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REGISTRATION OF CUSTOMARY MARRIAGES IN KENYA: A LEGAL SOLUTION FOR A SOCIAL PROBLEM?

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Abstract

Kenya's Marriage Act, 2014 made registration of customary marriages mandatory for the first time. This article reviews the relevant legal provisions and judicial decisions for clarity and coherence. Against the backdrop of inconsistency in judicial pronouncements on the legal consequences of non-registration, and low compliance with the legal requirement, this article examines whether mandatory registration secures rights or exacerbates vulnerability of parties in undocumented relationships. The article also examines factors that might account for low uptake of registration, which include gendered imbalance in the power to define relationships, lack of clarity in the legal provisions, administrative challenges, limited public awareness, and mistargeting of the intended beneficiaries. Approaches taken in other African jurisdictions are discussed, distinguishing between those that take a permissive approach (where non-registration does not invalidate a marriage), and those that employ a punitive approach (where non-compliance invalidates a marriage), drawing lessons for Kenya. Acknowledging the limited role of formal law in directing relationships, the article offers recommendations toward an approach that balances the pursuit of legal compliance with actually facilitating people's ability to use the law as a tool for securing rights in customary marriages.

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V. Introduction

Alongside birth, death, adoption and divorce, marriage is considered one of the vital events which, according to the United Nations, must be recorded and registered for all persons.[1] The registration of marriage is considered a significant step towards establishing legal status and protection and safeguarding the rights of parties to marriage.[2] This is regarded as particularly beneficial for women's socio-economic security, since their access to resources is primarily through family relationships.[3] Arguably, marriage registration strengthens inheritance claims, is a prerequisite to preventing child marriages, and leads to clearer outcomes at the point of dissolution of marriage, thus facilitating access to justice.[4] This would explain why the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol) calls upon states to take legislative measures to ensure that 'every marriage is recorded in writing and registered in accordance with national laws, in order to be legally recognised.' A few countries have heeded this call. Kenya did so in 2014 when it passed the Marriage Act which now makes provision for registration of all types of marriages, including customary marriages which did not hitherto have a system for registration. [5]

Enactment of the Marriage Act, with its mandatory requirement for registration of all marriages ushered in a new era, putting an end to five decades of intermittent agitation for this and other reforms to the law of marriage. Calls for uniform registration of marriages have been central to efforts to reform family law since the immediate post-independence period, featuring prominently in the work of a 1967 Commission on the Law of Marriage and Divorce.[6] At the time, the only marriages that had a registration system were statutory marriages contracted under the then Marriage Act, the African Christian Marriage and Divorce Act, the Mohammedan Marriage and Divorce Registration Act and the Hindu Marriage and Divorce Act.[7]

1 World Bank, 'Global Civil Registration and Vital Statistics Scaling Up Investment Plan 2015-2024' (World Bank) <https://www.worldbank.org/en/topic/health/publication/global-civil-registration-vital-statistics-scaling-up-investment> accessed 19 June 2025.

2 UNECA, 'Marriage and Divorce Registration'https://archive.uneca.org/sites/default/files/uploaded-documents/ACS/4th-CoM-on-CRVS/marriage-divorce-registration_eng.pdf accessed 19 June 2025 [hereinafter UNECA].

3 Carmen Diana Deere and Cheryl R. Doss, 'The Gender Asset Gap: What Do We Know and Why Does it Matter?' [2006] 12 (1-2) *Feminist Economics* 1; Florence Butegwa, 'Using the African Charter on Human and Peoples' Rights to secure women's access to land in Africa' in Rebecca Cook (ed) *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press,1994) 495; Aili Mari Tripp, 'Women's movements, customary law, and land rights in Africa: The case of Uganda', (2004) 7.4 *African Studies Quarterly* 1.

4 UNECA (n 2).

5 Eugene Cotran, 'Marriage, Divorce and Succession Laws in Kenya: Is Integration or Unification Possible?' (1996) 40 *Journal of African Law* 194, 196.

6 The Commission was set up in 1967 by the first president of Kenya and presented its report in 1968. This article will refer to the Commission by its year of establishment (1967) and to the report by its date of publication (1968). See Government of the Republic Kenya, *Report of the Commission on the Law of Marriage and Divorce* (Government Printer, 1968) [hereinafter 1968 Commission Report].

7 These marriage statutes were all repealed by the Marriage Act 2014 s 97, resulting in consolidation of all marriage laws under the umbrella of the 2014 statute. For a discussion of the legislative history of family law in post-colonial Kenya see the 1968 Commission report (n 6) at Chapter III from paragraphs 29-43.

The 1967 Commission recommended a harmonised registration system for all marriages, "*regardless of race, religion or community*."[8] However, the Commission noted the difficulties in transitioning all existing marriages - including customary marriages - to registration. The Commission therefore took the view that marriages should not be invalidated for lack of registration as long as they had been conducted in good faith and the parties had the requisite capacity.[9]

The Commission's recommendations did not pass into law, and so forty years later, a 2007 draft Marriage Bill by the Kenya Law Reform Commission once again made the case for registration of all marriages. The draft bill outlined the proposals for the registration of any marriage conducted before a registrar or registration assistant, including marriages contracted through Islamic or customary rites.[10] In addition, there was a proposal to allow parties in subsisting unregistered marriages to take steps to register them. Building on the Commission's approach, the 2007 draft bill made it clear that non-registration would not invalidate a marriage.[11]

The Marriage Act 2014 broke ranks with these previous reform efforts by making the registration of marriages not only universal across all marriage systems but also mandatory. Section 3(1) of the Act defines a marriage as a union that is contracted and registered in accordance with the Act.[12] Some courts have applied a strict interpretation of the law, ruling that non-registration renders marriages voidable.[13] While the requirement for universal registration of marriages is undoubtedly a noble goal, tying the validity of marriage to registration is ill-advised, especially given the lived realities of many couples in the country. A significant number of marriages, particularly customary ones, remain unregistered, which poses particular challenges when it comes to the dissolution of such marriages. The real vulnerability lies in the lack of legal protection for parties - especially women - at the point of dissolution, where the absence of registration can leave individuals without the security they need during a divorce or separation.

It is acknowledged, even by the relevant government officials, that uptake of registration of customary marriages remains very low, eight years since the rules were enacted in 2017.[14] However, accessing precise data to substantiate this

8 1968 Commission Report (n 6), Recommendation No 47.

9 1968 Commission Report (n 6) [154].

10 Draft Marriage Bill 2007, cl 39(2) https://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/Unpublished/200703.pdf accessed 19 June 2025.

11 Ibid, s 40.

12 Marriage Act 2014, s 3; See also Agnes Meroka-Mutua, 'From Relegation to Elevation: The Place of Customary Marriages under Kenya's Matrimonial Law' [2024] Oñati Socio-Legal Series 1, 5.

13 See for example the judgment of the court in PWK v EWK (Civil Appeal 71 of 2023) [2024] KEHC 12146 (KLR) (Family) (8 October 2024) (Judgment) [24]-[26] <https://new.kenyalaw.org/akn/ke/judgment/kehc/2024/12146/eng@2024-10-08> accessed 18 June 2025.

14 Remarks of Susan Jelagat, Principal Counsel, (Office of the Registrar of Marriages, Attorney-General's Chambers) 'Second Annual Family Conference' by Strathmore University and University of Nairobi, (22nd November, 2024) [hereinafter Susan Jelagat, Conference Remarks], referencing Marriage (Customary Marriage) Rules 2017 < www.kenyalaw.org> accessed 18 June 2025.

intuitive observation proves very challenging. It is difficult enough to access data on registration of marriages in general, because registration of marriage relies on manual records. The challenge is worsened by the fact that national data on registration of marriages is reliant on the timely filing of returns by the various officials licensed to conduct marriages, such as clerics and county-level marriage officers.[15] Nonetheless, even the sparse records available indicate that the compliance rate for the registration of customary marriages is much lower compared to that of civil and Christian marriages.[16] This calls for interrogation of the factors that account for the low uptake of registration of customary marriages.

This low uptake is worrying for all parties, but particularly for women whose property rights are often tied to their legal status in family, specifically, marriage.[17] Arguably, the potential negative impact of invalidation of unregistered customary marriages is likely to spell greater vulnerability for women than for men. This is on account of the socio-economic dynamics that have produced a gender asset gap[18] and cast women in the role of care givers, home makers and dependants, thus constraining women's agency in entering and exiting relationships.[19] Demographic realities, such as the early age at which women tend to marry, particularly in rural areas[20], further diminish their bargaining power in relationships, including ability to secure their rights by insisting on registration. Exposure to the risk of nullification of marriage for lack of registration is therefore gendered.

This article interrogates whether Kenya's approach to mandatory registration of customary marriages effectively protects women's rights, or whether it inadvertently exacerbates vulnerability. The article is organised into five sections. This introduction has set out a brief history of the requirement to register all marriages in Kenya, with a special focus on customary marriage. It flags the low uptake of registration and the gendered nature of the risk of invalidation on account of non-registration.

The second section explores the legal foundations of the requirement to register all marriages in Kenya, with a focus on the registration of marriages conducted under African customary law. The section also reviews the judicial decisions that have emerged on the legal effect of the failure to register customary marriages. The third section interrogates the factors that might explain why parties to customary marriage do not register their marriages despite the perceived benefits of marriage registration, and the potentially adverse legal consequences of non-registration. The fourth section juxtaposes Kenya's approach with the approaches taken by

15 However, the Office of the Registrar of Marriages has indicated that it is currently in the process of automating these records, which will likely improve the availability of data in the future. Susan Jelagat, Conference Remarks (n 14).

16 Susan Jelagat, Conference Remarks (n 14).

17 Agnes Meroka-Mutua (n 12).

18 On the gender asset gap, see Carmen Diana Deere and Cheryl R. Doss (n 2).

19 See UN-Women, Families in a Changing World, (Progress of the World's Women report, 2019-2020) (UN 2019) 82-83.

20 Ibid.

selected jurisdictions on the African continent, distinguishing between those that take a permissive or facilitative approach and those that, like Kenya, take a punitive approach as seen in case outcomes such as PWK v EWK[21]. The concluding section reflects on whether the current design of institutions to implement the requirement to register customary marriages is really pitched at those who stand to benefit from it. Recommendations are offered toward ensuring that despite the law's limited role in redressing the relational power dynamics implicated in undocumented relationships, registration as one of the tools in the legal tool-kit is made as effective as it can be, so that it proves useful in the hands of those able to pick it up and use it.

II. Legal Imperative for Registration of Marriage

It is not uncommon in weddings to hear the certificate of marriage analogized to a document of title to land: it ostensibly puts an end to all uncertainty and disputing. While the claim may amount to over-selling, there is a degree to which the claim rings true with respect to the potential benefit of a harmonized system for registration of marriages in all five systems.[22] If implemented well, such a harmonized registration system makes it possible to verify a person's marital status with a single search, thus averting the drama of multiple marriages across systems that has come to define succession disputes.[23]

Non-registration places a party on shaky ground should the validity of the union be questioned. Such a party risks losing out on the benefits associated with officially registered unions. These include the right to inherit from a deceased spouse, entitlements to matrimonial property, or claims relating to child custody. This has implications for the principle of equal protection of the law.[24] The gendered nature of this insecurity has already been pointed out in the previous section. Non-registration also acts as an impediment to instituting divorce through the formal legal process because in the absence of registration, the proceedings must be prefaced by proof of existence of a marriage in the first place.[25]

21 *PWK v EWK* (n 13).

22 Kenyan law recognises five systems of marriage: African customary, Christian, civil, Hindu and Islamic. See Marriage Act 2014, s 6.

23 For a discussion of succession disputes that involve rival widows' claims see Ali Elema Fila, Patrick Omwenga Kiage and Celestine Nyamu Musembi, 'Partition in Life and in Death: Intestate Succession after the Matrimonial Property Act, 2013' [2025] Special Issue: Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya, *East African Law Journal*, 135.

24 Sarah Castle, Elizabeth Ortiz and Philip Setel, 'Demand-side factors related to the registration of births, marriages, and deaths: A literature review' (2020) *Issue 2, CRVS Working Paper Series*.

25 Marriage (Matrimonial Proceedings) Rules 2022, rule 6(4)(a). However, this impediment may not be felt much with respect to dissolution of customary marriages, due to the dominance of AJS mechanisms that apply community-specific customs such as the return of bride price; See Meroka-Mutua (n 12) 10; Eugene Cotran, *Kenya: The Law of Marriage and Divorce* (Restatement of African Law Series, Vol.1 London, Sweet & Maxwell, 1968).

A. Mandatory Registration Under the Marriage Act 2014: Is the Law Clear?

Article 45(1) of the Constitution of Kenya 2010 places an obligation on the state to provide recognition and protection to the family.[26] Article 45(4) directs parliament to enact a law to recognize marriages conducted under any tradition, custom or system of law, provided that such marriages or systems are consistent with the Constitution.[27] Pursuant to that constitutional obligation, the Marriage Act, 2014 was enacted. The Act recognises five regimes under which marriages may be contracted, and provides for registration procedures for all five, under the Registrar of Marriages. Civil, Christian, Hindu and Muslim marriages are registered at the point of contracting.

In the case of customary marriages, section 44 which deals with notification states that parties to a customary marriage should notify the registrar 'within three months of completion of the relevant ceremonies or steps required to confer the status of marriage to the parties in the community concerned.'[28] Then section 55 which deals with registration states that after parties have completed the necessary rituals required by the applicable customary law, they are to apply to the registrar within six months for a certificate of registration of their marriage. Both parties are required to appear before the registrar in order to be issued with the certificate.[29]

To give further detail toward implementing these statutory provisions, the Marriage (Customary Marriage) Rules, 2017 were published on 7th April 2017.[30] The rules elaborate on section 44 by indicating that after the registrar receives the parties' notification, he shall display the notice in a conspicuous place for 14 days inviting any person with an objection to the registration of the marriage to notify the registrar within that period. If there is no objection to the registration at the expiration of 14 days, the registrar issues the parties with an Acknowledgement Certificate. [31] After the parties receive the Acknowledgement Certificate, they may then apply for registration in accordance with Article 55(1) at any time before the expiration of six months since the completion of the marriage rites in accordance with the relevant customary law. Upon receipt of the application for registration, the registrar may conduct further investigations in order to satisfy himself/herself that it is appropriate to issue the Certificate of Customary Marriage.[32]

Two months after the customary marriage rules were published, the then Attorney General issued a legal notice in the official government gazette indicating that with effect from the 1st of August 2017, parties contracting customary marriages

26 Constitution of Kenya 2010, art 45(1).
27 Ibid, art 45(4).
28 The notification includes a declaration by the parties certifying that they are both adults and are not within the prohibited degrees of relationship, and that they freely consent to the marriage. See Marriage Act 2014 s 45.
29 Marriage Act 2014 s 55(1).
30 Marriage (Customary Marriage) Rules, 2017 Legal Notice No 46 Of 2017, Kenya Gazette Vol. CXIX—No. 44, 7 April 2017 https://new.kenyalaw.org/akn/ke/act/ln/2017/46/eng@2022-12-31 accessed 19 June 2025.
31 Marriage (Customary Marriage) Rules 2017, rule 3.
32 Ibid, Rule 5.

would be required to 'obtain prior authorization from the Office of the Registrar of Marriages.'[33] This essentially introduced a preliminary marriage notification procedure similar to that followed in civil and Christian marriages. This is despite the fact that Legal Notice 46 of 2017, being subsidiary legislation cannot validly override sections 44 and 55 of the Marriage Act, 2014, which clearly provide that notification occurs only after the parties have already contracted a marriage under their applicable customary law. This raises important questions about the hierarchy of legal norms and whether administrative instruments can lawfully amend or conflict with substantive statutory provisions. Those statutory provisions do not impose on parties the burden of seeking prior authorization from the registrar. Curiously, the Attorney-General cites section 96 of the Marriage Act as the basis for this directive, yet section 96 deals only with pre-existing unregistered (and registrable) marriages, not the contracting of new marriages post enactment of the Act. Should parties contracting customary marriage comply with sections 44 and 55 and the Rules, or follow the subsequent legal notice? If the latter, on what legal anchor?

Section 96 of the Marriage Act requires that all unregistered customary, Hindu or Islamic marriages that were in existence at the time of entry into force of the Marriage Act be registered within three years of the coming into force of the Act, which would translate into a deadline of 20th May 2017, since the Act's commencement date is 20th May 2014. By the time the rules on the procedure to follow in registering customary marriages were published in 2017, the period for registration of subsisting marriages had about 6 weeks left to expiry. In order to mitigate for this very short period for compliance, the Attorney General, in exercise of the power given to the Cabinet Secretary under section 96(4) to extend the registration period, used the same legal notice to notify 'all parties married under African customary law that they are required to register their marriages starting 1st of August 2017'. The notice did not indicate a deadline or specify a window of time after which the registration would close, effectively making the registration period open-ended.

From the foregoing discussion, we can conclude that the law on registration of customary marriage suffered from a degree of uncertainty in the early stages. This may partially account for the low uptake.

B. Courts' Interpretation of the Legal Consequences of Non-registration

How have courts interpreted the customary marriage registration requirements under the Marriage Act, specifically, the legal consequences of non-registration?

33 *Kenya Gazette* Vol CXIX No 73 (Nairobi, 9 June 2017) Gazette Notice No 5345, p 2670 https://archive.gazettes.africa/archive/ke/2017/ke-government-gazette-dated-2017-06-09-no-73.pdf accessed 19 June 2025.

We attempt to answer this question by examining four recent cases: *EMM v PMK*[34]; *JTO v AP*[35]; *DMK v IL*;[36] and *MNK-v-POM*[37]

1. EMM v PMK (2024)

This case originated in the Chief Magistrate's Court at Machakos.[38] The petition sought dissolution of a customary marriage contracted in June 1987. Even though both petitioner and respondent admitted to having been in a customary marriage for 31 years, the court took it upon itself to deal with the preliminary legal question of whether indeed there was a marriage to dissolve, in accordance with the Marriage Act. Having established that the customary marriage was not registered, the court concluded that the combined legal effect of sections 3, 12(e), 59, and 96 of the Marriage Act, all of which deal with mandatory registration, meant that no valid marriage existed. The magistrate ruled that all existing customary marriages that had not been registered by 1st August 2020 had been rendered voidable, and therefore could only be annulled, not dissolved. The magistrate arrived at the cutoff date of 31st July 2020 by supposing that the Attorney-General's extension of the registration period by legal notice in 2017 was only for a further period of three years in accordance with section 96. The basis for this supposition is doubtful, as the legal notice does not specify any period, as pointed out above. No doubt the magistrate is working with a meaning of 'extension' that suggests that it must be for a period identical to the one being extended.

The case demonstrates that the uncertainty surrounding the requirement of registration of customary marriages is far from cleared up and is in need of further clarity. This ambiguity is heightened by the existence of other provisions of the Marriage Act which suggest that there are other considerations besides registration that establish the validity of a customary marriage. Section 43(2), for instance, states that the payment of a token amount of dowry 'shall be sufficient to prove a customary marriage'. Section 98 provides: 'A subsisting marriage which under any written or customary law hitherto in force constituted a valid marriage immediately before the coming into force of this Act is valid for purposes of this Act.'

The case also calls for reflection on the impact of such an interpretation of the provisions of the Marriage Act concerning registration. The parties in this case regarded themselves as married under custom for 31 years, with five children between them. Such a decision does not come without upheaval. We take up these issues in the concluding section.

34 Divorce Cause E023 of 2023) [2024] KEMC 11 (KLR) (15 May 2024) (Judgement).
35 *JTO V AP* [2024] KEHC 10464 (KLR) High Court at Nairobi (Milimani Law Courts) Family Appeal E128 of 2022.
36 *DMK v IL* [2021] KEHC 8611 (KLR).
37 See *MNK v POM*; *Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae)* (Petition 9 of 2021) [2023] KESC 2 (KLR) (27 January 2023) (Judgment) (2023).
38 There is no record of an appeal or review by a superior court.

2. *JTO v AP (2022)*

The petitioner sought a divorce decree from the High Court to dissolve an unregistered customary marriage. The court considered the question whether a valid customary marriage existed, and whether a party could file for divorce in respect of an un-registered customary marriage. The judge observed that once the requirements under customary law were fulfilled, then the parties were under an obligation to apply for registration of the marriage. The judge further noted that there was a grace period provided under section 96 of the Marriage Act to register unions that had been entered into prior to the enactment of the Act. In the case before her the judge found that the appellant, JTO, who claimed to have been married to the respondent since 2002, was required to prove that he had since registered his marriage through one of the ways provided under section 59 of the Act. The judge found that he had failed to prove that he had registered his marriage, and therefore he could not seek a dissolution of the union.[39] Here, the court went further to note that "a large number of adults are married customarily and [are] yet to register their unions," meaning that they could not get legal recourse as they cannot prove the requirements of registration under section 59 of the Act.[40] In its final disposition, the court held that parties finding themselves in such a quagmire as JTO could find recourse in the doctrine of presumption of marriage, provided they were able to satisfy the requirements of section 119 of the Evidence Act.[41]

The interpretation in this case and in *EMM* above say nothing of how section 98(1) is to be understood in relation to the provisions on registration. Section 98 is a saving clause, as cited above, recognising pre-existing marriages as valid, and there is nothing on the face of it that gives it an expiration date.

In addition, this strict interpretation of the registration requirements effectively sets aside previous established practice where courts would apply the English common law presumption of marriage to infer intention to marry in instances where a cohabitee alleging customary marriage failed to produce proof of compliance with customary rites. This approach provided a cushion against the upheaval that would otherwise follow outright annulment on a technicality. The principles for establishing the English common law presumption of marriage were elaborated and applied to this effect in the 1976 case of *Hottensiah Wanjiku Yawe vs Public Trustee*.[42] The Chief

39 *JTO v ATP* (n 35) [22]-[24].

40 Ibid. [24].

41 *JTO v ATP* (n 35) [28]; Section 119 of the Evidence Act provides: 'The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.' The common law presumption of marriage based on evidence of long cohabitation and repute is derived from this provision.

42 *Hottensiah Wanjiku Yawe vs Public Trustee* [1976] KECA 1 (KLR). The principles on application of the English common law presumption of marriage were affirmed to a limited degree in a 2023 decision of the Supreme Court. See *MNK-v-POM* (n 37). For a detailed discussion of the *MNK-v-POM* case see Evance Ndong, 'Case Review: Key Judicial Pronouncements on Constitutionality of Aspects of Family Law in Post-2014 Kenya' [2025] Special Issue: Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya, East African Law Journal, 253.

Magistrate in *EMM-v-PMK* interpreted the Marriage Act as having ushered in a new era which leaves no room for this stop-gap measure. However, the Supreme Court case of *MNK v POM* stopped short of declaring the death of the English common law presumption of marriage, leaving a door open for its limited application in some cases, but at the cost of stirring up legal uncertainty in its wake.[43]

3. DMK -v- IL (2021)

This case was argued before the High Court at Bungoma. The respondent filed an objection to the appellant's intention to marry someone else in a Christian ceremony, claiming that the appellant was already married to her in a customary marriage. The objection was escalated to the Deputy County Commissioner, who was also the Marriage Registrar, who then convened a conciliatory forum, incorporating the families involved. Having heard all the parties the Deputy County Commissioner (cum Marriage Registrar) ruled that there was indeed a valid customary marriage, concluded in accordance with the relevant customary law. It was further established that the parties had cohabited for four years and had two children together.

DMK, being dissatisfied, challenged the decision through these court proceedings. The respondent provided evidence of the marriage, including the payment of dowry, the involvement of elders, and cohabitation before the relationship ended. The court upheld the Marriage Registrar's finding that DMK was barred from contracting a monogamous marriage with another party until the customary marriage was dissolved.

This case illustrates the courts' willingness to recognize customary marriages based on proof of compliance with customary rites, even without formal registration. This recognition of the pre-existing customary marriage as valid despite lack of registration directly contradicts the outcome in the *EMM-v-PMK* case discussed above. This highlights a significant tension in Kenyan law regarding unregistered customary marriages. Some courts recognize the validity of these marriages based on evidence of compliance with traditional (customary) practices, while others construe the statutory provisions and rules strictly to invalidate unregistered customary marriages. The current state of the law raises concerns about the rights of individuals in unregistered marriages and their access to legal remedies.

4. MNK-v-POM: The Supreme Court's Limited Guidance

As noted above, the Supreme Court in *MNK v POM* did, to a limited degree, offer a solution for parties who find themselves contending for their rights in unregistered unions. First, the court affirmed that in limited circumstances the presumption of marriage may come to the rescue of such parties. Where the court finds the existence of a marriage based on the presumption of marriage, this should be done sparingly

43 See *MNK v POM* (n 37).

based on specific parameters.[44] Second, the court held that the property rights of parties to such unions may be protected through the equitable doctrine of a resulting trust, regardless of whether the union approximates to a marriage or not. Essentially, the Supreme Court points in a direction that separates the property issue from the status of the relationship. This may aid parties in customary marriages that fail to satisfy the strict interpretation of the registration requirement.

Still, with decisions such as *EMM -v- PMK* still in place, a clear and definitive statement on the precise legal status of unregistered customary marriages remains essential. This clarity would help guide the interpretation of the combined effect of the Marriage Act's conflicting provisions on establishing validity of a customary marriage, namely sections 3(3), 12(e), 43(2), 44, 55, 59, 96 and 98, along with the attendant subsidiary rules. Without clarity, the registration provisions could end up undermining the very security they were intended to guarantee.

One might argue, based on the "bad man" theory that a strict interpretation of the law, resulting in invalidation of unregistered marriages, is necessary to ensure compliance.[45] On the flip side, however, this approach raises the question of whether it is truly effective or merely opens a new set of challenges. The unintended consequences of such a strict approach could create more complications, potentially undermining the spirit of the law and leaving vulnerable parties, especially women, without legal recourse or recognition. Thus, a more nuanced approach may be needed to balance the pursuit of legal compliance with the pursuit of justice and equitable outcomes.

C. Regional and international legal instruments on the registration of customary marriages

The imperative for universal registration of marriages is present in both international and regional law, which have become part of the law of Kenya by virtue of Article 2(5) and 2(6) of the Constitution of Kenya, 2010 which affirm and domesticate the general rules of international law[46] and any treaty or convention ratified by Kenya.[47] Article 16 of the United National Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) requires state parties to take all necessary action to "make registration of marriages in an official registry compulsory."[48]

In General Recommendation 28 (issued in 2010) the CEDAW Committee has interpreted Article 2, the article prohibiting all forms of discrimination against women, to mean that states facilitate access to and provide for the full realisation

44 *MNK v POM* (n 37) [64].

45 The Bad man theory posits that law should be conceptualised from the perspective of the 'bad man': the law will only be complied with where there is sanction. See Michael Plaxton, 'The Challenge of the Bad Man' (2013) 58 (2) McGill Law Journal 451,478 https://ssrn.com/abstract=2267200 accessed 17 June 2025.

46 Constitution of Kenya 2010, art 2(5).

47 Ibid.

48 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)(adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 [hereinafter CEDAW Convention].

of women's rights, irrespective or marital status, including through effective policies and programmes. Such policies must ensure that women have access to necessary information, which would include information on the requirements and procedures for marriage registration.[49] The Committee has also stated in General Recommendation No. 21, that states must require the registration of all marriages, whether contracted under civil or religious or customary law.[50] Similarly in General Comment No. 19, the Committee on Civil and Political Rights (CCPR) has stated that it would not be antithetical to Article 23 of the International Covenant on Civil and Political Rights (ICCPR) for states to require registration of marriage.[51] The Human Rights Committee, in its concluding observations on Kenya's second periodic report highlighted the importance of ensuring that customary marriages are appropriately registered to guarantee the protection of women's rights and the enforcement of legal safeguards.[52]

At the regional level, Article 6(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol) requires that states enact appropriate national legislative measures to guarantee the recording and registration of marriages.[53] Similarly, Article 21(2) the African Charter on the Rights and Welfare of the Child (the African Children's Charter) provides that registration of all marriages in an official registry is compulsory. The African Children's Charter's interest in marriage registration is with regard to addressing child marriage. The call for mandatory registration of marriages has also been made by the African Commission in its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights. This document states that marriage registration is integral to the state's obligation to put in place national plans or policies that ensure that every marriage is registered.[54]

The issue of registration of marriage at the regional and international level has not been free of controversy. The state of Namibia entered a temporary reservation on

49 Committee on the Elimination of Discrimination against Women (CEDAW Committee), 'General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (16 December 2010) UN Doc CEDAW/C/GC/28 https://www.refworld.org/legal/general/cedaw/2010/en/77255 accessed 19 June 2025.

50 CEDAW Commitee 'General Recommendation No. 21: Equality in Marriage and Family Relations' (1994) UN DOC A/49/38 https://www.refworld.org/legal/general/cedaw/1994/en/61456 accessed 19 June 2025.

51 Human Rights Committee, 'General Comment No 19: Protection of the Family, the Right to Marriage and Equality of the Spouses (Art 23)' (27 July 1990) UN Doc HRI/GEN/1/Rev.9 (Vol I) 198, [4] <https://www.refworld.org/legal/general/hrc/1990/en/38884> accessed 19 June 2025.

52 Ibid.

53 The Maputo Protocol was adopted by the African Union in 2003. For a comprehensive legal commentary on the protocol's provisions see Annika Rudman, Celestine Musembi and Trésor Makunya (eds), The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A Commentary (PULP 2023) <https://www.pulp.up.ac.za/latest-publications/the-protocol-to-the-african-charter-on-human-and-peoples-rights-on-the-rights-of-women-in-africa-a-commentary> accessed 19 June 2025.

54 African Commission on Human and Peoples' Rights (ACHPR), *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* (2009) para 95(e) <https://archives.au.int/handle/123456789/2063 > accessed 19 June 2025.

Article 6(d) of the Maputo Protocol on the basis that it did not, at the time, have the necessary legislative framework for the recording and registration of customary marriage.[55] The Republic of South Africa similarly entered a reservation stating that "it does not consider itself bound by this Article that a marriage be recorded in writing and registered in accordance with national laws in order to be legally recognized."[56] The reservation by South Africa is based on its national law, the Registration of Customary Marriages Act, which does require registration of customary unions but does not invalidate marriages that fail to comply.[57]

In 2016, faced with lack of clarity on the legal consequences of Article 6(d) of the Maputo Protocol, five women's rights organisations from Kenya, Nigeria, South Africa and Zimbabwe sought an advisory opinion from the African Court on Human and Peoples' Rights on the nature and scope of Article 6(d) of the Maputo Protocol.[58] The applicants wanted the Court to clarify whether a state's obligation under Article 6(d) to enact legislation on registration of all marriages must necessarily be interpreted as invalidating marriages that failed to comply with the requirement of registration. The organisations' intent was to draw the court's attention to the prevailing reality of a high number of unregistered (customary) marriages, and that such an interpretation would itself constitute a violation of the rights of women by leaving their marriages without legal protection. However, the matter did not proceed to substantive determination because the organizations lacked legal standing before the African Court.[59]

Thus, at the regional level too, there lurks the real possibility that a strict literal interpretation of the law could end up undermining the very protection the Maputo Protocol seeks to avail to women in all types of marriages.

The requirement to register customary marriages must be understood in light of Kenya's international and regional legal obligations. Treaties such as CEDAW and regional instruments such as the Maputo Protocol are considered to have binding effect on Kenya under Article 2(6) of the Constitution of Kenya, 2010 and

55 Namibia intends to remove the reservation once it enacts the necessary legislation. See Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) <https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLES_RIGHTS_ON_THE_RIGHTS_OF_WOMEN_IN_AFRICA.pdf > accessed 19 June 2025, reservation by Namibia to art 6(d.

56 Ibid. It should be noted, though, that section 4 of the South African Recognition of Customary Marriages Act 120 of 1998 requires registration of customary marriages within 12 months. <https://www.gov.za/sites/default/files/gcis_document/201409/a120-980.pdf > accessed 19 June 2025.

57 JD Mujuzi, 'The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: South Africa's Reservations and Interpretative Declarations' (2008) 12 *Law, Democracy & Development* 41, 53.

58 The five organisations are: Centre for Human Rights, Pretoria (South Africa); Federation of Women Lawyers (Kenya); Women's Legal Centre (South Africa); Women Advocates Research and Documentation Center (Nigeria); and Zimbabwe Women Lawyers Association. See < https://www.the-isla.org/article-6d-advisory-opinion/ > accessed 19 June 2025.

59 *Request for Advisory Opinion* [2017] African Court on Human and Peoples' Rights 001/2016 (hereinafter *Request for Advisory Opinion*).; See also Centre for Human Rights, 'Litigation and Implementation Unit' (University of Pretoria 2025) <https://www.chr.up.ac.za/units/about-liu/30-units/litigation-and-implementation/2778-litigation> accessed 19 June 2025.

these frameworks strengthen the state's obligation in the protection of women by requiring it to eliminate barriers to the enjoyment of their rights. As such, Kenya must ensure that registration processes do not create new barriers or reinforce existing inequalities for women in customary unions. Kenya's implementation of mandatory registration must be sensitive to the risk of administrative hurdles whose impact falls disproportionately on women, particularly in rural or marginalized communities. The goal should be to operationalize registration as a protective mechanism not a punitive or exclusionary one.

III. Uptake of Registration of Customary Marriages

A. Overview: Status of Registration

Despite the promise of security that marriage registration holds, it is generally acknowledged that uptake of registration of customary marriages is low.[60] For instance, a baseline study undertaken for the Yes I Do Alliance, an NGO initiative working with youth and their communities against child marriage in Kajiado West collected data on registration of marriage among young people. The study found that at the time of the baseline study, 71% of the marriages reported among the participants were unregistered.[61] Similarly, in *JTO v AP*, the Court did note the low rates of uptake of registration of customary marriage.[62]

Various factors may explain the persistence of low registration rates. For starters, the manner in which the transition to mandatory registration of customary marriages was managed, as discussed above, may have caused uncertainty, which did little to sell the initiative. Parties who have conducted their affairs without the need for registration would have to be very intentional about transitioning to registration. They may rightly wonder what benefit would be conferred by this formality, especially in the face of an established practice of swearing affidavits whenever some documentary evidence of marriage is needed in dealings with officialdom or with institutions such as banks.[63]

The remainder of this section explores further the various factors that might explain low uptake of registration of customary marriages.

B. Information gap

There is little knowledge of the registration procedures, in a context of general lack of awareness of the requirement to register a marriage, especially a customary marriage. People may also not appreciate the consequences of failure to register.

60 Susan Jelagat, Conference Remarks (n 14).

61 Tabither Gitau and others YES I DO: *A Baseline Study on Child Marriage, Teenage Pregnancy and Female Genital Mutilation/Cutting in Kenya* (Royal Tropical Institute, KIT, 2016), 26.

62 *JTO v AP* (n 35) [24]-[25].

63 See Janet Kabeberi-Macharia and Celestine Nyamu, 'Marriage by Affidavit: Developing Alternative Laws on Cohabitation in Kenya', in John Eekelaar & R.T. Nhlapo (eds), *The Changing Family: International* Perspectives on the Family and Family Law (Hart 1998). Also published in 14 Zimbabwe Law Review (1997) 46.

Lack of awareness is compounded by the administrative complexity that comes with plural legal systems. There have been efforts to address this gap. For instance, the Kenya Legal and Ethical Issues Network (KELIN), a civil society organisation, undertakes advocacy efforts through projects aimed ultimately at safeguarding women's rights to property, with promotion of registration of marriage as one avenue. So far, projects have been undertaken in the Western region of Kenya.[64]

C. Administrative hurdles

Although efforts have been made to avail marriage registration services at the county level, further decentralisation would make registration centres more accessible. The need for further decentralization is made more significant by the requirement that parties wishing to register a customary marriage must appear in person together before the registrar of marriages. The travel and other costs associated with registering a customary marriage may create significant barriers for many individuals. Currently, the fee for acquiring a marriage certificate is set at Kes 3,900.00,[65] which poses a significant burden for many families, particularly in lower-income communities.

Additionally, the law places the onus for registration of a customary marriage on the parties themselves.[66] This contrasts with other marriage systems, such as Christian marriages, where the responsibility typically falls on church ministers, or civil marriages, where marriage registrars are tasked with handling the process.[67] This difference in the duty of registration may be a factor in contributing to the challenges faced by individuals in customary marriages, particularly those from marginalized or low-income communities.[68]

D. Gendered economic imbalance

The socio-economic position of women, particularly in rural areas may also play a role in explaining the low rates in registration of customary marriages. As discussed earlier, the gender asset gap translates into low bargaining power in relationships. As a consequence, the person who has reason to worry about marriage registration is often not the person with the power to initiate that conversation. Weak bargaining power is compounded by limited knowledge about rights and the protection that the law might offer.

64 'KELIN, *Securing Your Family's Future Together: A Course for SYFF for Men and SYFF for Women Couple Graduates* (19 October 2021) https://www.kelinkenya.org/wp-content/uploads/2024/09/SYFF-Together-Curriculum-v.2-19-Oct-2021-READY-to-PRETEST.pdf accessed 19 June 2025.

65 State Law Office, 'Registration of New and Existing Marriages' (Office of the Attorney eneral & Department fo Justice, Kenya)< https://www.statelaw.go.ke/services-to-the-public/getting-married-in-kenya/registration-of-new-and-existing-marriages/> accessed 19 June 2025).

66 Marriage Act 2014, ss 44 and 55.

67 Ibid, s 42.

68 United Nations Economic Commission for Africa, Report of the Regional Assessment Study of Civil Registration and Vital Statistics Systems in Africa (UNECA 2012) https://www.uneca.org/sites/default/files/PublicationFiles/ACS12-0028-ORE-Regional%20Asessment%20Report%20_12-01490_.doc accessed 19 June 2025.

E. Cultural fluidity

Another challenge arises from the fluid nature of formalities for contracting customary marriages. Despite the textbook-like manner in which checklists for validity of a customary marriage are presented in some court decisions,[69] the process is often marked by flexibility and variation. The one common feature in virtually all communities is the payment of bride wealth (which the Marriage Act terms 'dowry'), but even with that, variation abounds even in the same ethnic community as to how much and when it is due, whether in part or in full. For this reason, the question of completion of the rites so as to qualify for registration is not easily settled.

Section 43 of the Marriage Act clearly tries to get around this fluidity when it states that where payment of dowry is required by the relevant customary law, a token payment of dowry is sufficient to prove a marriage. This provision can save marriages where payment of dowry may not have been completed. However, there is still plenty of room for disagreement on what will suffice as a 'token' amount, which in turn affects the registrability of the marriage.[70]

On account of the fluidity and flexibility of customary marriage procedures, it can be difficult to prove that specific customary rites have been undertaken as was the case in *ASA -v- NA & another* [2020] eKLR.[71] The court concluded that conflicting accounts of witnesses in respect to whether certain rites had been undertaken must mean that they did not in fact happen. The inability to prove completion of customary rites as required by section 43 can count against an application for registration of marriage.[72]

F. Mistargeting of Beneficiaries

There is an additional potential factor that might explain the low uptake of registration of customary marriages. At the 2nd Family Law Conference held at the Strathmore University in Nairobi in November 2024, a Marriage Registrar recounted some instances where parties had completed the online notice of intention to marry, indicating the type of marriage as customary. When the parties presented themselves before the registrar and it was explained to them that a customary marriage is potentially polygamous, they backed off- the brides in particular. Whether these parties opted to pursue a different type of marriage or abandoned the process altogether is not known.

These accounts are anecdotal, but they do raise a fundamental question: to whom, then, is the option of customary marriage registration actually pitched? Individuals who choose the expense and administrative effort of approaching a registry at county

69 See, for example, Eugene Cotran, Casebook on Kenya customary law (Nairobi University Press & Professional Books 1987).

70 Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN), 'Impact of Dowry on Women's Land and Property Rights in Kenya' (KELIN, 2021) Survey Report 19 www.kelinkenya.org/wp-content/uploads/2024/09/Impact-of-Dowry-on-Womens-Land-and-Property-Rights-in-Kenya2.pdf accessed 19 June 2025.

71 *ASA v NA & another* [2020] KEHC 345 (KLR).

72 State Law Office (n 65).

or national level are perfectly capable of fulfilling the procedural requirements of a civil or Christian marriage. In order for them to opt for customary marriage, they would have to see it as offering something distinctive or beneficial. Low rates of registration of customary marriage may be on account of lack of concerted effort to promote and make customary marriage registration more accessible to those for whom it would be most beneficial or most practical. This entails reaching out at the village, ward, or sub-county level, where awareness and accessibility could be increased. By pitching the registration process at these more local levels, the process could be made more accessible and relevant for the communities where customary marriages are most common, ensuring that these individuals are better informed and able to take advantage of the option to register their marriages. This approach would be aligned to the suggestions by the Court in *JTO v ATP* where the court noted the need for civic engagement on the question of registration of marriages.[73]

IV. Approaches to registration of customary marriages in other African jurisdictions

Trends on the continent indicate that in most jurisdictions, customary marriages are not served by the official marriage registry. In the handful of jurisdictions that have extended registration to customary marriage, the uptake has been uniformly low.[74] The approaches adopted in these few jurisdictions have differed on the point of whether to make registration mandatory or not. As discussion about customary marriage registration in Kenya continues, it is essential to refer to other countries' experiences for lessons to draw and pitfalls to avoid.

The approaches on the continent may be classified into two categories: permissive and punitive, the latter being construed narrowly to refer to invalidation of marriage as the penalty for failing to register.

A Permissive Approach: Availing the System without Invalidating Unregistered Marriages

1. Uganda

Uganda's system for registration of customary marriages long predates the Maputo Protocol. The Customary Marriage (Registration) Act of 1973[75] sets up the system but specifies that failure to register does not invalidate the marriage. According to Section 20 of the Act, failure to register within the required period of six months

73 *JTO -v- ATP* (n 35) [25].

74 See Celestine Nyamu Musembi, 'Article 6', in Annika Rudman, Celestine Musembi & Trésor Makunya (eds), *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A Commentary* (PULP 2023) https://www.pulp.up.ac.za/latest-publications/the-protocol-to-the-african-charter-on-human-and-peoples-rights-on-the-rights-of-women-in-africa-a-commentary, 153 (hereinafter Musembi, 'Article 6').

75 Customary Marriage (Registration) Act, Cap 248 (Uganda) available at https://www.ugandalaws.com/statutes/principle-legislation/customary-marriage-registration-act accessed 19 June 2025 [hereinafter Customary Marriage (Registration) Act, Uganda].

incurs a late registration penalty but it does not invalidate the marriage.[76] However, the marriage could still be registered beyond the six month period upon payment of a fee as outlined under section 8 of the Act. Couples in subsisting marriages that predate the Act were required to register within five years of its commencement, and late registration incurs a fee.[77] The legislation was born out of the recommendations of a 1964 commission with terms of reference similar to Kenya's 1967 commission, namely, to examine marriage, divorce, and women's status. Among the recommendations was a requirement for registration of all types of marriages, in recognition of the challenges faced by women in customary marriages particularly regarding inheritance and abandonment.[78]

2. *South Africa*

In South Africa, customary marriages are regulated by the post-apartheid Recognition of Customary Marriages Act.[79] This law and its regulations detail the registration process for customary marriages. According to Section 4(1), couples must register their marriages within 90 days after the marriage rites. However, South Africa faces low compliance rates, and no penalties are imposed for non-registration.[80] There seems to be a preference for civil unions.[81] A significant difference between South Africa and Kenya is that in Kenya, an unregistered customary marriage can be voided under Section 12(e) of the Marriage Act, 2014. In contrast, South Africa's Act states that unregistered marriages remain valid as long as they comply with customary law.[82] While both spouses are responsible for registration, either one can initiate the process if they can prove that a customary marriage actually took place. In practice, both spouses usually need to be present to avoid cases of fraud.[83] Even though South Africa does not impose penalties for failing to register a customary marriage, parties whose marriage predates the Act must seek a court order in order to be eligible to register their marriage if they missed the initial deadline for registration.[84] This in itself may be considered a sanction owing to the burden that comes with court proceedings, but otherwise the statute's approach is facilitative rather than punitive, as non-registration does not invalidate the marriage.[85]

76 Ibid, s 37(2).
77 Customary Marriage (Registration) Act, Uganda, s 37(2).
78 H.F. Morris, 'Uganda: Report of the Commission on Marriage, Divorce and the Status of Women' (1966) 10(1) Journal of African Law 3-7.
79 Recognition of Customary Marriages Act No. 120 of 1998 (South Africa). The Recognition of Customary Marriages Act marked the first recognition of customary marriages in law. In the pre-apartheid era, customary marriages were referred to as 'unions' without legal status.
80 Matthews Eddie Nkuna-Mavutane and Juanita Jamneck, 'Improving Compliance with Section 4 (1) of the Recognition of Customary Marriages Act 120 of 1998: Registration of Customary Marriages' (2024) 27(1) Potchefstroom Electronic Law Journal (PELJ), 1.
81 Siyabonga Sibisi, 'Registration of Customary Marriages in South Africa: A Case for Mandatory Registration' (2023) 44(3) Obiter 515 (hereinafter Sibisi).
82 Recognition of Customary Marriages Act 1998 (SA), s 4(9).
83 Sibisi (n 81).
84 Recognition of Customary Marriages Act (Ghana), s 4(7) (a).
85 Sibisi (n 81).

3. Ghana

Marriage in Ghana is regulated by the Marriages Act[86] which, like Kenya, has unified all marriage laws in one legislation. The Act allows parties to elect to register their customary marriages, making registration optional. [87] Ghana does not impose penalties for failing to register. Section 1 of the Act stipulates that parties to a customary marriage may elect to have their marriage registered in accordance with the Act. The use of 'may' confirms that registration of customary marriages is optional. In addition, an application for registration of marriage can be made at any time, and a court need only be satisfied either by oral or documentary evidence that the customary marriage is valid.[88]

The Act further provides for a district level system for registration of customary divorces.[89] Dissolution of a customary marriage in Ghana is in accordance with the applicable customary law. Parties bear the duty of notifying the registrar through a statutory declaration stating that the marriage has been dissolved in accordance with the applicable customary law. Further the Act stipulates that the Minister responsible for Justice may, by legislative instrument, make regulations prescribing the periods within which customary law marriages contracted before or after the commencement of the Act shall be registered. The Minister is also given power to prescribe the periods within which the dissolution of customary law marriages shall be registered.[90]

An analysis of these selected countries demonstrates that even in countries that have adopted a permissive approach to marriage registration, no African state currently offers explicit incentives such as financial benefits or administrative support, to encourage the registration of marriages, including customary unions. Instead, the dominant legal approach across the continent continues to prioritize sanctions and legal consequences to compel compliance. However, the severity of these sanctions varies, and the key distinction lies in the degree of inconvenience or legal disadvantage imposed for non-registration.

Unlike countries that adopt a punitive approach where failure to register a customary marriage may result in complete lack of legal recognition and denial of spousal rights, some states impose less fatal consequences. For instance, in Uganda, late registration of a marriage merely attracts a penalty fee, without affecting the legal validity of the marriage itself. In South Africa, parties to unregistered customary marriages that pre-date the statutory deadline may face administrative hurdles, such as the need to obtain a court order to validate the marriage.[91] Meanwhile, in Ghana, there is no

86 Marriage Act, Chapter 127 of the Laws of Ghana.
87 Ibid, s 1.
88 Marriage Act, Chapter 127 of the Laws of Ghana, s 15(2).
89 Ibid, s 6.
90 Marriage Act, Chapter 127 of the Laws of Ghana, s 2(2).
91 Recognition of Customary Marriages Act, (Ghana) s 4(7) (a).

penalty or adverse legal effect for failing to register a customary marriage.[92] One might argue that the true incentives lie in the legal benefits attached to registration such as access to inheritance, spousal recognition, and property rights but these are more accurately described as protections rather than proactive inducements. This variation highlights that while sanctions are common, their impact and the burden they impose on vulnerable groups differs widely across jurisdictions.

B. Punitive Approach: Jurisdictions where the Legal Frameworks Tend toward Invaliding Unregistered Customary Marriages

The punitive approach is anchored in the goal of enforcing compliance by ensuring that marriages are not only recognized by custom but also by the state, thereby providing formal legal protection to the parties involved. The harshness of the sanction is ostensibly justified by the unlocking of the benefits that flow from easier proof of marriage thereby broadening access to legal remedies. Three jurisdictions that take the punitive path are discussed below.

1. Cameroon

In December 2024, the National Assembly of Cameroon enacted legislation officially recognizing customary marriages and granting them legal status equal to that of civil marriages.[93] This move acknowledges the historical marginalization of customary marriages in Cameroon, which were often considered inferior, with unclear legal status. According to the new legislation, customary marriages will only be legally valid if they are registered with a civil registrar. The process for registration is as follows:

a. **Marriage Declaration**: Spouses must formally declare their marriage to a civil registrar. This can be done at the registrar's office located in the place of either spouse's birth, their current residence, or the location where the marriage ceremony occurred.
b. **Transcription Request**: After the declaration, the couple submits a request for the marriage to be transcribed into the civil register.
c. **Publication and Notification**: The registrar publishes the marriage declaration and informs the relevant registrars in the spouses' places of birth and residence.
d. **Objection Period**: Following publication, there is a 30-day window during which any individual with a legitimate interest may raise objections to the registration of the marriage.
a. **Final Registration**: If no objections or issues arise within this 30-day period, the marriage is officially transcribed into the civil register, granting it legal recognition.[94]

92 Marriages Act, Ghana, s 1.
93 Law No. 2024/016; see also 'Cameroon: Law Enacted to Provide Legal Recognition of Customary Marriages' (*Citizenship Rights in Africa Initiative*, 7 January 2025) http://citizenshiprightsafrica.org/cameroon-law-enacted-to-provide-legal-recognition-of-customary-marriages/ accessed 18 June 2025.
94 Ibid., ss 16 and 17.

This law has been lauded as offering better safeguards for women's rights within such unions. The issue of implementation remains to be seen, as the legislation is newly enacted.

2. Democratic Republic of Congo

In the Democratic Republic of Congo (DRC), the law mandates that all marriages, including those based on customary practices, must be registered at the local city hall for them to be officially recognized.[95] This applies to marriages celebrated through intra-family structures, in accordance with the various customary laws. The government acknowledges that customary marriages are the most prevalent in the country's rural areas.[96] While customary marriages are legally recognised, they must be registered within a month of the ceremony in order to be treated as valid marriages and to officially alter the legal status of the individuals involved.[97] Failure to register could also result in intervention by the peace tribunal, either at the request of the Public Prosecutor's Department or any other interested party, as stated in Article 378 of the Family Code.[98]

The registration process requires the couple to submit a marriage declaration, indicating the date of the ceremony and confirming that the necessary customary marriage formalities have been observed. In some cases, the details of the witnesses, such as their names, professions, and addresses, may also be required.[99]

However, despite these strict and punitive legal provisions, many couples in the DRC continue to live together for extended periods without registering their marriages. It is often only when legal matters such as property disputes, separation, or divorce arise that the fact of official marriage registration becomes significant. In an effort to address this issue, the government has set up civil registry offices in various provinces and regions. These offices are intended to simplify the registration process and provide civil status certificates, making it easier for couples to comply with the legal requirements and ensuring their unions are legally recognized and protected.[100]

3. Zimbabwe

In Zimbabwe, the Marriage Act, which was enacted in 2022, but is yet to come into force, requires mandatory registration of marriages, including those contracted under customary law.[101] The law provides a clear framework for the registration and solemnization of customary law marriages, ensuring that these unions are

95 See Democratic Republic of Congo, Combined 11th to 13th periodic reports 2005-2015 on the African Charter on Human and Peoples' Rights [198] https://www.rightofassembly.info/assets/downloads/DRC_Periodic_Report_2005_2015_to_the_ACHPR.pdf accessed 20th June 2025 (hereinafter DRC periodic report).

96 Ibid.

97 DRC periodic report (n 95) [198].

98 Ibid.

99 DRC periodic report (n 95).

100 Ibid.

101 Marriages Act, 2022 (Zimbabwe) https://zimlii.org/akn/zw/act/2022/1/eng@2022-05-27#defn-term-marriage accessed 20 June 2025 (hereinafter Marriages Act, Zimbabwe).

given equal status under the law, thereby enhancing legal protections for the parties involved.

The Act emphasizes that all marriages registered under its provisions hold equal status, irrespective of whether they are customary or civil marriages.[102] To facilitate the solemnization of customary marriages, the Act grants Chiefs the authority to act as marriage officers within their districts. Every Chief, by virtue of their office, is responsible for performing customary law marriages.[103] To ensure that Chiefs are suitably qualified, the law mandates that they be certified as competent marriage officers within four months of the Act's commencement or their investiture. This certification ensures that customary law marriages are solemnized in a manner that is both legally sound and culturally appropriate.

For a customary marriage to be valid under the law, it must be solemnized in the presence of the appropriate marriage officer and two witnesses. These witnesses, typically relatives, must be recognized under the community's customary law as the primary family witnesses.[104] The marriage officer is tasked with ensuring that both parties are of legal age, have freely consented to the marriage, and that there are no legal impediments to the marriage.[105] Additionally, the marriage officer must confirm that customary law formalities, such as the payment of *lobola* or *roora* (bride price), have been met. If these conditions are satisfied, the marriage is deemed legally valid under customary law.[106]

Parties to a customary marriage, where that marriage is conducted according to customary rights, but not solemnised under the Marriages Act, must register within three months or within a later period prescribed by the Registrar.[107] The parties would be required to provide relevant information, including the date of marriage, and any marriage consideration (such as *lobola* or *roora*). The Registrar would verify the marriage and, if satisfied, issue a certificate of registration. [108] This formal registration process ensures that marriages are recognized by the state and that the parties involved have access to the legal protections afforded to legally recognized unions.

In Zimbabwe, parties to unregistered customary law marriages that predate the coming into force of the law will be required to register their marriages within twelve months.[109] This retrospective application of the registration requirement is similar to Kenya's approach. Failure to register a customary marriage in Zimbabwe will affect the validity of the marriage under customary law and may limit the couple's access to legal benefits, such as inheritance rights or the ability to claim

102 Marriages Act, 2022 (Zimbabwe) s 2.
103 Ibid, s 9.
104 Marriages Act, 2022 (Zimbabwe) s 16(3).
105 Ibid s 16(2).
106 Marriages Act, 2022 (Zimbabwe) s 16(2).
107 Ibid, s 17(1).
108 Marriages Act, 2022 (Zimbabwe) s 17 (2).
109 Ibid 47(3).

marital property upon divorce or separation. The rights of a child of an unregistered customary marriage, however, are unaffected by the failure to register the marriage.

Kenya could benefit from benchmarking Zimbabwe's legal framework as concerns legal recognition of Chiefs as official marriage registrars, a measure that was recommended by the 1967 Commission, and is only partially reflected in the Customary Marriage Rules. Rule 8(2) requires couples appearing before the registrar to bring a letter from the Chief confirming that the necessary customary rites were completed. The Zimbabwe legislation, by contrast, empowers local Chiefs to actually officiate and register customary marriages. Zimbabwe has made the process more accessible and inclusive for communities living far from urban centers.

In summing up this reflection on regional experiences, it is fair to state that whether a state employs a permissive or punitive approach, the laws in principle strike a delicate balance between respecting cultural traditions and providing legal clarity. They work toward the goal of ensuring that customary marriages receive the same legal recognition as civil marriages. However, jurisdictions pursuing a punitive approach could consider offering incentives instead to encourage compliance. Examples of such incentives might be waiver of registration fees for customary marriages, administrative support to users throughout the process, offering tax or other benefits to legally registered couples, or enhancing social welfare programs. At the very least, in both approaches, the need to invest in public awareness initiatives remains indispensable, so as to get to the bottom of the factors that explain low uptake of registration.

V. Conclusion

The importance of registering customary marriages cannot be overstated. The importance of clarity in the legal framework governing registration cannot be overstated either. This article has demonstrated that the provisions of Kenya's Marriage Act and its subsidiary rules and subsequent legal notice on registration of customary marriage are far from unambiguous. The Attorney-General's Legal Notice of 2017 requiring parties contracting customary marriages to seek prior authorization from the registrar contradicts the procedure laid out in sections 44 and 55. The combined effect of the registration provisions and the saving clause (section 98) on the validity of unregistered marriages that predate the Marriage Act is unclear both in the text of the statute and from the reported cases.

This ambiguity notwithstanding, courts have gone ahead to invalidate customary marriages on account of non-registration. A ruling from the apex court on this issue is necessary, perhaps triggered by a strategic litigation initiative.

The legal consequences of failure to register must be addressed using a substantive equality approach, taking into account the reasons why people do not register, the impact on women, the vulnerabilities that abound from making registration of marriage compulsory and ameliorating the harsh legal consequences of non-registration. A substantive equality approach would ensure that the legal

requirements for universal registration of marriage are interpreted in a way that does not further compound disadvantage for those who are at risk. It would need to acknowledge the disproportionate adverse impact on women, recognising that different groups of women would require different tactics to incentivise compliance. In essence, it would entail adoption of measures that encourage the structural change that is needed to promote compliance. This article proposes a two-pronged approach: the first involves increasing the incidence of registration of customary marriage, and the second revolves around lessening the harsh legal consequences of failure to register. In this way, the universal registration of marriage can be progressively attained without disadvantaging the very people it seeks to protect.[110]

Currently, compliance with the registration requirement is low. Judicial decisions offer no comfort. Among the reported decisions discussed in Section 2 above, one has invalidated an unregistered customary marriage on account of the absence of registration, despite other evidence of customary marriage. Another has invalidated on account of the absence of both registration and evidence of compliance with customary requirements. A third has affirmed the validity of a customary marriage in the absence of formal registration. In the face of these varied outcomes in court cases, there is a real concern that many individuals in customary marriages stand on shaky ground and risk having their unions invalidated due to non-compliance with registration requirements. The implications of this uncertainty are far-reaching, particularly in matters of divorce and inheritance, where parties may face hurdles in establishing their claims.

The Supreme Court in *MNK v POM* employed the equitable doctrine of a resulting trust to uphold the property claim of a party to a relationship that failed to meet the evidentiary threshold for the common law presumption of marriage. This device may hold out some hope for parties who fail to prove solemnization and registration of a customary marriage. However, proving a resulting trust is easier when the claimant has evidence of direct financial contribution. It is doubtful that the context of pleading a resulting trust will lend itself easily to establishing entitlement to a share of property on the basis of non-monetary contribution in the form of domestic responsibilities such as childcare. Non-monetary contribution is more likely to be claimed by women than by men, and it is usually more contested even in registered marriages.[111]

This article has emphasised the need to increase public awareness on the registration of marriage, its potential benefits and the modalities of undertaking it. Since many people, especially in remote or rural areas remain unaware that even customary marriages must be registered, or that there are legal consequences for failure to

110 The need for such an approach was emphasised by the women's rights civil society organisations that attempted to file a request for an advisory opinion from the African Court of Human and Peoples' Rights. See *Request for Advisory Opinion* (n 59).

111 There is empirical evidence that women are overwhelmingly more likely than men to claim non-monetary contribution to property acquired in the course of marriage. See for example Sussie Mutahi, 'The Matrimonial Property Act 2013 in Action: Empirical Analysis of a Decade of Decided Court Cases', [2025] Special Issue: Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya, *East African Law Journal*, 115.

register, there is an urgent need for comprehensive initiatives aimed at informing the public about their rights and responsibilities regarding marriage registration. The government should collaborate with local organizations and institutions that have well-established and well-respected networks at the local level, such as traditional authorities and faith-based communities to conduct mass civic education campaigns focused on family and personal law. These campaigns should utilize a variety of media channels and community outreach programs to reach a wider audience.

Another approach would be to increase the demand for marriage registration services by requiring certification for other services related to family law. For example, registration documents to prove marriage could be required when taking out family-based insurance cover, purchasing joint property or opening joint bank accounts. This, however, should be preceded by adequate notice and publicity, and should be implemented progressively to ensure that parties are not disenfranchised in accessing these services. This has to go hand in hand with ensuring administrative and financial accessibility of marriage registration services. The cost of marriage registration services should be as low as possible. Given that registration of customary marriage only became mandatory in 2017 and that it previously did not involve any costs, the sudden introduction of fees can discourage people from complying, especially when the benefits are little understood.

Designating Chiefs as marriage registrars in Kenya, as is the case in Zimbabwe's new legislation, could significantly improve the accessibility and efficiency of marriage registration, especially in rural areas. Chiefs are deeply embedded in their communities. They are often called upon to witness or arbitrate in various intra-family forums such as marriage negotiations and succession disputes. Their official administrative roles often overlap with socio-cultural roles as elders, dove-tailing formal authority with local legitimacy.[112] Indeed, the registration procedure under the Customary Marriage Rules relies on Chiefs to confirm the parties' declaration that they have complied with the necessary customary law rites. Chiefs are therefore well positioned to serve as local marriage registrars.

However, the success of this decentralization initiative would require careful implementation, including the establishment of clear legal frameworks and training for chiefs, and investment in adequate infrastructure. While chiefs possess both formal authority and a measure of local legitimacy, ensuring their impartiality and adherence to legal protocols is crucial. This calls for regular audits and oversight. With the right safeguards in place, this approach could effectively decentralize marriage registration services, reduce bureaucratic delays, and enhance legal recognition for all marriages, ultimately benefiting rural communities and improving access to justice.

112 For further discussion of the role of chiefs in mediating the formal and informal in local spaces see Celestine Nyamu-Musembi 'Are Local Norms and Practices Fences or Pathways? The Example of Women's Property Rights' in Abdullahi An-Na'im, (ed.), *Cultural Transformation and Human Rights in Africa* (Zed Books, 2002).

Ultimately, legislative and administrative fixes can only go so far. The low uptake of customary marriage registration is, no doubt, a reflection of deeper socio-cultural dynamics. Women's relatively weaker bargaining position in relationships can complicate their ability to make decisions regarding marriage registration. Legal and administrative reforms can improve their options, but they are by no means sufficient to fully address the issues. They must be coupled with efforts to shift societal attitudes and enhance social and economic empowerment of individuals, particularly women, within customary relationships. Short of this, the reforms suggested here will be a futile attempt, applying legal solutions to a social problem.

In revisiting the central question whether mandatory registration of customary marriages in Kenya serves to protect or undermine the rights of those in such unions this article has demonstrated that, while the law establishes a formal mechanism for recognition, its implementation is beset with practical and structural challenges. Limited access to registration services, low public awareness, and rigid socio-cultural norms hinder many individuals regardless of gender from complying with or benefiting from the legal framework. As a result, the current punitive approach, which risks denying legal recognition to unregistered marriages, may inadvertently deepen legal and social vulnerabilities.

To address these shortcomings, a two-pronged reform agenda is necessary: first, expand access to registration through targeted administrative support, public education, and community-level facilitation. The second prong entails mitigating the severity of sanctions tied to non-registration by adopting more flexible, context-sensitive measures that do not lead to complete invalidity of unregistered unions. Ultimately, parliamentary reform, strategic litigation, and grassroots advocacy will be essential to shift the system toward one that facilitates protection, inclusion, and legal certainty for all parties to customary marriages.

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