

## Woman-to-Woman Marriage: A Cultural Paradox in Contemporary Africa's Constitutional Profile

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**Abstract:** *The promulgation of several new Constitutions in Africa came with a paradigm shift in the official perception of second generational rights. For example, the Constitution of Kenya, 2010 enshrines the right to culture and family. Such a change in outlook has a special significance, as it intimately affects current institutions, in their work-orientation. Conflicts of approach frequently affect the working of such institutions, especially in light of new constitutional commitments.*

*Woman-to-woman marriage is one of the many forms of cultural practice recognised by some communities in Africa. Although this form of marriage is recognised by communities in several countries, there is no self-evident principle governing the different approaches adopted by the Courts, in adjudicating disputes relating to this form of marriage. We seek to demonstrate that the difference in constitutional and statutory frameworks governing these countries has occasioned this difference in approaches.*

*This article seeks to elucidate the nature of this unique form of customary marriage, with special focus on Kenya, by firstly, giving the overview of international and domestic laws with regard to the right to culture and family, in relation to the raison d'être of this practice. Secondly, we will provide a synopsis of the concept of woman-to-woman marriage, its recognition in certain communities, and the purpose for entering into such union. Thirdly, we will carry out a comparative analysis in which we consider the Constitution, statutory law and case law in Kenya, Tanzania and Nigeria, in relation to woman-to-woman marriage. In conclusion, we draw analogies from elements in international law, which aim at protecting cultural rights, such as the right to practise this form of marriage.*

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## A. Introduction

The African scene of governance, since the advent of independence from colonial rule in the 1950s and 1960s, has evolved to its current phase, with the incremental adoption of libertarian Constitutions that perceive the State as a vehicle of service to, rather than rule over, the people. In the *genre* of the new governance charters is the Constitution of Kenya, 2010: an elaborate document of fundamental rights, which proclaims new values, and asserts unambiguous limitations to the exercise of public power, placing the *judicial organ* at the very centre of the entire scheme of governance.<sup>1</sup>

Certain terms of Kenya's Constitution – as is also the case with the new generation of African constitutions – that are destined to lie at the very core of the incidence of legal disputes, are “*people-oriented*,” and entail both individual and communal dimensions (and these have a distinct bearing on *culture*). Kenya's Constitution, on “responsibilities of leadership”, provides that:<sup>2</sup>

*“Authority assigned to a State officer –*  
*a) is a public trust to be exercised in a manner that....*  
*b) vests in the State officer the responsibility to serve the people, rather than the power to rule over them.”*

And it provides, in relation to the role of Parliament, that:<sup>3</sup>

*“The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament.”*

The centrality of “the people” emerges also from the Constitution's stipulation on “*principles of executive authority*”:<sup>4</sup>

*“Executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.”*

The people's standing is to be underwritten by a *judicial authority* which “is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution”.<sup>5</sup>

The authors of this article perceive this “people-focus” of the Constitution as an ideal premise from which to consider the “cultural theme;” but beyond this level of argument, this element has been expressly consolidated into the “*rights-focus*” of the Constitution, with specific provisions on *culture* and *family*. Culture, in the context of this article, has a

1 Jackson Ojwang, *Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratising Constitutional Order*, Nairobi 2013, p. 29.

2 Article 73(1).

3 Article 94(1).

4 Article 129(2).

5 Article 159(1).

standard meaning: by the dictionary,<sup>6</sup> “the customs, ideas, and social behavior of a particular people or group.” And by the UNESCO Universal Declaration on Cultural Diversity,<sup>7</sup>

*“culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs...”*<sup>8</sup>

The said UNESCO Declaration, which is in tune with Kenya’s Constitution,<sup>9</sup> integrates practices of *cultural diversity* with *human-rights safeguards*:<sup>10</sup>

*“The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples.”*

By Kenya’s Constitution, the safeguards for culture are categorically laid out:<sup>11</sup>

1. *“This Constitution recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.*
2. The State shall –
  - a) promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage....”

In more specific terms, the Constitution provides:<sup>12</sup>

1. “Every person has the right to use the language, and to participate in the cultural life, of the person’s choice.
2. A person belonging to a cultural or linguistic community has the right, with other members of the community –
  - a) to enjoy the person’s culture and use the person’s language; or
  - b) form, join and maintain cultural and linguistic associations and other organs of civil society....”

6 *Angus Stevenson and Maurice Waite*, Concise Oxford English Dictionary, Oxford 2011, p. 349.

7 Adopted by the 31<sup>st</sup> Session of the General Conference of UNESCO, Paris, 2 November 2001.

8 Fifth preambular paragraph.

9 Article 2(5) of the Constitution provides that “The general rules of international law shall form part of the law of Kenya.”

10 Article 4 of the UNESCO Universal Declaration on Cultural Diversity, 2001.

11 Article 11.

12 Article 44(1), (2).

The Constitution provides separately for the elemental social unit which, frequently, is culture-guided: the *family*.<sup>13</sup> Of the family, the Constitution declares:<sup>14</sup>

*“The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.”*

Even as it is recognised that the Constitution is committed to safeguarding current cultural practices, there is a potential contretemps in its prescriptions on the *family* institution – and this will raise both juristic and academic questions bearing on the safeguards for *culture*. The Constitution provides:<sup>15</sup>

*“Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.”*

Such a provision (Article 45(2)) would prove conflict-prone, especially in countries far-advanced in the articulation of the human rights of homosexuals;<sup>16</sup> but in Africa, and in the context of this article, it raises immediate questions as to the standing-in-law of the woman-to-woman marriage, a quite widespread *cultural practice*.<sup>17</sup> There is, of course – as will be clear from this account – a technical distinction between the homosexual relationships, and the woman-to-woman marriage, which only brings two women into a social and symbolic, marital pairing-off. Although a number of researchers have conjectured that the elemental makings of sexuality may have a role in the woman-to-woman marriage,<sup>18</sup> the definitive

13 Article 45.

14 Article 45(1).

15 Article 45(2).

16 Evolutions in the judicial approaches to this question in the United States are clearly discussed in Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court*, New York 2008, pp. 214 – 222. (See note. 46, below).

17 A considerable number of social-scientific and legal researchers have shown this cultural practice to obtain among numbers of African communities: Balong in Cameroon; Dinka in South Sudan; Fon in Nigeria; Gusii in Kenya; Igbo in Nigeria; Kalaban in Nigeria; Kalenjin in Kenya; Kamba in Kenya; Kikuyu in Kenya; Kuria in Kenya and Tanzania; Lovedu in South Africa; Nuer in South Sudan; Zulu in South Africa. See: C.O. Akpangboa, *Woman-to-Woman Marriage and the Repugnancy Clause: A Case of Putting New Wine into Old Bottles*, *Journal of Legal Pluralism* 88 No. 14 (1977), pp. 87-95; Jean.R. Cadigan, *Woman-to-Woman Marriage: Practices and Benefits in Sub-Saharan Africa*, *Journal of Comparative Family Studies* Vol. 29 No. 1 (1998), pp. 89-98; Kenneth.C. Nwoko, *Female Husbands in Igbo Land, South East Nigeria*, *The Journal of Pan African Studies*, Vol. 5 No. 1 (2012), pp. 69-82; Marissa Herbst and Willemien du Plessis, *Customary Law v. Common Law Marriages: A Hybrid Approach in South Africa*, *Electronic Journal of Comparative Law*, Vol. 12 No. 1 (2008), pp. 1-15; Eugene Cotran, *The Law of Marriage and Divorce* (Vol. 1), London 1968.

18 Babere K. Chacha, *Traversing Gender and Colonial Madness: Same-Sex Relationships, Customary Law and Change in Tanzania, 1890 – 1990*, in: Signe Arnfred et al., *Gender Activism and Studies in Africa*, Dakar: 2004, p. 129.

evidence shows this family-type to be a purely social and economic condition; and as a scholar, B.K. Chacha notes:

*“Woman-to-woman marriage is predominantly an African institution. This form of marriage is an unfamiliar subject to most people outside Africa. It is only vaguely understood by historians and social scientists.”*<sup>19</sup>

Woman-to-woman marriage is the traditionally recognised union between two women, one of whom pays the dowry<sup>20</sup> in order to marry the other woman. It is recognised in some traditional African communities. As stated earlier, it is usually a union aimed at promoting the social or economic status of the women who participate in it. One of the characteristics in this union that make it different from heterosexual and homosexual relationships is that the women do not engage in sexual intercourse. The purpose of the union is the continuation of the family line and the enjoyment of a family life. Nevertheless, the married woman, usually the one for whom the dowry is paid, bears children with a chosen man from her female ‘husband’s’ clan or elsewhere. We will discuss this further on.

The Constitution of Kenya further provides that:<sup>21</sup>

*“Parliament shall enact legislation that recognizes –*

- 1. marriages concluded under any tradition, or system of religious, personal or family law; and*
- 2. any system of personal and family law under any tradition, or adhered to by persons confessing a particular religion, to the extent that any such marriages or systems of law are consistent with the Constitution.”*

The *potential conflict of rights-claims*, in respect of the cultural practice of woman-to-woman marriage, is an issue for inquiry, in view of the fact that Kenya’s Constitution is, indeed, a model in the incorporation of democratic values.<sup>22</sup> A striking discord is embodied in Arti-

19 Chacha, note 18. p.129. Indeed, a *hypothesis* arises that, in parallel with the vitality of values of *property* in the construction of fundamental rights in Western constitutional systems [See *Gottfried Dietze*, In Defense of Property, Baltimore 1971; *Yoram Barzel*, Economic Analysis of Property Rights, Cambridge 1989; *Franz Leopold Neumann*, The Concept of Political Freedom, Columbia Law Review, Vol. 53 (1953), p. 901], property is no less *doctrinally* and *dialectically* crucial in the portrayal of traditional African social and value orientations.

20 Section 2 of the Marriage Act No. 4 of 2014 of Kenya defines dowry as: *“any token of stock, goods, moneys or other property given or promised in consideration of an intended marriage”*. In the Webster’s Ninth New Collegiate Dictionary at p. 178, bride-price is defined as *“a payment (as of money or property) given by or on behalf of a prospective husband to the bride’s family in many cultures”*. The term bride price and bride-wealth are used interchangeably. In this instance it is referred to as bride-wealth because the groom or female husband pays a specific price, either monetary or otherwise, depending on the tradition which one adheres to.

21 Article 45(4).

22 Thus in *Kitumbi and Eight Others v. Commissioner of Mines and Geology*, Mombasa High Court Civil Case No. 190 of 2010 (Ojwang, J.) it was remarked: *“I take judicial notice that the Constitution of Kenya, 2010 is a unique governance charter, quite a departure from the two...earlier Con-*

cle 45, with regard to varying ethnic or community practices in respect of the *family* institution: practices which not only have definite functionalities, but which stand askance at the censorious tone of the Constitution itself, on the relevant matter.

By illuminating the dimensions of the marriage practice in question, we highlight the Constitution's purview on progressive governance; we shed light on emerging discrepancy between formal norm, and reality of social practice; and we signal concerns that should attend contemporary constitutional initiatives. When disputes arise but the Constitution does *not* speak in terms, the Courts take it upon themselves to define the *scheme of redress*: and thus, this article would claim to further illuminate the play of the elemental jurisdiction of the Courts, in the *common law* style. A comparative analysis of how the Constitutions in Kenya, Nigeria, Tanzania and Nigeria recognise rights in relation to this union and the mode of adjudication adopted will be discussed. This analysis will indicate that the Courts in these countries do not recognise this form of union on an equal footing. However, in countries such as Kenya, the promulgation of the new Constitution has led to the recognition of cultural rights and right to family, and is the basis for the judiciary's protection and promotion of these rights.

## B. Woman-to-Woman Marriage: The Concept

Woman-to-woman marriage has been the subject of socio-legal inquiry for a long time. For definition, it suffices to draw from Eugene Cotran's *The Law of Marriage and Divorce*:<sup>23</sup>

*"A woman past the age of child-bearing and who has no sons, may enter into a form of marriage with another woman. This may be done during the lifetime of her husband, but is more usual after his death. Marriage consideration is paid, as in regular marriage, and a man from the woman's husband's clan has sexual intercourse with the girl in respect of whom marriage consideration has been paid. Any children born to the girl are regarded as the children of the woman who paid marriage consideration and her husband."*

This kind of marriage is an age-old tradition among certain communities in Africa, and is practised essentially in *patrilineal communities*. The male child in such communities is perceived as carrying forward the *family name and heritage* and, indeed, becomes the custodian of *accumulated property and wealth*. Members of such communities often consider themselves socially and materially deprived and damnified, where a wife has not given

stitutions of the post-independence period. Whereas the earlier Constitutions were essentially programme documents for regulating governance arrangements, in a manner encapsulating the dominant political theme of centralized (Presidential) authority, the new Constitution not only departs from that theme, but also lays a foundation for *values and principles that must imbue public decision-making*, and especially the adjudication of disputes by the Judiciary."

23 Eugene Cotran, *The Law of Marriage and Divorce* (Vol. 1), London 1968, p. 117. (The author is, in this respect, making reference to the Nandi sub-tribe of the broader Kalenjin group, of Kenya).

birth to a son. The presumptively infertile wife may, in some cases, be herself the custodian of a significant asset-column, and is genuinely concerned about lack of an heir. This question has such constancy in the psyche of such communities, that the wife reckoned to be infertile is sometimes subjected to diminished social status: and it well serves such a wife to forestall the damage, by “marrying” a younger woman to bring forth a son, to carry the family heritage. Among such communities, the woman-to-woman marriage is objectively perceived as a *legitimate social practice*, which enhances the integrity of the family, and assures members of ordinary social fulfillment.<sup>24</sup>

The social perception, in such a marriage setting, certainly, is tilted in favour of the male, and against the female. This inequitable line of preference is thus explained by B.K. Chacha:

*“Succession to property was through the male lineage whose duty it was to ensure that all members of the family had access to the property. Studies carried out in eastern and southern Africa have revealed that the basis for the male inheriting the property was the fact that men stayed within the family, unlike women who, when married, left their domiciles of origin and joined their husbands’ families. The desire to keep family wealth within the community dictated that it be held by the men.”*<sup>25</sup>

*Property*, thus, is vital in the traditional African social setting: it belongs to the “house” wherein the woman is married; so it belongs to that *family* and that *community*, where it is to remain, save for portions made over to outside families or communities as dowry, where a marriage has taken place, with a woman relocating from one family to another. Hence the woman-to-woman marriage, which Chacha thus explains:

*“The main aim of woman-to-woman marriage was to [beget] a son for the ‘house’ to which the young woman was sociologically married. This ‘house’ would be represented by the old woman who could not bear a son for it in her marriage.”*<sup>26</sup>

Traditional family practices in Africa which have only gradually accommodated the dynamics of change had not incorporated the typical nuclear family of modern times. Rather, different types of marriage had been the norm: polygynous unions; leviratic marriages;

24 Regina Smith Oboler, *Is the Female Husband a Man?: Woman/Woman Marriage Among the Nandi of Kenya*, *Ethnology*, Vol. 19 No. 1 (1980), pp. 69-88. The learned scholar comments: “A female husband is a woman who pays bride-wealth for, and thus marries (but does not have sexual intercourse with) another woman. By so doing, she becomes the social and legal father of her wife’s children. The basic institution of woman/woman marriage is widespread in African patrilineal societies, although the way it functions varies from society to society. In Nandi, a female husband should always be a woman of advanced age who has failed to bear a son. The purpose of the union is to provide a male heir.”

25 Chacha, note 18, p. 131.

26 Chacha, note 18, p. 131.

woman-to-woman marriages – the dominant object being procreation, and continuation of the familial lineage.<sup>27</sup>

### C. Woman-to-Woman Marriage Before the Courts: Experience in Different Jurisdictions

#### I. Preamble

Although the basis of the practice of woman-to-woman marriage is by no means artificial, unimportant, or spurious, none of the formal regimes of law in the relevant countries has plainly accommodated it as a legitimate social practice; but it has fallen to the *courts of law*, by virtue of their unlimited powers of dispute settlement in matters within their jurisdiction, to give a hearing, and to respond to goals of justice. However, the position of the State law *vis-à-vis* such marriage has not, in the different countries, been identical: and thus, the judicial approach has varied from one country to another.

After considering varying examples, we will appraise them on the merits and, in particular, in the context of norms imparted by broader values of international law and of domestic public law.

#### II. The Kenyan Experience

As discussed earlier, the promulgation of the Kenyan Constitution in 2010 ushered in a ‘people centered’ Constitution in which rights such as cultural rights and the right to enjoy a family life are now enshrined. The previous Constitution lacked such a manifest people-focus; even though the courts, by way of the broad-textured common law methods, still endeavoured to protect the rights of those in these unions. And besides, customary law was still applicable, and judges recognised this union, as it formed part of the customary laws of some communities.

On 20<sup>th</sup> May, 2014, the Marriage Act (No. 4 of 2014) came into effect. This Act repealed the Marriage Act (Cap 150); the African Christian Marriage and Divorce Act (Cap 151); the Matrimonial Causes Act (Cap 152); the Subordinate Court (Separation and Maintenance) Act, (Cap 153); the Mohammedan Marriage and Divorce Registration Act (Cap 155); the Mohammedan Marriage, Divorce and Succession Act (Cap 156; and the Hindu Marriage and Divorce Act (Cap 157). Unlike the repealed Marriage Act (Cap150), the new Act provides for the definition of a marriage under Section 3(1) as: “ *the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act.*” Further, Section 6(1) recognizes registered customary marriages. The new Act is also forward- looking as Section 15(1) now protects the rights of widows, and allows them to remarry freely. Additionally, Section 43(2) provides that the payment of

27 Andrea Cornwall (ed.), *Readings in Gender in Africa*, London 2005.

dowry in instances where a particular culture requires it, is sufficient to prove a customary marriage.

Even though the mainstream perception of marriage in Kenya, over the years, has been that of union of *man* and *woman*, it is clear that the judicial perception has been that woman-to-woman marriage is a legitimate family practice: and contests founded upon it have been conducted through *channels of law*, with findings made which do not abnegate its status as a *valid transaction*.

The case, *Chepkurui v. Chebet and Kipsang*,<sup>28</sup> which was concluded at the court of first instance, was one of Kenya's earliest cases on the subject of woman-to-woman marriage; and its significance is that the learned Magistrate's perception of the relevant issues tallies with the scheme of justice that, to-date, has underlain the prevailing judicial approach.

The Court held that a Nandi woman-to-woman marriage between the applicant and the respondent was in all respects valid, and subsequent *consent* was one of the procedures by which it could be dissolved. (This, clearly, imports the essence of *marriage-contract* into the woman-to-woman union.) The court found that in such a marriage, the biological father of any children born is not recognised, and that the children fall exclusively within the charge of the "female husband" who has paid bride-wealth. Bride-wealth, in this regard, is perceived as a symbolism of *legality*, alongside formal child-custody in the preserve of the "female husband." *Property* in the form of bride-wealth is, in this regard, a consecrated item; its transfer is formal and ceremonial; by so relocating *property*, legal relations between persons and between families is defined and sanctified; the transactions accompanying such transfer of *property* are consecrated and socially endorsed; and the legal status of persons affected by such transfer of property is defined.

Such a finding underlines the social and cultural dimension of this type of marriage: it has to do with the economics of bride-wealth payment; with procreation to strengthen the family unit; with the recognition and collective perception of the community – but *not* with the biological fact of sex, husband and wife, or of an individual's family-pursuit.

In *Re Matter of the Estate of Musau Ngau (Deceased)*,<sup>29</sup> a woman-to-woman marriage instance from the Kamba community, the deceased left two widows – Kakuli Musau, and Mutindi Musau. Kakuli had one married daughter, while Mutindi had eight children. The landed property left by the deceased became a subject of dispute: because a third woman, Grace Wayua, claimed she had undergone a woman-to-woman marriage with one of the widows, Kakuli Musau. Grace Wayua was claiming a share of the deceased's estate, as she had given birth to five children following the alleged woman-to-woman marriage. The five children had grown up on the deceased's land.

The dispute came up before Judge Lenaola, who implicitly ascribed rationality and expediency to the scholar's viewpoint, thus holding:

28 Kapsabet Res. Mag's Court Div. Cause No. 16 of 1980.

29 Machakos High Court Probate and Administration Cause No. 137 of 1992.

*“In Restatement of African Law, Vol 1 by Eugene Cotran [at page 26], woman-to-woman marriages are recognised....Once that is so, then under Kamba customary law, Wayua is in the same position as any other wife; she can only inherit as a wife of her ‘husband’ and not of her ‘husband’s’ ‘husband’. In this instance..., Wayua cannot inherit as Musau Ngao’s wife because she is not his wife but his ‘wife’s’ ‘wife’.”*

The Kenyan judicial inclination consistently attributed legitimacy to the woman-to-woman marriage, and perceived this usage as the *dominant social reality* which the operative legal mechanisms ought not to abnegate. Even though this kind of marriage bears scarcely any association with subjects of the earlier history of the common law, Kenya’s superior courts have, in this sphere, found scope for *judge-made law*, responding to the *silences of the legislature*. This, arguably, bespeaks the potentiality of the common law as a scheme of “judges’ law.”

In *Millicent Njeri Mbugua v. Alice Wambui Wainaina*,<sup>30</sup> a probate and administration matter, the deceased [Mr. Murachia Barugu] was survived by two “daughters” – the appellant and the respondent, respectively. The appellant disputed the respondent’s claim to dependency status, for purposes of inheritance. At first instance, this contest came up before the Resident Magistrate’s Court. The respondent’s case was that she had come into the deceased’s family by being married to the deceased man’s deceased wife, under the Kikuyu customary woman-to-woman marriage. The respondent averred that her “female husband”, Priscilla Wanjiru who had died, was buried in the deceased man’s land, and the respondent thereafter continued living on that same land. The appellant, however, maintained that even though the respondent depended on the deceased man, following the death of her “female husband”, the respondent was at no time a daughter-in-law of the deceased man. The learned Magistrate held that the practice of woman-to-woman marriage was well recognised in Kikuyu customary law; that by this custom, the woman was allowed to benefit from the properties of the husband; and therefore, the respondent may inherit from the deceased’s estate.

This matter went on appeal before Makhandia, J in the High Court, where the evolving family-law jurisprudence regarding woman-to-woman marriage was endorsed. The court treated such marriage as a recognised institution, founded on clear criteria: the validity of such a marriage, within the Kikuyu community, was founded on certain conditions. Firstly, the husband of the woman marrying another woman must have died. Secondly, the woman marrying another woman must have been left childless by her deceased husband. Thirdly, the woman marrying another woman must be past child-bearing age. Fourthly, the woman marrying another woman must have paid bride-wealth (*ruracio*) to the family of the “bride”. Fifthly, the “woman-bridegroom” must have arranged for a man of the deceased

30 Civil Appeal No. 50 of 2003.

husband's age-group to have sexual intercourse with the "bride", for the purpose of siring her children who, themselves, must form part of the *deceased husband's family*.<sup>31</sup>

On the basis of the foregoing tests, and of the actual evidence laid before the court, the learned Judge found that the respondent had not met the requirements for a valid woman-to-woman marriage; and thus the appeal was allowed.

While making no reference to the woman-to-woman marriage, Kenyan legislation incorporates a concept which the courts have implicitly entertained: the *repugnancy clause*. The Judicature Act<sup>32</sup> thus provides:

*"The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law; and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."*

The courts, in the performance of their remit to be guided by African customary law, have been consistent in not treating its common place practices, such as the woman-to-woman marriage, as "repugnant to justice and morality" – even in those instances in which they rejected a specific claim resting on such a marriage.

In *Re Priscilla Nduta Gitwande (Deceased)*,<sup>33</sup> Rawal, J (as she then was) in the High Court rejected the contention that the very concept of woman-to-woman marriage was repugnant to justice and morality; and the court noted certain essential features of such a marriage: it has an inherently *social functionality*; and it *entails no connotation of sexual partnership*.

*Monica Jesang Katam v. Jackson Chepkwony and Selina Jemaiyo Tirop*<sup>34</sup> was the first case of woman-to-woman marriage decided by a superior court following the enactment of Kenya's new Constitution, with its remarkable libertarian design.<sup>35</sup>

31 Such rules were of common application. Of the Kuria of Tanzania and Kenya, *Chacha* note 18, pp. 131-132 thus writes: "After the married woman has been brought into the homestead, a male consort (umutwari) was normally appointed to enter her hut and raise seed for the house of the female husband.... [T]he umutwari was not a husband and did not have any rights concerning the children born following his association with their mother, nor do the children themselves inherit from his property. Umutwari was ordinarily appointed from the lineage of the husband of the ['female husband'] or any other close relative. He was only allowed to enter the house of the woman late in the evening and leave very early the following morning; he was not allowed by tradition to make any decision concerning the life of the woman."

32 Cap. 8, Laws of Kenya, Section 3(2).

33 Succession Cause 616 of 1997; (2006) eKLR.

34 Mombasa H.C. Succ. Cause No. 212 of 2010; [2011] eKLR.

35 The Constitution was promulgated on 27th August 2010; and judgment in the case was delivered on 17th June 2011.

The petitioner claimed to have entered into a woman-to-woman marriage with the deceased, and that the deceased was survived by her two children who, consequently, were entitled to benefit from the deceased's estate. It was the petitioner's case that the deceased died intestate; and that she and her children were the dependents of the deceased. The respondents, however, averred that no valid marriage, under Nandi customary law, had taken place between the petitioner and the deceased, and that the alleged beneficiaries had no standing in the succession.

The Court,<sup>36</sup> after evaluating all the evidence, and considering the submissions by counsel, came to its finding as follows:

*“The research material referred to shows this to have been the typical condition in which a woman-to-woman marriage takes place; and the testimonies show such a marriage to have taken place on 16<sup>th</sup> October, 2006. It is, therefore, not true as the objectors say, that the petitioner was only a servant; on the contrary, she was a ‘wife’, and, by the operative customary law, she and her sons belonged to the household of the deceased, and were entitled to inheritance rights, prior to anyone else. This custom, I hold, is to be read into the scheme of Section 29 of the Law of Succession Act (Cap.160), placing the petitioner and her children in the first line of inheritance: the petitioner herself for being ‘wife of the deceased’, and her children for being the children of the deceased. The conclusion is to be drawn that the petitioner herein is entitled to the grant of letters of representation.”*

The Court, apart from resolving the case on the facts on record, made an evaluation of the wider *constitutional context*, and adverted to the question of *cultural rights*:

*“The state of customary law among the Nandi, there is no doubt, is in a state of flux and, as the community becomes more prosperous, and fuses more with other Kenyan communities, such ethnic-culture-bound family practices are likely to be replaced by [more] ecumenical, public-interest-related practices. But I take judicial notice that social change on such a scale is only gradual; and hence the institutions of justice must be relatively accommodative of current practices. Indeed, contemporary social systems, for instance, in the shape of current practices in the domain of family among the Nandi, are, I think, to be regarded as aspects of culture which still rightly claim protection under Article 11(1) of the Constitution of Kenya, 2010....”*

### III. Nigerian Cases

The consistency of judicial perception in Kenya, on a subject of such primary social character, stands in distinct contrast to the position in Nigeria, where the highest courts have con-

36 The judgment was given by Ojwang, J.

sistently rejected any claims of propriety made in respect of the practice of woman-to-woman marriage.

It is worth noting that the laws in Nigeria differ from those in Kenya. In the Constitution of the Federation of Nigeria, 1999, Chapter IV which deals with the fundamental rights has limited provisions. Section 21 of the Constitution provides that “*the State shall (a) protect, preserve and promote the Nigerian cultures which enhance human dignity and are consistent with the fundamental objectives ...*”. The Nigerian Constitution is silent on the right to culture. Further the Marriage Act (Cap 218), Laws of the Federation of Nigeria 1990 is similar in provisions to the repealed Kenyan Marriage Act (Cap 150). It does not provide for the definition of marriage. In 2013, Nigeria also enacted the Same-Sex Marriage (Prohibition) Act, 2013, a law which expressly prohibits any form of same-sex relationship. Same-sex marriage is defined under Section 7 as “*the coming together of persons of the same sex with the purpose of living together as husband and wife or for other purposes of same sexual relationship*”. Section 1(1) of the Act prohibits a marriage contract or civil union between persons of the same-sex. Section 3 also provides that a valid marriage is one contracted between a man and a woman. The Act states that if persons enter into a same-sex marriage, they have committed an offence and are liable on conviction to a term of 14 years imprisonment.<sup>37</sup> It is worth noting that although the Nigerian Marriage Act does not define marriage or woman-to-woman marriage, the Same-Sex Marriage (Prohibition) Act defines marriage (Section 7) as “*a legal union entered into between persons of the opposite sex in accordance with the Marriage Act, Islamic law or customary law.*”

The statutory marriage laws in Nigeria automatically affect the manner in which the judiciary interprets customary woman-to-woman marriages. It is important to note that the decisions which will be discussed below were delivered before the enactment of the Same-Sex (Prohibition) Act.

In *Helina Odigie v. Iyere Aika*,<sup>38</sup> the question before the court was whether a “female husband” [the plaintiff] has rights over a child born between her “wife” and another man. The first-instance court had recognised the customary practice of woman-to-woman marriage, and held that the child “belongs to the female husband”. But now on appeal, it was held that, denying the biological parent rights over “his child” on account of the customary practice was contrary to public policy and was, consequently, unlawful. The “female husband” was, thus denied rights over the child.

In another case, *Eugene Meribe v. Joshua C. Egwu*,<sup>39</sup> the childless wife (Nwanyiakoli) of Chief Cheghekwa entered into a woman-to-woman marriage with her niece (Nwanyiocha) to bring four children for the Chief. After Nwanyiakoli died, a son born to Nwanyiocha claimed rights of inheritance, running in competition with the claims of Chief Cheghekwa’s first-born son. In the court of first instance it was held that since evidence

37 Section 7 of the Same-Sex Marriage (Prohibition) Act, 2013.

38 High Court of Bendel State, Ubiaja Judicial Division, Suit No. U/24A/79 (Unrep.).

39 1976, 3 S.C.2.

showed that a valid woman-to-woman marriage had taken place, it was to be considered that Nwanyiakoli had married Nwanyiocha for her husband, and that Nwanyiakoli had treated the plaintiff as her son. The plaintiff, therefore, was entitled to inherit.

The Supreme Court held otherwise: that one of the essentials for a marriage is union between *a man and a woman*, to create the status of husband and wife; and consequently, a custom permitting woman-to-woman marriage is repugnant to justice, in the terms of Section 14(3) of the Evidence Act.<sup>40</sup> This was a succinct statement by the Supreme Court that it did not recognize the woman-to-woman marriage as a lawful social practice.

Such a position is clearer still from *Okonkwo v. Okagbue*,<sup>41</sup> which went on progressive appeal to the Court of Appeal and to the Supreme Court. The appellant (Okonkwo) and his four brothers were the surviving children of a man (Nnanyelugo Okonkwo) who had died in 1931. The deceased had two sisters (Mrs. Lucy Okaghue and Mrs. Victoria Obiozo) none of whom had given birth. The two sisters, following the deaths of their husbands, took up residence in the Okonkwo household; and while they lived there, one of their brothers died. Some 32 years after the death of their brother the two sisters entered into a woman-to-woman marriage with one Ruth, who thereafter gave birth to six children, in the Okonkwo household. It was the two sisters' case that the six children were the children of the deceased brother, and were entitled to inherit the brother's property. The deceased brother's children lodged a case claiming to be the rightful heirs to their father's property, to the exclusion of Ruth's six children who must be treated as the children of the two sisters. The two sisters, for their part, contended that they had validly entered into a woman-to-woman marriage with Ruth, in accordance with Onitsha native law and custom; and consequently, the six children were legitimate heirs to the deceased brother. The trial court held that a valid marriage had been concluded, and that the six children were indeed the legitimate children of the deceased brother. The Court of Appeal upheld the trial Court's decision, on the basis that the necessary consent had been given by the Okonkwo family before the woman-to-woman marriage was concluded; the marriage, thus, complied with the requirements of validity under Onitsha customary practices.

The Supreme Court, however, took a different position, maintaining that woman-to-woman marriage was repugnant to natural justice, good conscience and equity. Reversing the lower court's decision, the Supreme Court held that the six children of the woman-to-woman marriage were not to be considered children of the late Okonkwo.

#### IV. The Tanzanian Experience

The Constitution of the United Republic of Tanzania (Cap 2), has limited provisions protecting the rights of the people. The Constitution does not provide for cultural rights or the right to family. However, in relation to woman-to-woman marriage, Sections 12 and 13

40 Evidence Act, Chapter 112, Laws of the Federation of Nigeria (1990).

41 (1994) 9 NWLR 301.

provide for equality of human beings and equality before the law respectively can be used to protect this practice. Further, Section 9(1) of the Law of Marriage Act, 1971 provides the definition of marriage as “*the voluntary union of a man and a woman, intended to last for their joint lives.*” Notably, the Marriage Act does also provide for the definition of woman-to-woman marriage.

The reported case law from Tanzania is less detailed than from elsewhere; and besides, unlike that from Kenya or Nigeria, it does not show Tanzania’s legal stand to be distinctly demarcated by the courts. Such is the picture emerging from the recorded works of scholarship on the subject.<sup>42</sup> This picture is typically portrayed in a primary court case which went on appeal, *Gati Getoka v. Matinde Kimune* – a case in the Kuria community.<sup>43</sup>

In the *Gati Getoka* case, the “wife” had not given birth while at the home of her “female husband”, for a continuous period of three years. This led to misunderstanding between the “spouses”, and the “female husband” sought divorce. The court of first instance dismissed the petition; on the basis that “sufficient reason” for dissolution of the marriage had not been given. The High Court, while agreeing with factual aspects as recorded in the court below, differed on a point of principle: “such a customary union... has meaning, if any, [only if] it persists by mutual consent, and it cannot be [sustained] against [an unwilling] party. Here the respondent (i.e., the female husband) seeks to terminate it...; [the] court should readily accede”. The union was, accordingly, dissolved.

The superior court thus declined a unique opportunity to pronounce itself on the *legal status* of woman-to-woman marriage. Thus the Tanzanian courts have not exercised the creativity of the common law tradition, in the face of a live social practice, lodged in clear pragmatics. Of this situation, B.K. Chacha thus comments:

“... *the post-colonial state [has been] un-sure what policy to adopt towards woman-to-woman marriage. It was not explicitly abolished nor was it legally recognised. The judicial officers are... uncertain as to how to treat the woman-to-woman marriage. Some thought it was rather like slavery while others saw it as ancient custom which was to be preserved until... women were liberated. Underlying all this official ambivalence was the problem of understanding what the relationship entailed....*”<sup>44</sup>

#### V. Woman-to-woman Marriage in Africa: A Critical Perspective

While there may be no self-evident explanation of the different official approaches to the woman-to-woman marriage in East and West Africa, probable cause may be attributed to the sheer orientation of the judicial process. Whereas the West African courts have preferred a judicial approach of line-drawing, founded on a convenience of conflict resolution,

42 Chacha, note 18, pp. 141-45; B.A. Rwezaura, *Traditional Family Law and Change in Tanzania: A Case Study of the Kuria Social System*, Baden-Baden, 1985.

43 Chacha, note 18, pp. 142-143.

44 Chacha, note 18, p. 145.

the East African approach has placed greater emphasis on cultural purpose. Further, comparative experience shows that Kenya, Tanzania and Nigeria do not define woman-to-woman marriage in the Constitution or statutory laws. However in Kenya, the practice is protected by the rights to culture and family as enshrined in the Bill of Rights. Thus, although this form of marriage is not expressly provided for or prohibited in statutory law, it is valid under the Constitution.

Woman-to-woman marriage, in its essential character, is adopted as a response to social hardship, and, over time, it has acquired its special ceremonies and its accepted norms, and has been perceived as a legitimate social practice. It may be presumed that the advent of formal legislation came to find this marriage practice already established, and, naturally, the State's scheme of law-making would have either to run in parallel, or formally proscribe woman-to-woman marriage. It may be inferred, in the context of legislative indifference, that the State system left the matter to the *judicial process*, to be addressed on a case-by-case basis, during normal dispute settlement.

Such a hypothesis is consistent with the path taken by the Nigerian Supreme Court: that of adjudging the practice on the basis of discretion founded on the "repugnancy clause" in statute law.

The effect of the approach of the Nigerian courts is to uphold certain assumptions of the formal legislation, while, in effect, doing violence to the expedient, spontaneous social arrangements within the various communities. The conflictual outcome is particularly evident in relation to matters of *child custody*, or the *probate and administration of estates*. Children in a woman-to-woman marriage are likely to be at the centre of a custody dispute, where their mother dies; the "female husband" considered as "father" to such children, may be challenged in court by the biological father who by statute, is granted parental rights. Such grant of rights by statute renders the "woman-to-woman" marriage a stranger to the family setting, though the situation on the ground may be different.

Just as it becomes a *political question* whether the African State should uphold the delicate family setting of the woman-to-woman marriage, or alternatively the formal scheme of uniform law-making, it is no less a *policy choice* for the judge, as between the existing cultural set-up, and the yardstick of the "repugnancy clause" in the legislation. Part of the criticism of the approach of the Nigerian Supreme Court rests on a historical background: the "repugnancy clause" originates in the colonial period of the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, when it was employed by the colonial authority to restrict the application of customary law among the indigenous people.<sup>45</sup>

In Kenya, by contrast, the courts have generally recognised woman-to-woman marriage as valid, where it has been entered into in accordance with the operative customary practice. The generality of such a position, as declared by the vital constitutional authority of

45 Jeanmarie Fenrich, Paolo Galizzi, Tracy Higgins (eds.), *The Future of African Customary Law*, Cambridge 2011, pp. 116-118; *Herbst and Du Plessis*, note 17, pp. 1-15; *Akpamgboa*, note 17, pp. 87-95.

the judiciary, in effect, proclaims it as *the law*, notwithstanding that no formal enactment has made any prescription on the subject. Indeed, it is to be presumed that the judiciary in thus stating the law, has properly anchored this law within the openings for discretion established by the Judicature Act itself.<sup>46</sup> And, over-and-above their common-law remit of law-making, the Kenyan courts have appeared as giving fulfillment to the express terms of the Constitution regarding *cultural rights*.<sup>47</sup>

By the Constitution of Kenya, 2010 every individual is entitled to partake of a positive cultural life; and the manifest object of the woman-to-woman marriage, which is to secure, cushion and assure family life in a communal context, should be perceived as a *cultural phenomenon*. Within such a cultural practice, however transient it may be in the evolution of social traditions, the law not only recognizes the “spouses” in the woman-to-woman marriage, but also the children who might otherwise have no experience of family-belonging. Women and children in such a position will benefit by their incorporation in the functioning of the law of probate and administration, and that of child-custody. The availability of such protective cover for the affected women and children, besides, would enable them to enjoy still other rights under the Constitution: equality; and freedom from discrimination;<sup>48</sup> human dignity;<sup>49</sup> and family life.<sup>50</sup>

The judicial recognition of the validity of woman-to-woman marriage in Kenya has not been free of normative obstacles.

The Constitution<sup>51</sup> provides that –

*“Any law, including customary law, that is inconsistent with this Constitution, is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”*

And customary law, defined as –

*“the law consisting of customs that are accepted as legal requirements or obligatory rules of conduct, practices and beliefs that are so vital and intrinsic a part of social and economic system that is treated as if they were laws”<sup>52</sup>,*

46 See note 26 and accompanying text.

47 *Monica Jesang Katam v. Jackson Chepkwony and Selina Jemaiyo Tirop*, Mombasa High Court Succ. Cause No. 212 of 2010; [2011] eKLR.

48 Article 27 of the Constitution.

49 Article 28.

50 Article 45.

51 Article 2(4).

52 *Bryan. Garner* (ed.), *Black’s Law Dictionary*, St. Paul 2009, p. 443.

by the recorded experience, is the basis of the woman-to-woman marriage. Although the judiciary has upheld the validity of such marriage, the Constitution bears one paradoxical stipulation:<sup>53</sup>

*“Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.”*

Does this contradict the woman-to-woman marriage, which brings “together” *persons of the same-sex*? What is the mischief of the constitutional provision? Is it the conjugal element in a marital union, or the bare fact of social companionship in a family setting?

The Constitution by its express language, safeguards the *family unit*, and protects *cultural rights*, yet at the same time only protects the union of *man and woman* in marriage. Such open texture in drafting is a warrant for the courts to render such interpretation as will yield *rational purpose* to the law. The *declared* judicial position in Kenya, today, is that the said provision of the Constitution does not outlaw the woman-to-woman marriage; and that such marriage, by its acceptance in cultural practice, is to be considered a subject of safeguard under the *cultural rights* of the Constitution.

It follows from the foregoing argument that the Constitution’s limitation to same-sex marriage is limited to the *conjugal situation*.<sup>54</sup> The merit of such a position, which has been expressly addressed in national law in a number of countries,<sup>55</sup> therefore, is not due for elaborate consideration in this article.

A similar ambivalence is to be found in the law of Tanzania, the Constitution of the United Republic of Tanzania, 1977 providing that –

*“every person is entitled to respect and protection of his person, the privacy of his person, his family and his matrimonial life...”*<sup>56</sup>

even as the Law of Marriage Act<sup>57</sup> defines marriage as “a voluntary union of a man and a woman intended to last for their joint lives.” The Act acknowledges customary marriages to

53 Article 45(2).

54 It is relevant in a comparative context that in Nigeria the matter is governed by special enactment: the Same-Sex Marriage (Prohibition) Act, 2013.

55 This question has had to be resolved in leading nations marked by substantial diversity, within the context of respect for basic human rights for all: see *Jeffrey Toobin, The Nine: Inside the Secret World of the Supreme Court* New York 2008, pp. 214-222. And the various African countries, by the inevitable trends of history, will have to address the question openly; this is foreshadowed in the live observation of a Kenyan press correspondent, in *The Standard* (Nairobi), 11<sup>th</sup> August 2013, p.18: “The fight and eventual achievement of the gay rights in Kenya constitutes the latest frontier in entrenching liberal democracy in the country and genuine human rights defenders have a duty to lead the way. We cannot afford to apply human rights principles selectively.”

56 Article 16(1).

57 The Law of Marriage Act, 1971, s.9(1).

the limited extent of recognizing polygynous marriages.<sup>58</sup> Thus, just as Kenya, Tanzania does not by legislative enactment, formally recognize the woman-to-woman marriage.<sup>59</sup>

Such ambivalence has been ruled out, by way of *judicial interpretation*, in the case of South Africa; and it is to be presumed that woman-to-woman marriage in that country gives all the rights attached to customary marriage. Same-sex marriages were formally legalized by the Constitutional Court decision in *Minister of Home Affairs and Another v. Fourie and Another*:<sup>60</sup>

*“The common law definition of marriage is declared to be inconsistent with the Constitution and invalid to the extent that it does not permit same-sex couples to enjoy the status and benefits coupled with responsibilities it accords to heterosexual couples.”*

The Court (Sachs, J.) in that case, perceived a proper link between same-sex unions and the fundamental right of self-expression, free of subordination to claims of cultural or religious forces; the court discerned such unions as a manifestation of the “right to be different”. In that light, the woman-to-woman marriage, by contrast, seeks the *collective* element in self-realization – in established cultural practice which gives a fulfillment in family life.

While such a judicial position, in strict terms, concerned only the conjugal relationship in marriage, it is to be read into the broader constitutional context and, on that basis, will cover also the customary practice of woman-to-woman marriage. The Constitution of South Africa<sup>61</sup> provides that members of a particular cultural community may not be denied the right to enjoy their culture, so long as the relevant cultural practices are not inconsistent with the terms of the Constitution; and an obligation is placed upon the State not to discriminate against persons directly or indirectly, on the basis of culture or other such attribute. South Africa’s Recognition of Customary Marriages Act<sup>62</sup> defines a customary marriage as “a marriage in accordance with customary law”,<sup>63</sup> and it defines customary law itself as “the customs and usages traditionally observed by the indigenous African peoples of South Africa and which form part of the culture of those people”.<sup>64</sup>

Contemporary dynamics of globalization, and the attendant conjoint participation in unifying economic, political and social transactions; and the conditions of diversity of people living in common nationality – all have a tendency to broaden popular perceptions of cherished rights and entitlements, a trend well exemplified in South Africa’s approach to

58 Section 9(3).

59 *Chacha*, note 18, at p. 149.

60 *Minister of Home Affairs and Another v. Fourie and Another* (CCT/60/04) [2005] 2 ACC 19, 2006(3) BCLR 355 (CC), 2006(1) SA 524 (CC) (1 December 2005).

61 Section 31 of the Constitution of the Republic of South Africa, No. 108 of 1996.

62 Act No. 120 of 1998.

63 Section 1.

64 *Herbst and Du Plessis*, note 17, pp. 1-15.

pluralistic regimes of law that readily accommodate cultural practices, such as woman-to-woman marriage. This may turn out to be the model recourse, in the development of culture-related law in other African countries as well.

#### **D. Woman-to-Woman Marriage: Drawing Analogies From Elements of International Law**

If woman-to-woman marriage is correctly perceived as a practice falling within the plane of culture, it will be appreciated that it does not stand in conflict with the relevant instruments of international law.

The Universal Declaration of Human Rights (1948) declares that “Everyone has the right freely to participate in the cultural life of the community....”<sup>65</sup> This principle is eloquently restated in numbers of other normative proclamations at the international level. The preamble to the International Covenant on Economic, Social and Cultural Rights (1966) thus states:

*“Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights....”*

The safeguard for cultural rights is consistently provided for in conjunction with *family rights*. The Convention on the Elimination of All Forms of Discrimination Against Women (1979), for instance, provides safeguards for culture and family, even as it upholds equality for the female gender; it provides:<sup>66</sup>

*“States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on the basis of equality of men and women, the same rights, in particular:*

*a) The rights to family benefits; ....*

*b) The right to participate in recreational activities, sports and all aspects of cultural life.”*

The Convention places upon States Parties clear obligation, with family and cultural dimensions:<sup>67</sup>

*“1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*

65 Article 27(1).

66 Article 13 (a) and (c).

67 Article 16(1).

- a) *The same right to enter into marriage;*
- b) *The same right freely to choose a spouse and to enter into marriage only with their free and full consent;*
- c) *The same rights and responsibilities during marriage and at its dissolution;*
- d) *The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount....”*

While being mindful that not all cultural practices will be of a positive nature, and indeed, some may merit limitation, especially those that infringe upon recognised human rights,<sup>68</sup> any mitigation effected must be *proportionate* to the competing claims.<sup>69</sup>

Such a position is reflected, too, in a regional instrument, the Protocol to the African Charter on Human and Peoples’ Rights, on the Rights of Women in Africa (2003), which reposes in States Parties the obligation to resort to accommodative, pacific methods of securing appropriate *cultural change*. This instrument thus provides:<sup>70</sup>

*“The States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or superiority of the sexes, or on stereotyped roles for women and men”.*

It further provides:<sup>71</sup>

*“Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies.”*

One does not find, in the body of such instruments of international law, any inveterate posture that forecloses communal cultural practices not infringing upon safeguards for human rights. In these circumstances, it is argued in this article that the woman-to-woman marriage merits accommodation within the governing constitutional principles; and that it falls to the relevant state agency, the judiciary, to lay out a path of safeguard for this custom.

68 A typical example is the widespread cultural practice of female genital mutilation, which is found among some communities in Africa.

69 The Committee on Economic, Social and Cultural Rights [General Comment No. 21 of 2009, 43rd Session, 2-20 November, 2009, para. 19] has stated that there is room for limitation to cultural rights, especially in instances in which customs promote negative practices that infringe upon other human rights, for instance, by discriminating against women.

70 Article 2 (2).

71 Article 17(1).

## E. Conclusion

To those unfamiliar with the dynamics of ethnic and communal life in certain parts of Africa, the woman-to-woman marriage may appear as a plain oddity. But, on this continent of great diversity of cultures, and of relatively belated integration into modern global economic and political systems, the contemporary times are marked by transitions from unique cultures, in which family practices still have a place for the woman-to-woman marriage.<sup>72</sup>

The comparative normative experience shows, on one extreme, the West African position, in which the formal judicial system has treated this marriage practice as untenable under the law; and on the other, the East African situation in which the judiciary proceeds from a perception of legitimacy, for an institution so pragmatic and so well-defined: readily accommodating it in the legal system, by way of the common-law scheme of judge-made law.

72 The common face of this phenomenon is well depicted in a current press report, in *The Standard* (Nairobi) 16 September 2013, p. 19, under the caption “She has two Wives and 12 Children: Magdalene, 95, married two women according to Nandi customs after finding out she could not give birth.” Following is a passage in the report: “Magdalene Kesumo has two loyal wives with whom she has 12 children and 20 grandchildren. This may seem like an extract from a fiction story, but it is not. It is the reality of life on Tuiyo Farm in Kapseret Constituency, Uasin Gishu County. Kesumo plays ‘husband’ to Flomena and Roseline Kogo, with whom she has lived happily for the last three decades. The wives, married in 1972 and 1978, have seven and five grown-up children respectively, and over 20 grandchildren. Kesumo, 95, is among many Kalenjin women who resorted to the age-old practice of woman-to-woman marriage. This union is different from same-sex unions as practised by local lesbians, who ape the habit from Western countries. It is a custom designed by Nandi forefathers to care for barren women in the community, giving them a chance to have a family.”