However, such litigation is not without its dangers: future judicial interpretation may very well exclude woman-to-woman marriage from the protection of article 45(2).

The third possibility targets the executive. The Protection of Traditional Knowledge and Cultural Expressions Act places responsibility for matters relating to culture on the county government¹²¹ and the national government,¹²² to promote all forms of culture and cultural expression. Policymakers in this sphere must take the necessary steps to ensure that woman-to-woman marriage receives legal recognition as a cultural rite. The Protection of Traditional Knowledge and Cultural Expressions Act also provides that regulations should be enacted to facilitate its implementation.¹²³

Whatever option is chosen, civil society needs to play a significant role. Stakeholders such as non-governmental organizations (NGOs) and traditional leaders must ensure that woman-to-woman marriages enjoy the same recognition that other forms of marriages enjoy in Kenya. This can be achieved by sensitizing Kenyans to the importance of the promotion of culture and cultural practices and to the on-going celebration of woman-to-woman marriages in traditional communities. Most importantly, NGOs can open up the possible legal recognition of woman-to-woman marriages by initiating strategic litigation before Kenyan courts. Traditional leaders can also lobby lawmakers on the unequivocal recognition of all forms of traditional marriages, including woman-to-woman marriage.

The authors’ argument in favour of the constitutional validity of woman-to-woman marriage in Kenya does not imply an argument *against* homosexual same-sex marriage. Although the two manifestations of

¹¹⁷ P Bowry “Is it time to amend Kenya’s Constitution?” (22 April 2015) *Standard digital*, available at:

<<https://www.standardmedia.co.ke/article/2000159271/is-it-time-to-amend-kenya-s-constitution>” (last accessed 3 September 2019).

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ See generally *Katam v Chepkwony*, above at note 107, where the High Court interpreted art 11(1) of the Constitution 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 no 308 of 1994, where the High Court interpreted id, art 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; *CMS v IAK Suing through Mother and Next Friend CA O* (2008) const appln no 526 of 2008, where the High Court interpreted id, art 53(2) and ruled that DNA testing would be conducted if it is in the best interest of the child.

¹²¹ Protection of Traditional Knowledge and Cultural Expressions Act 2016, sec 4(1).

¹²² *Id.*, sec 5.

¹²³ *Id.*, sec 43.

marriage are distinct, in that woman-to-woman marriages primarily relate to succession and inheritance whereas same-sex sexual attraction and affection are at the heart of same-sex marriages, they also have an important element in common. Both forms of marriage challenge the notion that there is only one legitimate and legal union between consenting adults, namely the heteronormative nuclear family consisting of a husband, wife and their offspring. In this sense, the constitutional validity of woman-to-woman marriage opens the door to a more expansive and fluid understanding of “family” in Kenya.