

BALANCING ACTS: THE RIGHTS OF WOMEN AND CULTURAL MINORITIES IN KENYAN MARITAL LAW

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In the postcolonial world, many developing nations struggle to manage significant populations of different ethnic groups, religions, and nationalities within their borders. There has been a concentrated effort on the part of many nations to provide protection for cultural groups, even to the extent of allowing cultural and religious groups to define the personal law that will govern their members. Often, however, the effort to provide freedom for cultural groups to practice their beliefs conflicts with the ideals of equality and choice for women that are central to the liberal feminist movement. In this Note, Catherine Hardee surveys the theoretical literature surrounding the debate between multiculturalism and feminism and advocates for the use of a middle-ground approach that balances the rights both of cultural groups and women—giving minority groups protection from the law of the majority if, and only if, their practices do not interfere with the rights of individuals within that culture to fully participate in society. Hardee then examines Kenyan marital law to see how that balance is struck. She finds that the multiple types of marriages available to Kenyan women create something of a market in marriage with the potential to amplify women's voices through choice. Practical problems, however, lead to inefficiencies in the market that threaten women's rights. To adequately protect women's interests these inefficiencies must be addressed to ensure that market outcomes accurately reflect the preferences of women within the cultural group.

INTRODUCTION

After the death of Mrs. Otieno's husband, a prominent Kenyan lawyer and a member of the Luo tribe, Mrs. Otieno wanted to bury him on the farm they shared together; the place where he had expressed a desire to be laid to rest. Luo tradition, however, required that he be buried at his birthplace after a traditional tribal ceremony to ward off evil spirits. The Luo tribe demanded that they, not Mrs.

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Otieno, be allowed to bury the body. The parties brought the case to court. The question before the court was whether a wife has a right to bury her husband's body in the manner she sees fit or whether that right remains with the deceased's tribe. The Court of Appeals ruled that the Luo had a stronger claim to Otieno's body than his widow, and he was buried according to Luo custom.¹

The battle over the right to bury Mr. Otieno is one example of the tension between cultural rights and protecting the rights of women. Should Mrs. Otieno have the legal right to decide her husband's final resting place, or should tribal customs trump what most Western nations see as the right of the surviving spouse? Debate continues in academic circles over the conflict between multiculturalism and feminism.² Some argue that the law should not protect cultural traditions that are antifeminist, even if that results in the culture's extinction.³ The opposing view is that outlawing cultural practices often is rooted in racism and colonialism, and argues that change must come from within a culture.⁴ Some scholars and cultural groups argue that a Western notion of feminism should not trump a society's right to determine its own cultural practices—even if that means running afoul of international norms.⁵ There is also a middle-ground approach that argues that both cultural practices *and* women's rights can and should be protected by finding a balance between the two.⁶ This position advocates giving cultural minorities protection from the law of

¹ See Blain Harden, *Kenyan Buried in Village He Hated: Nairobi Lawyer's Funeral Ends 5-Month Battle with Widow for Body*, WASH. POST, May 25, 1987, at A21; *A Top Kenyan Lawyer Buried Amid Tribe's Exorcism Rites*, N.Y. TIMES, May 25, 1987, at 37.

² See generally IS MULTICULTURALISM BAD FOR WOMEN? (Joshua Cohen et al. eds., 1999) (providing several essays by leading scholars attempting to answer title's provocative question).

³ See, e.g., Susan M. Okin, *Is Multiculturalism Bad for Women?*, in IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 2, at 7, 22–23 (arguing that female members of more patriarchal minority group within less patriarchal majority group might be better off if the minority culture becomes extinct).

⁴ See, e.g., Radhika Coomaraswamy, *Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women*, 34 GEO. WASH. INT'L L. REV. 483 (2002).

⁵ See, e.g., Ann Elizabeth Mayer, *A "Benign" Apartheid: How Gender Apartheid Has Been Rationalized*, 5 UCLA J. INT'L L. & FOREIGN AFF. 237, 271–72 (2000) (describing how Islamic countries used accusation of cultural imperialism to stop investigations of their reservations to the United Nations' Convention on the Elimination of All Forms of Discrimination Against Women); David M. Smolin, *Will International Human Rights Be Used as a Tool of Cultural Genocide? The Interaction of Human Rights Norms, Religion, Culture and Gender*, 12 J.L. & RELIGION 143, 158, 169 (1995–96) (characterizing feminism as movement against religion and culture and comparing feminism to other "oppressive ideologies" like Marxism and fascism).

⁶ See, e.g., Ayelet Shachar, *Reshaping the Multicultural Model: Group Accommodation and Individual Rights*, 8 WINDSOR REV. LEGAL & SOC. ISSUES 83, 86 (1998) (advocating accommodation of both group and individual rights in public policy).

the majority if, and only if, the practices of cultural groups do not interfere with the rights of individuals within that culture to participate in society.⁷ If everyone can participate in the definition of the group, “culture” will reflect the collective will.⁸

The debate is not merely academic. In the postcolonial world, many developing nations struggle to manage significant populations of several different ethnic groups, religions, and nationalities within their borders. Some nations respond by expelling foreign elements and reclaiming the land for the “original” inhabitants, like the much-discussed tensions in Zimbabwe between the government and white farmers.⁹ Other nations attempt to create a multicultural society in which different groups can live together and the cultural traditions of each group can be respected.¹⁰

Alongside this struggle, the fight for women’s equality rages. The effort to provide freedom for cultural groups to practice their beliefs often conflicts with the ideals of equality and choice for women that are central to the liberal feminist movement. The debate over whether Muslim girls should be allowed to wear headscarves in French schools is only one example of a situation that has put the two positions at odds.¹¹ Those who argue for allowing the headscarves cite the cultural value of the tradition and freedom of religion, while those who oppose the practice in public schools ask whether the girls have a choice in following this tradition or whether it is simply the first step in subordinating women—a process that is inappropriate in the public school system.¹² The tension between the two views is significant in postcolonial societies where the customs seen as harmful to women are part of the indigenous culture, and their repression is a reminder

⁷ See, e.g., Will Kymlicka, *Liberal Complacencies, in IS MULTICULTURALISM BAD FOR WOMEN?*, *supra* note 2, at 31.

⁸ There are many definitions of culture. See, e.g., Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 511–16 (2001) (giving various definitions of culture: “‘thing’-like,” “the process of individuals interpreting their world,” and “‘webs of significance’ individuals spin to create a home within their surroundings”). This Note uses culture in a limited sense, to mean the local practices and customs that self-identified groups use to carry out their daily lives. For example, the acceptance of polygamy is an aspect of a group’s “culture,” and the choice to recognize it is a “cultural” choice. A single woman’s decision to marry in a monogamous union, personally rejecting polygamy, is an individual choice, although if she does it as a way of advocating a change in her culture, her dissent becomes part of her culture too (even if it is not a controlling voice).

⁹ See generally Bill Keller, *Mugabe Finds Useful Target in White Farmlands*, N.Y. TIMES, Aug. 22, 1993, at L3 (discussing President Robert Mugabe’s plan to appropriate and redistribute commercial farmlands and to deport whites who do not comply).

¹⁰ See, e.g., *infra* Part II (discussing Kenyan marital law).

¹¹ See Okin, *supra* note 3, at 9 (describing headscarf controversy); Katha Pollitt, *Whose Culture?*, *in IS MULTICULTURALISM BAD FOR WOMEN?*, *supra* note 2, at 27, 29–30 (same).

¹² See Okin, *supra* note 3, at 9; Pollitt, *supra* note 11, at 27, 29–30.

of Western imperialism.¹³ This tension is most acute in societies with large populations of minority groups that traditionally have been allowed to use cultural law, both by colonial powers and the new democratic majority governments, in the area of personal law.¹⁴ Kenya is an example of such a country.¹⁵

Kenyan marital law exemplifies a complex system with several cultures vying for the right to define personal law, resolving this conflict by giving individuals the option of choosing among different regimes of personal law.¹⁶ This Note evaluates this system using a theory that attempts to balance the rights of cultural minorities and women's individual freedom. Unlike other discussions of multiculturalism and feminism, this Note considers a country's marriage system as a whole rather than focusing on individual aspects of a single minority culture within a greater society.¹⁷

This method will show that the clash between multiculturalism and feminism is not inevitable. By using a balanced approach, it is possible to design a *complete* system of laws that protects both cultural identity and women's rights, but the system must be created through a conscious process that looks at the practical and legal implications of a *set* of laws and strives to ensure that "tradition" or "custom" is not used simply as a proxy for patriarchal control. The system must be structured to protect traditional practices as they are embraced by those within a culture and must give women a mean-

¹³ See e.g., Coomaraswamy, *supra* note 4, at 484 (noting that "western imperialism has historically been the champion of third world females" and asking how one can "fight for women's rights without being complicit in the racism and prejudice" of western imperialism).

¹⁴ Personal law, as used in this Note, is the body of laws governing personal relationships such as marriage, divorce, and child custody.

¹⁵ See *infra* Part II (discussing Kenya's diverse personal law regimes).

¹⁶ My particular interest in this subject comes from my work with FIDA in Kenya. I spent a summer working at FIDA's legal aid clinic in Nairobi, counseling indigent women in need of legal assistance. Most of my work centered on helping women with marriage, custody, and divorce issues. As a volunteer I often saw where the system went terribly wrong. While social problems such as alcoholism and poverty were at the root of many, if not most, of my clients' problems, those issues are outside the scope of this Note. Instead I focus on the problems created by the legal structure of marriage—problems that may be more easily addressed by the national government. My time working and living in Kenya provided me with some insight into the practical effects of Kenyan law and allowed me to see how these abstract theories apply to the legal system and, perhaps more importantly, how those laws play out in the lives of Kenyan women. Information about FIDA in Kenya can be found at their website, <http://www.fidakenya.org>.

¹⁷ See, e.g., Okin, *supra* note 3 (discussing particular practices in different cultures but never complete system); Richard A. Shweder, "What About Female Genital Mutilation?" and *Why Understanding Culture Matters in the First Place*, in *ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES* 216 (Richard A. Shweder et al. eds., 2002) [hereinafter *ENGAGING CULTURAL DIFFERENCES*].

ingful voice in defining those cultural practices (or a meaningful exit option if they are unhappy with the cultural definition). Once this voice is ensured, the system then must respect the cultural choices of both women and men—even if they conflict with Western notions of equality. Kenyan marital law can succeed in this balancing endeavor with respect to women's personal law by creating something like a market for marriage.¹⁸ Practical problems, however, lead to inefficiencies in the market that threaten women's rights. To protect women's rights these inefficiencies must be addressed to ensure that market outcomes accurately reflect women's preferences.

Part I of this Note provides an outline of the debate surrounding the tension between multiculturalism and feminism. Part II turns to the marriage laws of Kenya and considers where power is vested—in the national government or with cultural minorities—in each system of marriage. Part III analyzes these laws using a market-based approach and discusses problems that arise for women, especially poor women, under the current system. Part IV applies a balancing approach to suggest solutions to the current system that could bring Kenyan marital law in line with the values inherent in that theory—maintaining respect for cultural diversity and self-determination *and* protecting women's rights.

I

THEORIES OF MULTICULTURALISM AND FEMINISM

One approach to cultural and women's rights is epitomized by Susan Okin's essay *Is Multiculturalism Bad for Women?*¹⁹ She points out that religious or cultural groups that are fighting for the right to protect their culture often are concerned most with personal law.²⁰ This has a disproportionate effect on women because home is where culture is disseminated to the young and "the distribution of responsibilities and power at home has a major impact on who can participate in and influence the more public parts of the cultural life."²¹ Oppressive cultural practices in the home have deep ramifications for women's ability to participate in all other aspects of society. Okin argues that women in such patriarchal cultures "*might* be much better off if the culture into which they were born were either to become extinct . . . or, preferably, to be encouraged to alter itself so as to reinforce the equality of women."²² Essentially, whenever women's

¹⁸ See *infra* note 115 and accompanying text.

¹⁹ Okin, *supra* note 3.

²⁰ *Id.* at 13.

²¹ *Id.*

²² *Id.* at 22–23.

equality is compromised by a cultural practice, that practice should not be tolerated.

This approach potentially glosses over the fact that each individual is made up of a complex web of identities. Race, class, religion, gender, and ethnicity are all elements that shape an individual.²³ The differences between a single, American law student and a Masai²⁴ mother of four living in rural Kenya cannot be ignored in the name of female solidarity. To think of women solely in terms of their sex and to disregard the rest of their identity is in opposition to the very ideals of most forms of feminism. Okin defines feminism as a "belief that women should not be disadvantaged by their sex, that they should be recognized as having human dignity equal to that of men, and that they should have the opportunity to live as fulfilling and as freely chosen lives as men can."²⁵ Certainly the right to choose one's cultural or religious beliefs is part of maintaining human dignity.

Some women take pride in continuing their heritage—embracing traditional practices as a way of reaffirming aspects of their identity or actively rejecting Western culture.²⁶ Women should have the right to *choose* to live their lives according to their cultural traditions, even if they offend Western notions of equality, just as much as they should have the right to fight against those traditions and work for a new cultural definition that is more aligned with Western notions of feminism.

Another approach to this conflict is to say that cultural groups should have the right to maintain their identity and protect themselves from assimilation.²⁷ This view points out that when Western feminists try to erase culture in the name of women's equality, they stereotype

²³ See Coomaraswamy, *supra* note 4, at 483 ("Identity is often composite, made up of multiple selves, often contesting, contradicting, and transforming the other.").

²⁴ The Masai are pastoral nomads living in the southern regions of Kenya. 17 THE NEW ENCYCLOPAEDIA BRITANNICA MACROPAEDIA 796 (15th ed. 1993) [hereinafter MACROPAEDIA].

²⁵ Okin, *supra* note 3, at 10.

²⁶ See, e.g., Azizah Y. al-Hibri, *Is Western Patriarchal Feminism Good for Third World/ Minority Women?*, in IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 2, at 41, 44 (arguing that women find "spiritual celebration of women's bodies, cycles, sexuality, and pro-creative power" in, for example, Orthodox Jewish ceremonies); Bhikhu Parekh, *A Varied Moral World*, in IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 2, at 69, 73 ("[W]e should avoid the mistaken conclusion that those who do not share our beliefs about their well-being are all misguided victims of indoctrination.").

²⁷ See, e.g., Homi K. Bhabha, *Liberalism's Sacred Cow*, in IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 2, at 79, 81 (pointing out that culture is not stereotype but rather integral part of identity). See also Shweder, *supra* note 17 (arguing that women should have right to choose female circumcision); Smolin, *supra* note 5 (arguing that use of international human rights law to repress certain religious practices amounts to cultural genocide).

and dehumanize women in the developing world.²⁸ Since giving women a voice and equal rights does fundamentally change the core patriarchal nature of some of these cultures, this approach can be used to argue that cultural values must trump women's rights and cultures should be allowed to continue their patriarchal practices, regardless of how greatly they infringe on women's rights.²⁹

In a world where the international community acknowledges basic human rights, this approach cannot succeed. Taking this model to its extreme, it would have to recognize institutions of slavery and human sacrifice if they were part of how a culture defined itself or its religious practices. Rather than following this slippery slope to its unacceptable end, we should strike a balance between the protection of culture and protecting individual rights within that culture.

An ideal approach recognizes that culture is an important aspect of individual identity worthy of protection, but that protection of group identity should be balanced with protection of members' individual rights.³⁰ Due to the complexities of individual identities, certain members of a group, women for example, can be disadvantaged within their own group, so it is necessary that we "critically examine in whose name the arguments 'from tradition' are made. Who speaks for a culture?"³¹

Ideally, all members of a culture should be part of the voice that speaks for the group. The right balance will contain structures to ensure that all members of a group, including such typically marginalized groups as women and the poor, have a voice in shaping their culture.³² If all members of a society have input into the definition of their culture, the larger majorities can protect that version of culture without fear that "cultural rights" are being used to subordinate the voiceless *within* a cultural minority.

Will Kymlicka argues for voice by drawing a helpful distinction between "internal restrictions," whose "aim is to restrict the ability of individuals within the group (particularly women) to question, revise,

²⁸ See, e.g., Bhabha, *supra* note 27, at 81–82.

²⁹ The Taliban used this rationale to argue that summarily flogging women caught not wearing proper dress, blocking women's and girls' access to public schools, healthcare, and the workforce, and other atrocities were justified in the name of protecting religious freedom. See Mayer, *supra* note 5, at 275–77.

³⁰ Shachar, *supra* note 6, at 86 ("[B]ecause certain group members are in disadvantaged intra-group positions, their interests, concerns and voices must be taken into account when developing accommodation policies that redistribute legal powers between their *two* membership communities—the group and the state.").

³¹ *Id.* at 87.

³² See MARILYN FRIEDMAN, *AUTONOMY, GENDER, POLITICS* 183 (2003) (arguing that women, and other groups, must consent to practices that violate their rights in order for practices to be politically legitimate).

or abandon traditional cultural roles and practices,”³³ and “external protections,” defined as “rights that a minority group claims against the larger society in order to reduce its vulnerability to the economic or political power of the larger society.”³⁴ The former should not be allowed in the interest of protecting the voice of disadvantaged group members, while the latter is necessary to protect minority groups from state control.³⁵ Freedom of speech is an example of the majority protecting against internal restrictions because it guarantees a voice for all members of a cultural group (even if granting a voice to women is anathema to cultural traditions). Granting minority groups the right to define the personal law that will govern their members is an example of external protections because it protects a culture’s right to continue its cultural practices—even if those practices conflict with the law of the majority.³⁶

This differs from Okin’s approach because it does not assume that women will choose the “liberal” or “Western” approach. Under this balancing test, women must be given a voice by their cultural group (as advocated by Okin) but that voice must be respected by outside cultures, including the international feminist community, even if they decide to speak out in favor of cultural practices abhorred by Western feminists. To ensure that women are protected from internal restrictions and that cultures are given appropriate external protections, a balance of power must be struck between majority control and control by individual cultural groups.

II KENYAN MARITAL LAW

This Part examines the balance between national, or majority, control and cultural control over Kenyan marital law—both the procedures required to form a valid marriage³⁷ and the substance of the

³³ Kymlicka, *supra* note 7, at 31.

³⁴ *Id.*

³⁵ *Id.* at 31–32.

³⁶ There are other practices which are harder to classify. In the debate over headscarves, for example, one could argue the cultural practice is an internal restriction that represses women’s expression and individuality which has indirect effects on women’s ability to participate in society. On the other hand, allowing the scarves to be worn in public places, such as schools, is arguably a necessary external protection to allow Muslims to express their religion and raise their children according to their religious beliefs. See *supra* note 11 and accompanying text.

³⁷ Procedures, as the term is used here, are the formalities that members of a community must go through before being considered married by the community and under the law. They may include a marriage ceremony, particular vows, payment of dowry or bride price, or registration with a national registry.

marriage once it is solemnized.³⁸ The less control the national government retains over the marriage—by placing restrictions on cultural minorities' definitions of marriage—the more power is left to “culture” to define the union and what protections will be afforded to women.³⁹ The remaining Parts of this Note then examine these laws with an eye to identifying imbalances in the system and resulting problems.

There are between thirty and forty different ethnic groups in Kenya with varied languages and cultural practices.⁴⁰ As a former British colony, Kenya and its population still reflect the influence of the British Empire, with three-fourths of the population practicing Christianity.⁴¹ There is also a large population of Indians who emigrated from what is now Pakistan during colonial rule.⁴² Due to the influence of Arab traders and Arab colonization, the coastal areas are primarily Muslim.⁴³ There is also a population of indigenous people who have resisted outside influence and maintain at least some of their traditional customs and culture.⁴⁴ Kenyans exist in a country where different cultures live side-by-side and influence one another, so it is not uncommon for a Kenyan to have multiple identities; for example, to consider herself a Kenyan, a Masai, and a Christian. Kenya's system of personal law reflects a respect for this diversity.

As a basis for comparison, consider the American view of equality, where a “neutral” law, one that does not single out one religion, may infringe on a group's religious practices as long as it is applied equally.⁴⁵ Kenya, with its diverse population, takes a different

³⁸ The substance of a marriage, for purposes of this Note, is the set of rules that govern the substance of the marriage contract—i.e., whether the marriage is polygamous or monogamous, or the grounds on which a divorce may be granted. There are obviously extralegal issues that define the substance of a marriage—e.g., who will cook or how to spend the family finances—but these issues are outside the scope of this Note.

³⁹ In other words, the balance of power is represented by comparing “internal restrictions,” such as a right to free speech, imposed on cultural minorities with the “external protections,” such as the right to define personal law in opposition to national law, afforded to cultural minorities. See *supra* notes 33–35 and accompanying text.

⁴⁰ 6 THE NEW ENCYCLOPAEDIA BRITANNICA MICROPAEDIA 806–07 (15th ed. 1993) [hereinafter MICROPAEDIA].

⁴¹ *Id.*

⁴² MICROPAEDIA, *supra* note 24, at 797.

⁴³ *Id.* at 797, 799.

⁴⁴ See MICROPAEDIA, *supra* note 40, at 806–07 (reporting that one-fifth of Kenyans remain animists).

⁴⁵ For example, to protect the idea of the nuclear family, the government can prohibit polygamous marriages even if they are part of a group's religious traditions. *Cleveland v. United States*, 329 U.S. 14, 20 (1946) (upholding prosecution of Mormon polygamists under Mann Act despite Mormon religion's acceptance of practice at that time); see also *Employment Div. v. Smith*, 494 U.S. 872, 878, 890 (1989) (holding that law denying unemployment benefits due to consumption of controlled substances can be applied constitu-

approach to equality and has taken affirmative steps to ensure that different religions and cultural groups are allowed to choose a personal law that is in line with their beliefs. Instead of one law with general application, the Kenyan Parliament has enacted several marriage laws—one for each of the major religions and a civil statute. These laws provide for marriage under “customary law”⁴⁶ to ensure that “neutral” laws do not infringe on an individual’s right to practice his or her culture. The courts have expanded the idea of customary marriage to include instances where the formal requirements for a customary marriage have not been met, but through cohabitation and repute, the couple is considered married in the eyes of the law.⁴⁷

The end result of this protection of diversity is that there are six different ways of contracting a marriage in Kenya. Any Kenyan can marry under the civil law or under one or more of their cultural group’s laws.⁴⁸ Each type of marriage is different with respect to the amount of control the national government exerts in defining both the substance and procedures of the marriage contract. Consent of both parties is required for all types of marriage, but the procedure for entering into a marriage can vary greatly and with little to no governmental control over minority cultures.⁴⁹ The most important substantive differences among the marriage options are whether a marriage is monogamous or potentially polygamous and the rules governing grounds for divorce. The following Sections will look at the different types of marriages in Kenya and the balance of power in each.

A. Civil Marriage

Civil marriages are defined in the Marriage Ordinance.⁵⁰ The Marriage Ordinance makes no cultural or religious distinctions. All people who are not married, meet the age requirement, and have resided in Kenya for over fifteen days may be married under this Ordinance,⁵¹ and ceremonies can take place in “any place of public

tionally to use of peyote for religious purposes where effect on religious practices is incidental and purpose of law is not to burden religious activity).

⁴⁶ “Customary law” is used here as a source of law defined by a group’s custom or culture, recognizing that when custom is brought into a formal legal system in any way it becomes customary law and loses some of the flexibility of custom. See Laurence Juma, *Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Process*, 14 ST. THOMAS L. REV. 459, 466–67, 469 (2002).

⁴⁷ See *infra* Part II.F.

⁴⁸ For example, a woman who is a Masai and a Christian can marry under civil law, Christian law, or the customary law of the Masai tribe. See *infra* notes 51, 64, 98–102.

⁴⁹ See *infra* Parts II.D–F.

⁵⁰ Marriage Ordinance, Laws of Kenya, CAP. 150 (1962).

⁵¹ § 11.

worship.”⁵² The Marriage Ordinance is very specific as to the procedure and substance of the marriage. Parliament outlines a process for licensing ministers to perform the ceremony⁵³ and details requirements for public notification,⁵⁴ registration of the marriage,⁵⁵ and even the time of day the wedding may take place and the required wedding vows.⁵⁶

The Marriage Ordinance also defines the substance of civil marriage as a monogamous union between a man and a woman that can only be dissolved through the formal system laid out in the law.⁵⁷ Provisions for separation and divorce from a civil marriage are outlined in the Subordinate Courts (Separation and Maintenance) Ordinance⁵⁸ and the Matrimonial Causes Ordinance,⁵⁹ respectively. Both ordinances continue to define the substance of civil marriages by limiting the grounds on which a divorce or separation may be granted.⁶⁰

In civil marriage, the national government defines marriage in a way that excludes most manifestations of minority culture. By completely defining both the procedure and substance of the marriage to the exclusion of different religious or cultural norms, the national government creates an option for Kenyans who wish to marry outside the customs of their religion or tribe.⁶¹

⁵² § 7.

⁵³ §§ 3–7.

⁵⁴ §§ 8–18 (requiring public notice twenty-one days prior to, but not more than three months before, marriage).

⁵⁵ §§ 32–34 (outlining system of registry for local offices and reporting process to Registrar General).

⁵⁶ § 29 (requiring that weddings be performed between 10 A.M. and 4 P.M. and giving transcript of required vows).

⁵⁷ § 11 (requiring that neither party be married); § 29(2)b (prescribing vows that state man and wife desire to become married in union that can only be dissolved by judgment of divorce).

⁵⁸ Subordinate Courts (Separation and Maintenance) Ordinance, Laws of Kenya, CAP. 153 (1962).

⁵⁹ Matrimonial Causes Ordinance, Laws of Kenya, CAP. 152 (1962).

⁶⁰ § 8 (restricting divorce to cases of adultery, desertion, cruelty, or five years of continual psychiatric treatment for either party, as well as rape, sodomy, or bestiality by husband); Subordinate Courts (Separation and Maintenance) Ordinance § 3 (allowing women to petition for legal separation and maintenance on same grounds as divorce, as well as for conviction of certain criminal offenses, venereal disease, compelling wife into prostitution, or habitual drunkenness).

⁶¹ Since the civil marriage mirrors Christian marriages, monogamous with restricted divorce options, it is not a meaningful alternative for a couple that wishes to escape the restrictions of Christian marriage. *See infra* Part II.B.

B. African Christian Marriage

The African Christian Marriage and Divorce Ordinance ("African Christian Ordinance")⁶² was enacted, in part, to recognize the difficulties of going through the process of a registered marriage under the Marriage Ordinance in rural areas of Kenya, and to provide a simplified procedure for African Christians to be married under their faith.⁶³ The African Christian Ordinance only applies to couples where at least one person is an African and a Christian.⁶⁴ It is structured in such a way that the civil Marriage Ordinance serves as a backdrop and applies to all marriages sanctioned under the African Christian Ordinance unless otherwise specified in the African Christian Ordinance.⁶⁵

The differences between the two ordinances are not extensive. An African Christian marriage is still monogamous and must be performed by a licensed minister.⁶⁶ Divorce still is covered by the Matrimonial Causes Ordinance.⁶⁷ The main difference is that the formal procedures are relaxed greatly. Registration and reporting requirements are still present, but the African Christian Ordinance allows more time for the government agent to report the marriage to the Registrar General.⁶⁸ Although the minister must be licensed, the place of worship need not be.⁶⁹ Instead of the formal notification process and other preliminary requirements under the Marriage Ordinance, the African Christian Ordinance allows the usage of procedures "established, usual or customary for African Christians in the denomination to which one or both of the parties belong."⁷⁰ The minister must be satisfied only that "adequate notice has been given of the intended marriage."⁷¹

⁶² African Christian Marriage and Divorce Ordinance, Laws of Kenya, CAP. 151 (1962).

⁶³ EUGENE COTRAN, 1 RESTATEMENT OF AFRICAN LAW: KENYA: THE LAW OF MARRIAGE AND DIVORCE 2 (1968) [hereinafter RESTATEMENT].

⁶⁴ African Christian Marriage and Divorce Ordinance § 3(1).

⁶⁵ § 4.

⁶⁶ See § 9(3) (providing required vows to convert customary marriage into Christian marriage and stating that marriage is monogamous).

⁶⁷ See § 4; see also Matrimonial Causes Ordinance, Laws of Kenya, CAP. 152 § 2 (1962) (defining marriage as "voluntary union of one man and one woman for life to the exclusion of all others," necessarily including African Christian marriages).

⁶⁸ African Christian Marriage and Divorce Ordinance, Laws of Kenya, CAP. 151 § 11 (1962) (allowing three months for ministers to transmit certified copy to Registrar General).

⁶⁹ §§ 5-6.

⁷⁰ § 7.

⁷¹ *Id.*

A major substantive provision of the African Christian Ordinance is its protection for widows. It forbids the practice of widow inheritance, through which a widow automatically becomes the wife of her deceased husband's brother,⁷² and mandates that a widow become the guardian of the children of the marriage as long as she remains a Christian, defeating the practice of male relatives taking their deceased brother's children for their own.⁷³ However, the Ordinance does allow the male relatives to inherit the "bride price" of their deceased relative's daughters if the daughter eventually marries under customary law.⁷⁴ The African Christian Ordinance also allows for the conversion of customary marriages into Christian marriages.⁷⁵ This feature is unique. No other marriages can be converted.

The African Christian Ordinance controls the substance of the marriage and, to a lesser extent, some procedures. In this way, the national government still is defining marriage with local Christian culture playing only a limited role in outlining the procedures required for solemnizing the marriage. The Ordinance also takes affirmative steps to provide additional protection to African Christian women who choose to marry under the Ordinance, and under the Marriage Ordinance, by preempting certain traditional customs that are seen as harmful to women.⁷⁶ Women thus can choose to abandon the cultural practices of widow inheritance and patrilineal custody by marrying outside of customary law.

⁷² § 13(1).

⁷³ § 13(2).

⁷⁴ *Id.* The "bride price" is the money or gifts given to the family of the bride upon her marriage. Many Africans object to the term "bride price" because it is not seen as "purchasing" a woman but rather as a gift between two families who wish to join together or an incentive not to divorce. REPORT OF THE COMMISSION ON THE LAW OF MARRIAGE AND DIVORCE 32 (1968) [hereinafter REPORT]. However, male relatives do try to gain custody of female relatives (especially if they are near marrying age) in order to get the bride price. See *Onchoke v. Ondieki*, Application No. 9 of 1958 (S. Nyanza Dist. Registry No. 42 of 1957), in RESTATEMENT, *supra* note 63, at 195-96. Because "bride price" is the term used in Kenyan statutes, this Note uses it here, although recognizing the perhaps unjustified negative connotation.

⁷⁵ African Christian Marriage and Divorce Ordinance, Laws of Kenya, CAP. 151 § 9 (1962). Customary marriages are marriages contracted under customary tribal law and usually include certain ceremonies and the payment of a "bride price." For a more in-depth discussion of customary marriage, see *infra* Part II.E.

⁷⁶ See *supra* notes 72-74 and accompanying text. The African Christian Marriage and Divorce Ordinance also protects women married under the Marriage Ordinance by making the provisions for the dissolution of a marriage apply to marriages under the Marriage Ordinance as well. African Christian Marriage and Divorce Ordinance § 3(2).

C. Hindu Marriage

The Hindu Marriage and Divorce Ordinance ("Hindu Ordinance"),⁷⁷ much like the African Christian Ordinance, sets out substantially similar substantive marriage law as the Marriage Ordinance. Marriages are monogamous⁷⁸ and divorce is limited to judicial divorce for cause.⁷⁹ The Hindu Ordinance specifically incorporates the Matrimonial Causes Ordinance and the Subordinate Courts (Separation and Maintenance) Ordinance where those provisions do not conflict with the Hindu Ordinance.⁸⁰

The only substantive differences in Hindu marriages are that they can only occur between two Hindus⁸¹ and that there are three additional grounds for divorce.⁸² As with Christian marriages, the main differences between the Hindu Ordinance and the Marriage Ordinance are procedural. Hindus may solemnize their marriage according to their own customary practice.⁸³ In addition to the general provision allowing Hindu rites to be used, there are two sections that define when a marriage has taken place under two common Hindu marriage ceremonies.⁸⁴ Since these two ceremonies are laid out in the statute, they are fixed and not subject to changes in cultural practices unless revised through the legislative process. With respect to registration, the Hindu Ordinance allows the Minister in charge of marriages to make different rules for registration of different Hindu castes or communities and to require registration of all marriages.⁸⁵

Although procedures vary in the statute to accommodate Hindu cultural practices, it is important to remember that the substantive law of marriage remains the same. Hindus do not have the power to define marriage outside of the statutory framework and have substantially the same rights and obligations once a marriage is contracted as non-Hindu Kenyans married under the civil or Christian ordinances.

⁷⁷ Hindu Marriage and Divorce Ordinance, Laws of Kenya, CAP. 157 (1962).

⁷⁸ Hindu Marriage and Divorce Ordinance §§ 3(a), 7(3). This is a change from traditional Hindu marriages, some of which were potentially polygamous. See REPORT, *supra* note 74, at 6.

⁷⁹ Hindu Marriage and Divorce Ordinance § 10(1).

⁸⁰ §§ 9, 7(5).

⁸¹ § 2.

⁸² §§ 10(1)(e)–(g) (allowing divorce if one party leaves Hindu faith, if one party enters religious order, or if judicial separation has been in effect for two years).

⁸³ §§ 5(1)–(3).

⁸⁴ *Id.* (stating that, when *Saptapadi* is performed, taking seven steps together before sacred fire, marriage becomes complete after seventh step; when *Anand Karaj* is performed, going around *Granth Sahib* together, marriage is binding after fourth round).

⁸⁵ § 6.

D. Mohammedan Marriage

The Mohammedan Marriage, Divorce and Succession Ordinance ("Muslim Ordinance")⁸⁶ provides for the legal validity of Muslim marriages but defines neither the substantive nor procedural aspects of Muslim marriage under the law. The Muslim Ordinance states that Muslim marriages are valid if contracted in accordance with Mohammedan law and that questions of validity and divorce shall be governed by Mohammedan law.⁸⁷ The Supreme Court is given jurisdiction to hear cases involving Muslim marriages but is instructed to follow Mohammedan law.⁸⁸ Nowhere in the Muslim Ordinance is Mohammedan law defined, except to say that the onus of proof is on the party alleging that a practice is Mohammedan law.⁸⁹

This is vastly different from the African Christian and Hindu Ordinances. Muslim Kenyans, or at least those Muslim Kenyans in positions of authority in the Church, completely retain the right to define their cultural practices. Not only are Muslims not required to accept the Kenyan majority's definition of marriage (i.e., monogamy),⁹⁰ but they retain the right to continue to refine and alter their customs and law of marriage.

The Muslim Ordinance could have defined the substance of Mohammedan law (for example, allowing men to take up to four wives, or defining the grounds for divorce) or defined certain marriage procedures (like the *Saptapadi* and *Anand Karaj* ceremonies defined in the Hindu Ordinance).⁹¹ Instead the Muslim Ordinance leaves the law open to interpretation, change, and possible abuse.⁹² Given the existence of centuries of written law both in the Qur'an and Islamic scholarly writing, however, it would be difficult for Muslim Kenyans to alter their concept of Muslim law drastically in a short period of time.⁹³

The only procedural requirement placed on Muslim marriages is the registration and reporting requirement in the Mohammedan

⁸⁶ Mohammedan Marriage, Divorce and Succession Ordinance, Laws of Kenya, CAP. 156 (1962).

⁸⁷ § 2.

⁸⁸ § 3.

⁸⁹ § 3(4).

⁹⁰ See *supra* note 57 and accompanying text.

⁹¹ See *supra* note 84 and accompanying text.

⁹² See *infra* Part III.B.1.

⁹³ A drastic change is not impossible, however. For example, Islamic law in Afghanistan changed dramatically in a relatively short period of time under Taliban rule. This led to women being forced out of the workplace and public life. See generally Anastasia Telesetsky, *In the Shadows and Behind the Veil: Women in Afghanistan Under Taliban Rule*, 13 BERKELEY WOMEN'S L.J. 293 (1998) (discussing gender apartheid under Taliban rule).

Marriage and Divorce Registration Ordinance (“Muslim Registration Ordinance”), which allows for the appointment of a Registrar of Mohammedan Marriages and Divorces⁹⁴ and requires every couple to register their marriage with a local registrar⁹⁵ who must then report the marriages back to the Registrar at the end of every month.⁹⁶ Unlike the other ordinances, the Muslim Registration Ordinance does not require the parties in the marriage to give public notice *prior* to their marriage but rather allows registration *after* their marriage.⁹⁷

The Muslim Marriage Ordinances are an example of great deference to culture. Virtually nothing in the ordinances interferes with the application of cultural (Muslim), rather than national (Kenyan), law. The law need not even remain fixed to ensure the expectations of the parties are met. The procedural requirements are minimal, limited to registration, and allow for custom to control what ceremonies create a legitimate marriage.

E. Customary Marriage

Unlike other forms of marriage in Kenya, there is no separate act of Parliament allowing for the validity of customary (or tribal) marriages. Their validity comes from a brief mention in the Marriage Ordinance. Section 37 of that ordinance states: “[N]othing in this Ordinance contained shall affect the validity of any marriage contracted under or in accordance with any native law or custom, or in any manner apply to marriages so contracted.”⁹⁸ The Muslim Ordinance also mentions a preexisting customary marriage as a bar to contracting a Muslim marriage.⁹⁹

Consequently, no law governs the substance or procedure of customary marriages; the law varies from tribe to tribe. Procedures for marriage usually entail ceremonies with the bride’s and groom’s families and the payment of a “bride price” or gifts to the bride’s family which must be returned upon divorce or if the bride dies childless.¹⁰⁰ Since all tribes in Kenya traditionally practiced polygamy, all cus-

⁹⁴ Mohammedan Marriage and Divorce Registration Ordinance, Laws of Kenya, CAP. 155 § 3 (1962).

⁹⁵ § 9.

⁹⁶ § 16.

⁹⁷ See § 9 (stating that registration may take place up to seven days after marriage or divorce).

⁹⁸ Marriage Ordinance, Laws of Kenya, CAP. 150 § 37 (1962).

⁹⁹ Mohammedan Marriage, Divorce and Succession Ordinance, Laws of Kenya, CAP. 156 § 6 (1962).

¹⁰⁰ See generally RESTATEMENT, *supra* note 63 (discussing substance of marriage and procedures for contracting marriage for different Kenyan tribes). For further discussion of the “bride price” see *supra* note 74 and accompanying text.

tomary marriages are potentially polygamous.¹⁰¹ Divorce is somewhat easier to attain under the customary system. If certain grounds for divorce are not met, the couple may still go to the Elders of the community and ask for a divorce based on irreconcilable differences.¹⁰²

When dealing with a customary marriage or divorce, courts are required to apply the customary law of the parties before them. For example, the High Court in *Anyango v. Oyugi*¹⁰³ chastised the district magistrate's application of statutory grounds for divorce to a customary Luo¹⁰⁴ marriage.¹⁰⁵ There is little guidance, however as to where they should glean their knowledge of customary law.¹⁰⁶ There is also no system for registration or reporting of customary marriage or divorce.

F. Cohabitation

The final type of marriage in Kenya is marriage through cohabitation. While the Court of Appeals denied the existence of common law marriage in Kenya in *Njoki v. Mutheru*,¹⁰⁷ it recognized that "[l]ong cohabitation as man and wife gives rise to a presumption of marriage in favour of the party asserting it."¹⁰⁸ It does not matter that all the ceremonies and rituals of a customary marriage are not performed; unless a party presents evidence tending to contradict marriage, the presumption is not rebutted.¹⁰⁹ The *Njoki* court pointed to precedent showing long cohabitation and repute, and the existence of children as evidence supporting the presumption of marriage.¹¹⁰ A lengthy and vigorous dissent by Judge Madan argued in favor of an even stronger presumption of marriage and that the facts of the case supported the presumption.¹¹¹ In the end, the judges agreed that there is a presump-

¹⁰¹ See REPORT, *supra* note 74, at 21.

¹⁰² See generally RESTATEMENT, *supra* note 63 (listing customary grounds for divorce for different tribes of Kenya).

¹⁰³ 1979 Kenya L. Rep. 279 (Civil Appeal No. 57 of 1978) (outlining divorce under Luo customary law and allowing divorce even though statutory criteria could not be met).

¹⁰⁴ The Luo are a large tribe who inhabit the rural area of Kenya's western plateau. MACROPAEDIA, *supra* note 24, at 796.

¹⁰⁵ *Anyango*, 1979 Kenya L. Rep. at 280.

¹⁰⁶ The *Anyango* court simply claimed to have an understanding of Luo law but did not explain the source of their authority. *Id.*

¹⁰⁷ 6 Decisions Ct. App. Kenya 30 (Civil Appeal No. 71 of 1984).

¹⁰⁸ *Id.* at 47.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 48.

¹¹¹ *Id.* at 39-42 (Madan, J.A., dissenting) (arguing for presumption by cohabitation and evidence describing couple's relationship and dismissing as unnecessary various requirements for marriage presumption posited by trial court).

tion of marriage under Kenyan customary law, even if all customary ceremonies are not performed, even though they disagreed as to what should trigger the presumption.

Later cases have held the presumption of marriage in different circumstances.¹¹² It is difficult to find cases of cohabitation marriage, however, because magistrate judges, whose opinions are unreported, handle marriage and divorce cases. The few matrimonial cases that reach the higher courts, where at least some reporting takes place, are usually cases in which the parties to the marriage can afford to bring an appeal and therefore are more likely to be able to afford a "proper" wedding.¹¹³

Cohabitation marriages are not governed by national norms except insofar as a particular magistrate or panel of judges determines whether or not to recognize them. Essentially the judge must decide whether a deviation from procedure under customary law invalidates the marriage. If the marriage is recognized, the judge then treats it as marriage under customary law and applies the customary law of the parties to the issue before him.¹¹⁴

III ANALYZING THE BALANCE OF POWER IN KENYAN MARRIAGE

This Part analyzes the balance of power in the different forms of marriage in Kenya, with an eye to the practical realities of life in the developing world, to discover whether the current system of marital law in Kenya gives adequate weight to both women's rights and cultural rights—in other words, whether minority groups have been given enough external protections and whether women in those groups sufficiently have been protected from internal restrictions. The analysis reveals that something resembling a market in marriages emerges with

¹¹² *Gichuru v. Gachuhi*, Civil Appeal No. 76 of 1998, <http://www.uni-bayreuth.de/departments/afrikarecht/kenya62.html> (finding marriage on basis of cohabitation and existence of children from marriage even though issue of whether actual ceremony occurred remained unresolved). This case is interesting because the "wife" was disputing that she had been married in order to inherit more of her father's estate (married women receive less than unmarried women under Kikuyu custom). The court believed that the marriage had taken place but said that even if it had not, the fact of cohabitation and children was enough to create a presumption of marriage. *Id.*

¹¹³ See *infra* Part III.B.3 for reasons why people might choose unofficial weddings or cohabitation, such as the inability to pay for a wedding or an unplanned pregnancy. Through my personal experiences at FIDA both serving clients and speaking with Kenyan advocates, I found that a large percentage of FIDA's clients are married through cohabitation for these reasons.

¹¹⁴ See, e.g., *Gichuru*, Civil Appeal No. 76 (finding existence of Kikuyu marriage and therefore applying Kikuyu inheritance law).

the potential to strike the right balance.¹¹⁵ This market is not a free market in the traditional sense—there is no product being purchased, and it is highly regulated. Market language is useful, however, because it describes a system of choice for aggregating preferences with the potential to effect change through choice. Women's choices in the marriage market enhance their voices in the culture of their community. It is in this sense that market language is used here.

While some aspects of the marital system in Kenya lead to an efficient market, and therefore maintain an equitable balance of power, both between men and women and between majority control and minority group control, many parts of the law and Kenyan culture lead to market inefficiencies, leaving women's rights severely unprotected and depriving women of their opportunity to select the marital law that best reflects their values and priorities. Consequently, women have difficulty influencing the development of personal law through their choice.¹¹⁶

A. *Successful Balancing in the Kenyan System—A Market for Marriage*

Offering several systems of marriage, with every Kenyan capable of choosing between different options, can go a long way in protecting both cultural rights and the rights of individual women. Using Kymlicka's language,¹¹⁷ the rights of minority groups are given external protection because each group maintains the right to create a system of laws that represents their own customs and values. These external protections are not the end of the inquiry, however. The system also must ensure that women's voices are protected from internal restrictions imposed by the community.

The market system of marriage does have the potential to protect women's rights, but the argument is complicated and depends on the limitations of the external protection afforded to cultural minority groups. Women always have the option of speaking out against a pre-

¹¹⁵ Use of a market analysis is not intended to reduce marriage to a transaction. Marriage embodies values and emotions, such as love, trust, and respect, that cannot be quantified. The use of the term "marriage market" only refers to the choice between different systems of marriage and to the competition that the market creates between different groups to craft a system that is appealing to both men and women.

¹¹⁶ For a market analysis of choice of law, see generally Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151 (2000) (arguing that efficiency is improved by allowing parties to choose which state law governs their contract).

¹¹⁷ See *supra* notes 33–36 and accompanying text.

vailing practice or achieving change through the political process.¹¹⁸ Feminists, however, often argue that since the deck is stacked against women in patriarchal societies, it cannot be presumed that they have the political power to advocate for change.¹¹⁹ This power imbalance explains why silence, or even selection of a practice, on the part of women does not necessarily indicate support for that particular cultural practice.¹²⁰

A market system of marriage gives women another way to express their preferences and to amplify their voice. By choosing to marry under one system of law over another, women can express which part of their identity they feel best defines their personal relationships. A woman who feels that equality is most important to her can choose to be married in a civil or African Christian marriage, where the marriage is monogamous and she will have certain protections against cultural practices that she feels may infringe on her liberty.¹²¹ On the other hand, a woman who values her tribal identity over all else may express herself by marrying under the customary law of her people, and forego the protections of the civil law for the protections and way of life offered by her community.

In addition, like any market system, supply and demand play a role in determining which marital practices survive and which die out. Marriage is unique in that it takes a man and a woman to perpetuate a system of marriage.¹²² If women—at the time of forming the contract, when they have the most power—decide to opt out of a system of

¹¹⁸ A market for marriage is not intended to supplant the need for women's participation in the democratic process, but rather to amplify women's voices within it. For an excellent discussion of the potential role of deliberative democracy in bringing the voices of both women and cultural minorities into this debate, see MONIQUE DEVEAUX, *CULTURAL PLURALISM AND DILEMMAS OF JUSTICE* 138–88 (2000). Deveaux argues that in order for norms to be legitimate “all citizens should be allowed to propose and question contested norms and assertions within practical dialogue.” *Id.* at 147. She suggests changes to the structure of democratic debate: for example, reserving seats in Parliament for certain groups or allowing groups access to deliberations on matters of significance to them, in order to ensure that minority voices are heard. *Id.* at 145.

¹¹⁹ Coomaraswamy, *supra* note 4, at 495 (arguing that, given social and economic pressures, widows can never freely choose practice of *Sati*—widow immolation—and that therefore practice should be banned).

¹²⁰ *But see* Robert Post, *Between Norms and Choices, in IS MULTICULTURALISM BAD FOR WOMEN?*, *supra* note 2, at 65, 65–66 (criticizing Okin for assuming that women cannot “choose” to perpetuate culture that appears harmful to them).

¹²¹ *See supra* notes 72, 73 and accompanying text (discussing protections for widows in African Christian Marriage and Divorce Ordinance).

¹²² While there is a strong argument to be made in the name of human dignity and choice for allowing homosexual marriages, both in the United States and Kenya, this Note assumes the model of heterosexual marriage since it is universal among marriage laws in Kenya. A discussion in support of homosexual unions in Kenya and their implications is beyond the scope of this Note.

marriage because they find its procedures and/or substance too onerous, the system will be forced either to change or become extinct.¹²³ For example, if Kikuyu women insist on a Christian marriage instead of a customary marriage because they fear their husbands will take another wife of whom they do not approve, men will be forced to make concessions in the customary law to ensure that the system of law they favor continues. Kikuyu customary law might then evolve into a system in which men must get permission from their first wives before taking a second wife, or a system that abolishes polygamy altogether.

Instead of a top-down approach, with the state enforcing a ban on certain practices, the option of an alternative form of marriage can create a market that gives women "buying power" that they can use to institute change from *within* their own community. Because the market can ensure that women's voices are heard and give them a meaningful exit to cultural practices (thereby reducing internal restrictions on women's voice), external protections can be afforded to cultural minorities.

B. Breakdowns in the Kenyan Marriage Market

The various options under the Kenyan legal system have the potential to create a market system that empowers women while still protecting the rights of minority cultures. An ideal market system, however, depends on full knowledge and free choice. Women must have full knowledge of what law they are "buying" with their marriage contract and a real choice, as opposed to simply a legal, but impractical option, at the time of entering into a marriage.¹²⁴ It is in these areas that the Kenyan system of marriage begins to break down and women lose the freedom to choose the marital law that best represents their interests. They consequently lose a powerful part of their voice in shaping how marriage is defined in their community.

1. Imperfect Information of the Applicable Laws

If full knowledge of the contract is a concern in the marriage market, the Muslim Ordinance on its face may pose a problem. It does not define Mohammedan law; so those entering into a marriage

¹²³ See O'Hara & Ribstein, *supra* note 116, at 1161 ("Exit can both complement and substitute for voice in the political process.") (emphasis omitted).

¹²⁴ These requirements for a functioning market are aligned with Friedman's conception of liberal autonomy. She argues that women must be able to choose freely among an array of alternatives, to incorporate their personal reflections, and to have been socialized in a manner consistent with developing competence to make free choices. See FRIEDMAN, *supra* note 32, at 201.

under the Muslim Ordinance cannot be certain what law will apply to them or whether the law will remain constant. Therefore, they cannot make a fully informed decision.¹²⁵ This problem, however, is alleviated greatly by the fact that Muslim law has a long written history, and special Khadi courts have created precedent regarding Mohammedan law. In a way, the Qur'an and subsequent interpretations act as a codification of Muslim law not easily changed, but in Kenya, such law is still subject to interpretation by the courts.¹²⁶

Women can look to this body of law to determine with relative accuracy what law will apply to their marriage. They can reject a Muslim marriage if they do not wish to have a polygamous marriage, as having up to four wives is acceptable under traditional Islamic law and a custom practiced by men in Kenya.¹²⁷ They may also choose to reject Muslim marriage because they feel that the Islamic community is not adequately enforcing certain aspects of Muslim law—such as the rule that Muslim men must maintain all their wives equally.¹²⁸ Since they are aware of these elements of Islamic law, which are reinforced by the Qur'an and years of precedent, they can select a personal law that best suits their needs and expectations. Muslim women can make plans with a great degree of certainty that these customs will not change dramatically, and can bargain within the system to change it.

Customary law does not have this body of precedent to inform women of the consequences of their choice. The parties responsible for defining customary law are those the court deems to be “likely to know of its existence.”¹²⁹ Prior to colonial times, lack of information about local customs and marriage practices did not pose as much of a problem.¹³⁰ Most Kenyans lived in the villages where the law was practiced. The Elders defined customary law and although they represented an elite, male minority, they were still at least somewhat

¹²⁵ This Section assumes that women do have a full and free choice to marry. See *infra* Part III.B.3 for a discussion of the limits on choice.

¹²⁶ Urfan Khaliq, *Beyond the Veil?: An Analysis of the Provisions of the Women's Convention and the Law as Stipulated in Shari'ah*, 2 BUFF. J. INT'L L. 1, 6–12 (1995) (giving brief history of Islam and Islamic law).

¹²⁷ See REPORT, *supra* note 74, at 21.

¹²⁸ See *id.* at 22 (reporting that Kenyan Muslims stress that “Islam requires a man to accord equal treatment and affection to all his wives”).

¹²⁹ Evidence Act, Laws of Kenya, CAP. 80 § 51(1) (1989) (“When the court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of such custom or right of persons who would be likely to know of its existence if it existed are admissible.”).

¹³⁰ Of course, since the other systems of marriage were not available, choice was lacking prior to colonization.

responsive to the needs of the community.¹³¹ Women were needed to give birth and raise children as well as work in the *shamba*, or family farm. The need to ensure that women would continue to participate in society gave men some incentives to find a balance between the desires of both genders and maintain that balance to promote harmony both in the home and in society at large.¹³²

With a large number of Kenyan men leaving their home villages for Nairobi in search of work, much of that incentive is gone. A man can leave his village and his wife behind in the *shamba* and start a new life, free of the constraints of custom, while still enjoying its benefits.¹³³ In addition, many couples now live a “modern” life in Nairobi with office jobs, fast food, and the freedom of virtual anonymity. Although these men are married under customary law, they no longer have the incentive to define customary law in a consistent way that provides for harmony in the community.

It is not surprising then that judges and magistrates (who are predominately men) and informed by cultural experts (also men) quickly “found” many “modern developments” in customary law that suited the needs of men at the expense of women.¹³⁴ In addition, new realities could be ignored when “interpreting” custom to lead to results antithetical to traditional practice. For example, although custom never required a man to notify his wife or to obtain formal consent

¹³¹ See Lona N. Laymon, Note, *Valid-Where-Consummated: The Intersection of Customary Law Marriages and Formal Adjudication*, 10 S. CAL. INTERDISC. L.J. 353, 362 (2001) (stating that tribal leaders often decide matters by consensus); see also REPORT, *supra* note 74, at 21 (stating that, historically, consent of first wife was obtained before taking additional wives).

¹³² Women traditionally could not inherit property in most Kenyan tribes. See, e.g., *Gichuru v. Gachuhi*, Civil Appeal No. 76 of 1998, <http://www.uni-bayreuth.de/departments/afrikarecht/kenya62.html>; RESTATEMENT, *supra* note 63, at 21–22. Nonetheless, as women, they were not powerless. See *infra* note 156 (describing tradition of women organizing in Kenya).

¹³³ See REPORT, *supra* note 74, at 14 (lamenting common practice among African men of taking additional wives after previously contracting monogamous marriage and deploring lack of enforcement of bigamy laws); Jane Perlez, *When Tying the Knot Goes Gordian*, N.Y. TIMES, Aug. 27, 1988, at 4 (reporting confusion resulting from illegal multiple marriages in Nairobi); see also David L. Chambers, *Civilizing the Natives: Customary Marriage in Post-Apartheid South Africa*, in ENGAGING CULTURAL DIFFERENCES, *supra* note 17, at 81, 84 (discussing urban migration of men in South Africa and noting that decline in extended family living arrangements has probably contributed to high levels of spousal abuse by African husbands).

¹³⁴ See Chambers, *supra* note 133, at 87 (discussing African National Congress’s distrust of customary elders and magistrates due to perception that they act in self-interest). For example, by 1968, customary law had changed so that a man no longer needs the consent of his family to marry, although the bride still does, see, e.g., RESTATEMENT, *supra* note 63, at 10 (for Kikuyu), 23 (for Kamba); men may marry women dramatically younger than themselves, *id.* at 11 (outlining modern development in Kikuyu custom); and men are no longer required to provide each wife with her own home, *id.* at 16 (for Kikuyu), 28 (for Kamba).

from her before taking a second wife,¹³⁵ it is hard to imagine such a practice being necessary. A man could not easily take a second wife in a small village without his first wife knowing in advance and, in the name of familial harmony, without soliciting her tolerance if not her blessing. However, the strict interpretation of customary law with regard to consent allows men to marry a second wife in secret hundreds of miles away, which although not technically in violation of the letter of customary law, certainly violates the spirit of the compromises developed over centuries.¹³⁶

To provide an example of how the lack of settled law leads to corruption of women's choices, imagine Mwasambu, a woman from a small tribe living in a remote village relatively untouched by "modern" society. In her village, all wives have their own homes and are not required to share a home with other wives. Christian missionaries have encouraged women to marry under Christian law so they will not have to "suffer" under polygamy. Although she is a Christian, Mwasambu grew up in a polygamous family and would like to have the additional help that a co-wife provides. She does not mind polygamy as long as she is in charge of her own household. Given this choice, she opts to marry under customary law.¹³⁷

What she does not know is that in other villages of her tribe men have begun to leave the village in search of work and, to save money, have begun requiring their wives to live together. When her husband does the same, she goes to the tribal elders to ask them to enforce her right to a separate home. Many of the elders have sons, or are themselves in the same predicament, so they announce a change in tribal custom allowing the practice. Mwasambu then takes her case to the local magistrate. The magistrate, having been raised and educated in Nairobi, is unfamiliar with the tribe's customs and asks to hear evidence on it. Mwasambu's only evidence is her own testimony, and the testimony of other women in her village, that wives have always had their own houses. The Elders testify that although women *usually* were given their own homes, customary law did not *require* it. The magistrate, trusting the opinion of the tribal elders more, rules that customary law does not require that men provide houses for each wife.

Had Mwasambu known that customary law did not require her husband to provide her with her own home, she would have insisted

¹³⁵ See, e.g., RESTATEMENT, *supra* note 63, at 10, 23.

¹³⁶ See *supra* note 133 and accompanying text.

¹³⁷ This is not a far-fetched notion. There is evidence that, at least historically, women were not always opposed to polygamy and, in fact, would often bring a second wife into the marriage for extra help around the family farm. See REPORT, *supra* note 74, at 21.

on being married under Christian law to ensure that she would not be forced to share control over the home with another woman. Now that she is married, however, she cannot make that choice.

This hypothetical shows how the market system breaks down with amorphous customary law. Drastic changes in customs, caused by rapidly changing environment, the intervention of the judicial system, and interpretations by elite men highlight the problem that an unfixed definition can cause women in a malleable system of customary law.

2. *Imperfect Information Due to Lack of Registration*

Urbanization and changing cultural practices have created another problem of information—knowledge of a person's marital status. In a traditional village society, knowledge as to a person's marital status or the addition of a wife was not difficult to obtain. Communities were small enough that everyone knew through personal observation, or could easily ascertain, whether a person was married, how many wives he had, and how those wives were maintained. With urbanization, determining whether a man is already married, and under what system, is more difficult.¹³⁸ Adding to the confusion is the fact that customary marriages are not registered. There is no way for a potential wife to determine whether a man has another wife tucked away somewhere.¹³⁹

Consider a modern-day situation. A man and woman living in Nairobi wish to marry. He claims to be single and happy to remain monogamous but wishes to marry under the law of his people, the Kikuyu, instead of under civil law. Knowing that he is unlikely to take a second wife in Nairobi, where the practice is uncommon, she agrees to a Kikuyu marriage. After she is married, she finds out he has another wife in his hometown. She cannot divorce him because both of his marriages are polygamous; having a previous wife is thus not grounds for divorce.

Also, since customary law does not *require* notification or consent of other wives,¹⁴⁰ he can begin an affair and marry another woman, and she still cannot get a divorce. If he tires of her, he can simply leave her for another woman. As long as he continues to maintain the children and visit occasionally, she has no grounds for

¹³⁸ See *supra* note 133 and accompanying text.

¹³⁹ A woman might travel to the man's village, a likely place to find a first wife, but that can entail great expense, and she still may not discover a wife living elsewhere.

¹⁴⁰ See *supra* note 135 and accompanying text.

divorce.¹⁴¹ As he is legally required to maintain his children regardless of whether he remains married to their mother,¹⁴² it costs him little to refuse divorce, and he gains the satisfaction of maintaining sexual control over her.

Even if she chooses to marry under a form of monogamous marriage, her lack of information still could harm her. If he had a wife in the village he could be prosecuted for bigamy during his lifetime, but this very rarely occurs.¹⁴³ If she did not find out about his first wife during his life, at his death she would learn that her marriage was a nullity.¹⁴⁴ A judge would then have to decide how to distribute the assets of the deceased. There are no winners in this situation. Either the woman who worked her life to build a business or buy a house in what she thought was a monogamous marriage loses everything, or the woman who had been maintaining land in the village, expecting a full share gets half of that inheritance taken away by a wife of whom she never knew and is left with little to support herself and her children.¹⁴⁵

The existence of cohabitation marriages further exacerbates this problem. A man can begin an affair, live part-time with his mistress, and have children. If he is married under a system of polygamy, this secret affair can become a marriage without even the traditional openness of a polygamous customary marriage.

¹⁴¹ These acts do not constitute grounds for divorce under Kikuyu customary law. RESTATEMENT, *supra* note 63, at 20 (listing as grounds for divorce desertion and failure to maintain wife and children but specifically excluding adultery by husband as grounds for divorce).

¹⁴² Children Act §§ 92–94, Act No. 8 of 2001, Kenya Gaz. Supp. No. 95 (Gov't. Printer, Nairobi, Jan. 4, 2002).

¹⁴³ REPORT, *supra* note 74, at 14.

¹⁴⁴ See Marriage Ordinance, Laws of Kenya, CAP. 150 § 35(1) (1962) (“No marriage in Kenya shall be valid . . . where either of the parties thereto at the time of the celebration of such marriage is married by native law or custom to any person other than the person with whom such marriage is had.”).

¹⁴⁵ Kenyan law is unclear as to who would prevail in this situation. The Law of Succession requires that the wife or wives of the deceased must be provided for in the deceased's will or if the deceased died intestate. Law of Succession Act, Laws of Kenya, CAP. 160 §§ 26–29 (1981). The provisions for wives when the deceased died intestate, however, require that the man have married “under a system of law permitting polygamy.” *Id.* § 40. Some courts prior to the enactment of the Law of Succession Act held that the second marriage after a *Christian* marriage is not a legitimate marriage and therefore the second “wife” has no claim to an inheritance. See, e.g., Re Ogola's Estate, 1978 Kenya L. Rep. 18 (misc. civil case 19 of 1976); Re Ruenji's Estate, 1977 Kenya L. Rep. 21 (misc. civil case 136 of 1975). Cf. Mairura v. Anginda, Application No. 10 of 1958 (S. Nyanza Dist. Registry No. 25 of 1957), in RESTATEMENT, *supra* note 63, at 194 (recognizing wife's dissolution claim and allowing some latitude in definition of marriage, primarily because husband, who was claiming sanctity of their monogamous marriage, had taken three other wives).

3. *Lack of Meaningful Choice*

Even assuming full information, women still must have a meaningful choice when entering into a marriage or information will not help them. There are several, seemingly neutral, factors in Kenya that place limitations on women's choices—both the choice of which marriage to enter into and the more fundamental question of whether she wishes to marry at all.¹⁴⁶

Money can play an important part in limiting a couple's ability to choose the type of marriage they prefer. Although the actual religious or civil ceremonies are inexpensive or free,¹⁴⁷ the expected social rituals surrounding the wedding can make it quite expensive and outside the financial means of many couples. My friend Sylvia, a Kikuyu woman, was married in a Christian ceremony. Custom required that the wedding feast be open to anyone with any connection to her or her husband. They ended up with over 300 "guests" at their wedding. Instead of suffering the public shame of not having enough food to feed everyone they know, many couples may opt to be married informally, through cohabitation leading to customary law,¹⁴⁸ so as not to make public their lack of means.

Another financial burden that limits a couple's choice of marriage is that in a customary marriage, the groom and his family must pay a suitable "bride price" to the bride's family.¹⁴⁹ If he cannot raise the money, the father of the bride may not allow the wedding to take place, and the couple may have no choice but to elope and register in a civil ceremony or begin living together in hopes that a cohabitation marriage will be recognized even if they both would prefer to be married under customary law.

Women also can feel forced into a marriage that they do not want, or feel pressured to accept a form of marriage that they do not freely choose, because their bargaining power has been reduced by seemingly neutral laws. For example, abortion is illegal in Kenya, so a

¹⁴⁶ There are many more factors with the potential to affect choice than can be discussed here. This Note discusses two examples that, since they are not the most obvious, may remain hidden: the impact that limited means and "neutral" laws can have on women's wedding options serve as examples of where to look for possible problems in the system. There are obviously greater problems, such as poverty leading to dependence on a husband or lack of education for women, but detailing and attempting a solution to these systemic problems lies far beyond the scope of this Note.

¹⁴⁷ Marriage Ordinance § 9 (requiring registrars to supply notice forms gratuitously); § 40 (providing for waiver of fees upon proof of poverty).

¹⁴⁸ See *supra* Part II.F. (outlining cohabitation marriage).

¹⁴⁹ In Kikuyu custom, the bride price is called *ruracio* and can consist of livestock, spears, shields, honey, blankets, and sheets. See RESTATEMENT, *supra* note 63, at 13–14. Without at least partial payment of *ruracio*, the marriage is not valid. *Id.* at 15.

woman who finds herself pregnant is forced to carry the child to term.¹⁵⁰ This alone may create enough social stigma and familial pressure that she feels compelled accept an offer of marriage from the father. Since he likely will know of her need to be married, and therefore of her reduced bargaining power, the father can insist on a form of marriage that benefits him.

In addition to social pressures, the Children Act¹⁵¹ incidentally gives more bargaining power to men. This act requires child support from the father only if the parents are married or the father has recognized the child.¹⁵² Since a father only acquires responsibility for his child by taking affirmative steps to recognize the child as his own, he can withhold that recognition in order to contract a marriage with the child's mother on his own terms. If she wants, or likely needs, financial support to raise their child, she will be forced to agree to his terms.

Also, if a woman wishes to marry, and otherwise would withhold her consent to cohabit with a man without the protections formalized marriage provide, an unplanned pregnancy may force her into cohabitation. She then will be forced to rely on the hope that the union will be recognized by the courts as a cohabitation marriage, if that is the only form of recognition the father will agree to.¹⁵³

IV

FINDING SOLUTIONS THAT RESPECT THE BALANCE

The lack of information and choice leads to inefficiencies in the functioning of the marriage market, and therefore in its ability to protect both women and cultural groups. From a Western perspective, it may seem that the easiest way to solve these problems is to outlaw polygamy and set up a single marriage law, applicable to all. This would end confusion, protect women from being forced or tricked into polygamous unions, and give men no leverage for abuse within the legal system when contracting a marriage. This solution, however, disrupts the balance of power because it gives cultural minorities no right to define their practices and ignores the importance of an individual's

¹⁵⁰ The Penal Code, Laws of Kenya, CAP. 63 §§ 158–160 (1985).

¹⁵¹ Children Act, Act No. 8 of 2001, Kenya Gaz. Supp. No. 95 (Gov't. Printer, Nairobi, Jan. 4, 2002).

¹⁵² Children Act § 90 (requiring financial contribution if parents are married and if not, only when father has "acquired parental responsibility for the child"); Children Act § 94 (allowing court to make order for payment of child support for any child whom parent has accepted into the family).

¹⁵³ See *supra* Part II.F for a discussion of the uncertainty in cohabitation marriage.

culture in shaping his or her identity.¹⁵⁴ External protections are necessary to ensure that cultural groups can carve out niches in society, in which they are free to define for themselves the meaning of their cultural identity. It is patronizing to women in cultures where polygamy is practiced to assume that if these women truly were educated and empowered they would not want this system.¹⁵⁵ While this indeed may be true, there is no way to test this hypothesis because whether women in a society are fully educated and empowered is a subjective, unverifiable claim. One step towards empowerment, however, is to ensure that decisions regarding the practice are made by the women involved.¹⁵⁶

The Kenyan system, providing for multiple choices among marriage laws, creates a market for marriages that is beneficial both to those concerned with protecting the rights of cultural minorities—as it allows each group to maintain their own system of laws—and to women who can use their choice to select the personal law with which they identify and advocate for change if desired. However, there are flaws in the system that prevent the market from functioning efficiently.¹⁵⁷ The market gives adequate external protections, but some regulation of culturally defined personal law is needed to ensure that there are no internal restrictions on women's choices. This Part suggests solutions that address some of those flaws to help ensure that the results of the marriage market truly reflect the wishes of both cultural groups and the women within those groups.

A. *Registry of All Marriages to Combat Lack of Information*

Imperfect information about a man's marital status¹⁵⁸ is perhaps the simplest problem to remedy. One solution is to create a centralized database for registration of marriages, enforce the registry provisions of the existing legislation, and enact a Customary Marriage Ordinance requiring the registration of all customary marriages.

¹⁵⁴ See *supra* note 23 and accompanying text (discussing theories of identity).

¹⁵⁵ See, e.g., Martha Minow, *About Women, About Culture: About Them, About Us*, in *ENGAGING CULTURAL DIFFERENCES*, *supra* note 17, at 252, 256–57 (arguing that questioning choice to engage in “traditional” practices in fact denies women choices).

¹⁵⁶ Kenyan women have a tradition of organizing around their common interests and played a part in shaping the struggle for independence from colonial rule. See Mumbi Mathangani, *Women's Rights in Kenya: A Review of Government Policy*, 8 *HARV. HUM. RTS. J.* 179, 183 (1995). Some women in Kenya may choose to advocate for a tradition that includes polygamy because they appreciate the extended family support it provides or because they value the history of their culture and do not wish to see it changed.

¹⁵⁷ See *supra* Part III.B.

¹⁵⁸ See *supra* Part III.B.2.

First, by creating a central database, government officials and Kenyan citizens will be able to direct inquiries to a central location and verify the marital status of any Kenyan prior to the issuance of a marriage certificate. Forms of statutory marriage in Kenya already require registration and require the marriages to be reported to the Registrar General,¹⁵⁹ therefore the new requirement will not create a substantial administrative burden. Other ordinances provide for the creation of a system of registry but do not mandate registration.¹⁶⁰ To further the goal of complete information, these optional provisions should be made mandatory to create a system of full registration.

In addition, customary marriages pose a special problem to the goal of complete information since no law in Kenya requires the registration of customary marriages. If this goal is to be realized, that problem must be remedied by an act of Parliament. A customary marriage ordinance must be passed that, at a minimum, requires registration of customary marriage like the Muslim Registration Ordinance.¹⁶¹ The proposed ordinance could be modeled after Ghana's Customary Marriage and Divorce (Registration) Law, which requires public notification prior to marriage and registration with the local Registrar.¹⁶² The law should also contain a provision for the filing of registrations with the Registrar General.¹⁶³

Once all marriages are registered and collected in a central location, the problem of asymmetric information can be more easily remedied. The waiting period required for public notification under the Marriage Ordinance¹⁶⁴ could be extended to all monogamous forms of marriage to give local registrars or ministers time to contact the Registrar General's office in order to ascertain whether either party is already married, and therefore is attempting to violate the law by marrying again. This can be accomplished by simply requiring local

¹⁵⁹ Marriage Ordinance, Laws of Kenya, CAP. 150 § 32 (1962) (requiring all marriages under Marriage Ordinance be registered and transmitted to Registrar General); Mohammedan Marriage and Divorce Registration Ordinance, Laws of Kenya, CAP. 155 § 9 (1962) (requiring same for Mohammedan marriages).

¹⁶⁰ African Christian Marriage and Divorce Ordinance, Laws of Kenya, CAP. 151 § 11 (1962) (permitting enactment of registry and reporting system that can be mandatory for African Christian Marriages); Hindu Marriage and Divorce Ordinance, Laws of Kenya, CAP. 157 § 6 (1962) (allowing same for Hindu marriages).

¹⁶¹ See Mohammedan Marriage and Divorce Registration Ordinance, Laws of Kenya, CAP. 155 (1962).

¹⁶² Provisional National Defence Council Laws 112, §§ 1-4 (1985) (Ghana) (requiring public notification and registration). South Africa has a similar Customary Marriages Act requiring that all marriages be registered. See Chambers, *supra* note 133, at 90.

¹⁶³ Registration of all marriages also will require a massive registration drive, especially in rural areas, to ensure that all current marriages are registered and to educate the population that all future marriages are required to be registered as well.

¹⁶⁴ Marriage Ordinance §§ 8-11 (requiring notification of marriages).

registrars to include, with the list of new marriages they are already required to send the Registrar General at regular intervals, a list for inspection of parties intending to be married.¹⁶⁵ For polygamous forms of marriage, the ordinance could also require notification and a waiting period¹⁶⁶ to ensure that neither party has been married under a system requiring monogamy, as a previous monogamous marriage would nullify the polygamous marriage.¹⁶⁷

B. Formalizing Customary Law

As registration only affects certain procedures surrounding marriage, but leaves to cultural groups the freedom to define and change substantive law, it is likely to be relatively uncontroversial. However, registration combats only half of the problem that lack of knowledge creates in the marriage market. Lack of information as to the substance of customary law is another, perhaps greater, problem.¹⁶⁸

To ensure that customary laws are not "interpreted" to cater to the needs of those in power, creating uncertainty about the law that can be used by those in power to exclude women's rights, it is necessary to define customs and traditions to a certain extent—national legislation or cultural groups themselves can accomplish this. This definition would act as a prohibition against the internal group practice of altering laws to suit the needs of elite males. It is important to maintain flexibility in these definitions to recognize that cultures and customs do change, but some structure is necessary to ensure transparency in the law, giving women the information they need to make an informed decision. Only by putting a definition in the public arena as notice to members of the community can a cultural practice truly be accepted, or challenged, by all its members.¹⁶⁹

¹⁶⁵ The problem may be cured by setting up the national registry for all marriages and requiring parties who wish to marry to check for themselves whether their intended is being truthful about his marital status. This puts an onerous burden on rural Kenyans and is unlikely to be utilized because it introduces an element of suspicion into relationships.

¹⁶⁶ This will require amending the Mohammedan Marriage and Divorce Registration Ordinance, Laws of Kenya, CAP. 155 § 3 (1962). See also text accompanying *supra* note 97.

¹⁶⁷ Mohammedan Marriage, Divorce and Succession Ordinance § 5 (stating that Mohammedan law has no application to marriages contracted *after* monogamous marriage); Marriage Ordinance, Laws of Kenya, CAP. 150 § 37 (1962) (precluding anyone married under Marriage Ordinance from contracting legal customary marriage); *Re Ogola's Estate*, 1978 Kenya L. Rep. 18 (misc. civil case 19 of 1976) (refusing to find customary marriage because husband previously married under Marriage Ordinance); *Re Ruenji's Estate*, 1977 Kenya L. Rep. 21 (misc. civil case 136 of 1975) (same).

¹⁶⁸ See *supra* Part II.E. While the lack of national codification of Mohammedan substantive law may also raise problems, the quasi-codification created by centuries of precedent helps to alleviate that problem. See *supra* notes 127–28 and accompanying text.

¹⁶⁹ See *supra* Part I.

Critics have argued against the codification of customary law on the grounds that it must remain amorphous to allow the law to change over time and respond to the needs of the community. When an issue comes to court, the court should use the help of a neutral “expert” witness to determine cultural practices as they currently exist.¹⁷⁰ While this argument may be initially appealing because it could lead to the incorporation of human rights norms into traditional systems by local courts, in reality this is not the case. First, customary law is not interpreted by neutral experts but rather by tribal elders with their own agendas. Judges also often use the law to manipulate customary law to their own ends or, at the very least, interpret it with a masculine gaze.¹⁷¹

In addition, a closer examination of Kenyan customary law reveals that the intervention of judges, the practice of judicial notice, and reliance on existing precedent have led to a state in which customary law has been fixed to a large extent by national judges and academics. An alternative system, requiring some written guarantees at a local level, may be more true to the idea of a dynamic system of law than the current system of national judge-made customary law.

The mere process of bringing cases in front of a district magistrate and the possibility of appeal to a national court, instead of leaving decisions to village elders, interrupts the fluidity of customary law. Judges work within a system of precedent, or *stare decisis*.¹⁷² They are trained to preserve the status quo until a legislative body instructs them to make a change in the law. While the system in Kenya allows for change in customary law, any change must overcome the inertia of *stare decisis* before it may be affected.¹⁷³

In addition to *stare decisis*, evidence rules in Kenya require courts to “take judicial notice of . . . all written laws, and all laws, rules

¹⁷⁰ See Laymon, *supra* note 131, at 362.

¹⁷¹ See *supra* notes 134–36 and accompanying text (discussing decisionmakers and changes in customary law); Madhavi Sunder, *Cultural Dissent*, 54 *STAN. L. REV.* 495, 504 (2001) (“[T]he real question for law is not how to make possible the ‘free exercise of culture,’ but rather, whether the self-proclaimed guardians of culture are excluding other members of the culture from making and contesting cultural meanings.”).

¹⁷² See Laymon, *supra* note 131, at 362 (discussing critique of *stare decisis* as infringing on flexibility of customary law).

¹⁷³ *Cf.* *Njoki v. Mutheru*, 6 Decisions Ct. App. Kenya 30, 46 (Civil Appeal No. 71 of 1984) (“The onus of proving customary law marriage is generally on the party who claims it.”). As those bringing the action are more likely to disagree with the interpretation of customary law, the burden of proof will usually be on the party trying to alter the understanding of customary law.

and principles, written or unwritten, having the force of law.”¹⁷⁴ This allows, or requires,¹⁷⁵ courts to sidestep trying the issue of what constitutes current customary law and to rely instead on existing written precedent, a form with which they may be more familiar. This may explain why courts often do not mention the source of the customary law they apply¹⁷⁶ or why they speak of it in terms of “settled law.”¹⁷⁷ In a misguided effort to respect customary law some judges, distrustful of oral evidence or unwilling to make up their own version of customary law, simply reach back in time to a source that gives them a concrete definition of a tribe’s custom. Two cases from 1998 cited with approval the trial court’s use of the Restatement of African Law, compiled in 1968, as their source of customary law.¹⁷⁸ Even if courts had more recent legal compilations, the reliance on literature authored by outside intellectuals is still the most removed from, and therefore the option least responsive to, the changing needs of the cultural community.

These factors have led to a system where customary law is still codified at a national level, only by the judiciary rather than the legislative branch. Given the judiciary’s power of judicial notice and its respect for precedent, customary law is at least as fixed, if not more, than a national codification of customary law, since the legislature may be more responsive to change through lobbying by influential cultural groups.

If the argument against guaranteeing customary law in writing is based on keeping custom dynamic, it fails in the Kenyan system. Without justification for maintaining an unwritten code, the need to provide transparency to ensure full information in the marriage market (and the protection of both women and cultural self-definition) suggests that customary law can be written, in some form, to

¹⁷⁴ Evidence Act, Laws of Kenya, CAP. 80 § 60(a) (1989). Judicial notice is not unique to Kenya; Nigeria also provides for judicial notice of custom. *See* Evidence Act, 8 Laws of Nigeria, CAP. 112 § 14 (1990).

¹⁷⁵ It is likely that judicial notice is only permissive since other provisions in the Evidence Act say that evidence of customs and practices are relevant and admissible. *See* Evidence Act, Laws of Kenya, CAP. 80 § 13 (1989).

¹⁷⁶ *See, e.g., Anyango v. Oyugi*, 1979 Kenya L. Rep. 279, 280 (Civil Appeal No. 57 of 1978) (using phrase “as I understand it” to indicate judge’s source of customary law). This case is particularly interesting because in the lower court the magistrate had applied *statutory* law and had not looked into customary law so there could be no lower court finding of fact as to custom raising the obvious question of where the court of appeal’s “understanding” had come from. *Id.*

¹⁷⁷ *See, e.g., Gichuru v. Gachuhi*, Civil Appeal No. 76 of 1998 (“[I]t is settled law that under the Kikuyu custom land is inherited by sons.”), <http://www.uni-bayreuth.de/departments/afrikarecht/kenya62.html>.

¹⁷⁸ *See id.*; *Chira v. Gichuhi*, Civil Appeal No. 30 of 1998, <http://www.uni-bayreuth.de/departments/afrikarecht/kenya43.html>.

achieve these goals. This is not to say, however, that national codification is the only solution to provide more transparency.

With over thirty different ethnic groups in Kenya, the codification of customary law at a national level will infringe too greatly on each group's ability to define their marriages according to their own custom.¹⁷⁹ Going past the obvious option of national legislation, however, a solution can be found that provides transparency while still protecting the choice of customary marriage as defined by one's own community. For example, the hypothetical customary marriage ordinance, suggested previously to ensure knowledge of marital status¹⁸⁰ could also contain a provision requiring that each community set out the substantive provisions of the marriage contract in their registration form.¹⁸¹ Every couple that wishes to marry under customary law must register with their local registrar where they will be informed of the content of the marriage contract, much like the vows outlined in the Marriage Ordinance.¹⁸² If a community decides they wish to change customary law, they may alter their definition of marriage through their own internal mechanisms¹⁸³ and effect the change by altering the marriage registration forms for subsequent marriages.¹⁸⁴ By requiring some codification, the majority can step in to protect the rights of women while still leaving cultural groups free to define personal law for themselves.

C. Ensuring Choice

While the suggested customary marriage ordinance is obviously a working model, it demonstrates that it is possible to provide transparency to ensure adequate information and still protect cultural groups' ability to define law for themselves. The last, and most diffi-

¹⁷⁹ This also will lead to a system that inadequately protects the rights of cultural minorities because they will not have the option to marry according to *their own* customs, as opposed to a concoction of all customary law.

¹⁸⁰ See *supra* note 162 and accompanying text.

¹⁸¹ Obviously terms like "community" will have to be defined but the particulars of this aspect of the law are outside the scope of this Note.

¹⁸² Marriage Ordinance, Laws of Kenya, CAP. 150 § 29(b) (1962) (requiring parties to affirm their understanding that marriage is monogamous and cannot be dissolved without court judgment).

¹⁸³ Traditional African legal systems did contain quasi-legislative bodies comprised of Elder councils called together at times of changed circumstances. See Juma, *supra* note 46, at 470–71. The market will provide that women have some voice in these changes since their consent is needed to perpetuate the customary practices. See *supra* Part III.A. These internal mechanisms, of course, also should be free of internal restrictions on women's voices.

¹⁸⁴ To ensure that contract expectations are respected, the new definition of marriage in a tribe should not affect previously contracted marriages.

cult, piece of the puzzle for a functioning market is ensuring that women are free to choose a marriage system. Problems caused by laws that infringe on women's bargaining power, such as child support laws,¹⁸⁵ can be altered on a national scale to ensure robust choice.¹⁸⁶ Other issues that affect women's choices, like poverty, are not as easily overcome.¹⁸⁷

Whether or not one can pay for the type of wedding he or she wants is one of the more superficial impacts poverty can have on a woman's voice.¹⁸⁸ Poverty and lack of education have far greater impacts on the choices available to women. The less financially independent women are, the more they depend on remaining in their community's good graces. One could argue that without the ability to support themselves independently women feel that they have no choice but to accept the "harmful" cultural practices that their family and community encourage. Given the "oppressive" nature of the practice, the argument goes, they could not have freely chosen it.¹⁸⁹ It is this type of argument that leads Western feminists to argue that cultural practices with "harmful results" cannot be accepted.¹⁹⁰

The problem with pointing to results as indicators of choice is that everyone is susceptible to social pressure. One could argue that a polygamous marriage is no more a result of social pressures than voluntarily having bones broken, fat cells sucked out, or silicone implanted in the name of beauty.¹⁹¹ Both practices seem to be results

¹⁸⁵ See *supra* note 152 and accompanying text.

¹⁸⁶ For example, if a woman can prove a sexual history with a man the law could create a presumption of parental responsibility rebuttable by a blood or DNA test. Requiring the party in error to pay for the expensive tests would discourage women from bringing frivolous claims and fathers from denying paternity.

As another example, if women commonly enter customary marriages through cohabitation, without making the choice to marry, they lose the opportunity to select their own personal law and their voices will have no part in shaping that law. For the free market system of personal law to work, it is necessary that an individual's decision to adopt his or her culture's personal law is a conscious and informed one. Therefore, the uncertain practice of recognizing cohabitation marriages should be stopped. Again, registration drives and educational campaigns will be needed to ensure that women know what is required for a valid marriage.

¹⁸⁷ See *supra* notes 146–49 (discussing some limits money can have on choice).

¹⁸⁸ See *supra* notes 147–49.

¹⁸⁹ See Coomaraswamy, *supra* note 4, at 495 (outlining argument that social and economic forces pressure widows into practice of performing *Sati*, suicide on husband's funeral pyre).

¹⁹⁰ See, e.g., Shweder, *supra* note 17 (describing Western responses to African women who support practice of female circumcision).

¹⁹¹ See, e.g., Minow, *supra* note 155, at 256 (citing argument that all preferences, desires, and choices are formed within social experience and that therefore Muslim woman who claims that she wants to wear veil is no more impaired in her choice than Western woman who wants breast augmentation).

of women's free choice being corrupted by societal or peer pressure. In every culture, there always will be an argument that due to social or economic conditions, women's (or anyone's) choice is never truly free. The existence of a practice that seems unfamiliar or unhealthy is not evidence enough, in itself, to prove that a cultural practice is not embraced by the women who engage in it.

Instead of focusing on results we should look to the process. Women prohibited from owning or inheriting land, from moving about freely or working outside the home if they choose, and from having access to education are indicators that processes for ensuring choice are fundamentally flawed.¹⁹² If women have access to land, jobs, and education, at least to the same extent as men, the process may be sufficient to ensure the possibility of choice, even if Western feminists disagree with the outcome.¹⁹³ This may explain why liberals may be more comfortable with an educated and employed Western woman choosing to have breast augmentation than an uneducated African woman entirely dependent on her family and community choosing to be circumcised. This is not because Western women are impervious to social pressure or because cosmetic surgery is not traumatic or violent to a woman's body,¹⁹⁴ but rather because we can be more certain that the woman choosing breast augmentation had a choice to make. While the Western woman undoubtedly is influenced by a cultural ideal of beauty, her survival does not depend on meeting that ideal. She can work, feed, and house herself, marry and have children without the breast augmentation. If the African woman were to be thrown out of her home and community or be unable to marry, and therefore be left homeless after her parents die, as a result of refusing to be circumcised (or refusing to enter into a polygamous marriage) then she does not have the same choice to make. If one's survival depends on accepting a cultural practice, it is not a choice.

¹⁹² See generally Coomaraswamy, *supra* note 4 (detailing different violations of women's rights that make it difficult or impossible to exercise choice).

¹⁹³ See, e.g., Adrien K. Wing, *Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-first Century*, 11 J. CONTEMP. LEGAL ISSUES 811, 850 (2001) (reporting anecdotal evidence that educated female teachers in rural Zimbabwe refused to tolerate polygamous marriage). *But see* Shweder, *supra* note 17, at 218 (discussing case of African woman returning to Sierra Leone from United States after college graduation to be circumcised voluntarily).

¹⁹⁴ See Claudia Kalb, *Our Quest to be Perfect*, NEWSWEEK, Aug. 9, 1999, at 52, 56, 57 (discussing women who feel pressure to have cosmetic surgery to keep youthful appearance and their jobs and reporting that in 1998 over 1500 patients 18 and under have had liposuction and 1840 had breast augmentation). These surgeries are not entirely safe. *Id.* at 58-59 (reporting lack of qualification of many plastic surgeons, horror stories about adverse side effects, including deaths, and estimating that revision rate for cosmetic surgery might be as high as one in ten).

Again the focus of the inquiry must be on the woman's *choice*, not the result. At some point, a woman's decision to embrace her culture must be seen as a choice and not as a result of cultural brainwashing.

This is not to say that any practice can be justified because women have not mobilized against it. The proper structures must be in place to give a woman the opportunity and information she needs so that she can decide for herself what is in her best interest. Society then should respect the choices she has made. The requirement of choice does not mean that an Ivy League education is a prerequisite for providing input on cultural practices. The ability to choose always will vary among societies, depending on factors such as economic viability, cultural hegemony, and the extent of religious control over private life. Finding the baseline of choice needed to determine that cultural practices are really accepted by women is not easy, but ensuring options are available to women, such as the marriage market, is a way of providing choice that helps to ensure (and prove to the outside world) that a woman's choice is just that—her choice.

CONCLUSION

Using scholarship from the current debate regarding the rights of cultural minorities and the rights of women, this Note shows that the Kenyan legal system has set up a structure that has the potential to find the right balance between cultural and majority control. The marriage market makes two important contributions to finding that balance: It allows cultural minorities to define for themselves the personal law that will govern their group and gives women bargaining power through the ability to reject laws they find unfavorable, thereby ensuring they will have a say in the definition of cultural law.

The Kenyan system is in no way perfect. Imperfect knowledge and constraints on choice lead to inefficiencies in the market, which make it difficult to tell whether the results accurately represent the will of women within the system. This Note points out a few of these inefficiencies, but many more remain. The marriage market, on its own, is not sufficient to ensure the protection of women's rights. Access to property, education, and the democratic process are all necessary to ensure full and free choice. Having options with regards to personal law merely compliments these other forms of ensuring choice. It is a way of amplifying choice through structural legal changes.

The model, therefore, provides a good starting point for analyzing choice. Instead of focusing on results, or as one scholar put it,

the “yuck response,”¹⁹⁵ the marriage market gives a concrete framework in which to analyze the process of choice in contracting marriage. Analyzing the process, as opposed to the outcome, helps test whether the right balance has been struck between prohibiting internal restrictions in cultures (that limit the voice of less powerful members of a group) and providing external protections that ensure the right of minority cultures to self-define. This analysis can focus the examination of other cultural practices that often have been debated in the context of feminism and multiculturalism, such as female circumcision or property rights. This type of analysis should avoid the criticisms on both sides of the debate—that women’s rights are being ignored and that cultural rights of minorities are not adequately protected.

There are many countries like Kenya where many different ethnic and religious groups struggle for the right to define the law that governs their group. Oftentimes large segments of the population are torn between different facets of their identity—race, tribe, religion, and nationality. Countries struggling to protect different ethnic or religious populations while still maintaining protections for those who are less powerful within their own group should consider designing a system of personal law that allows members of cultural minorities to choose between the laws of a group with which they identify or the laws of the national majority.

¹⁹⁵ Shweder, *supra* note 17, at 222.

