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A JOURNEY OF FIVE DECADES: FAMILY LAW REFORM IN POST-COLONIAL KENYA (1967-2015)

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Abstract

This article traces the historical trajectory of family law reform in post-colonial Kenya. Taking the 1967 Commission on the Law of Marriage and Divorce as its take-off point, the article draws from the commission's internal documents, memoranda submitted to the commission, and media accounts of the time to isolate six key concerns that defined the legal reform debate then. These issues continue to animate the contemporary family law reform agenda: minimum age and consent to marry; universal registration of marriages; child custody and child support irrespective of legitimacy; safeguarding matrimonial property rights; mainstreaming alternative justice systems; and legal and institutional response to violence in the family. Legislative reforms of the past decade are assessed for the degree to which they fulfil the ambition of the 1967 Commission. The article concludes that buoyed by the 2010 Constitution's framework that balances accommodation of plural normative orders with safeguarding of unifying constitutional ideals such as dignity and equality, gains in legislative reforms on minimum age and consent and child support have surpassed the 1967 proposals. However, reforms in matrimonial property, universal registration of marriage, mainstreaming alternative justice systems, and responding to gender-based violence in family relationships have yielded a mixed picture and left some unfinished business.

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I. Introduction

In the decade and a half since Kenyans promulgated the historic Constitution of 2010, key legislation on marriage and family has been enacted to bring the law into alignment with the Constitution. These are the Matrimonial Property Act (MPA) 2013, the Marriage Act (2014), and the Protection against Domestic Violence Act (PADVA) 2015. In addition to these three, the enactment of the Children Act in 2022 has also brought about far-reaching reforms with implications for family law.[1] This article takes a legal history tour behind these recent legislative reforms to unearth the post-independence foundations on which the reforms stand.

The family law reform agenda took shape shortly after independence, when the young nation's attention was rivetted toward the reform proposals of a historic Commission of Inquiry appointed by the first President of the Republic of Kenya in 1967. [2]. The big family law issues that troubled the nation then continue to project a long shadow onto the present. It therefore makes sense to retrace our steps to that pivotal moment and, from that vantage point, take stock of the family law reforms of the past decade.

Then and now, one key concern has framed the quest for reforms in family law: how to meaningfully and equitably accommodate legal plurality in norms governing family relations, while safeguarding the unifying values that define 'an open and democratic society based on human dignity, equality and freedom…'[3]

This article is organised into eight sections. Following this introduction, the second section briefly sketches the state of family law at independence in 1963, illustrating why reform was necessary in the post-independence era. The third section gives considerable attention to the reform proposals of the 1967 Commission on the Law of Marriage and Divorce (hereinafter, 'the 1967 Commission').[4] Their proposals in the six key areas highlighted continue to define the contemporary agenda for family law reform. The fourth section uses the three-decade hiatus that followed the rejection of the 1967 Commission's legislative proposals to reflect on the gap between legality and legitimacy in state-led reform of family law in a context of legal pluralism. The section argues that this hiatus is a window into the elusive balance in

1 The Victim Protection Act 2014 is relevant too, as a corollary to the implementation of the Protection against Domestic Violence Act (PADVA) 2015. The Children Act 2022 is referred to but not included in this historical review for two reasons: first, the focus of this review is primarily on reforms to marriage law; second, the children's rights sector has its own distinct historical dynamics which warrant a separate recounting. Some aspects of the Children Act 2022 are discussed in Celestine Nyamu Musembi, Evance Ndong and Charles Nyukuri, 'From Legislative Success to Community-level Action to End Child Marriage in Kenya', [2025] Special Issue: Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya, *East African Law Journal*, 30.

2 Government of Kenya, *Kenya Gazette*, Special Vol. LXVIX, 6th April 1967.

3 Constitution of Kenya, 2010, Art 24(1).

4 The commission submitted its report in 1968. In this article, the commission will be referred to as the 1967 Commission, going by the year of its establishment. Government of the Republic Kenya, *Report of the Commission on the Law of Marriage and Divorce* 1967 (Government Printer, 1968) [hereinafter 1967 Commission Report]. See cover letter accompanying report.

accommodating plural normative orders while safeguarding unifying constitutional ideals such as dignity, equality and freedom. The fifth section makes brief mention of draft bills that were prepared in 2007 by the Kenya Law Reform Commission, the precursors to the legislative reforms of a decade ago. Section six argues that Kenya's Constitution of 2010 fundamentally redefined the constitutional terms of engagement with pluralism in the sphere of family. It contrasts the 2010 Constitution's approach to that of the independence-era Constitution. The penultimate section highlights the key features of the three main pieces of legislation enacted in the past decade, namely, the MPA 2013, the Marriage Act, 2014, and PADVA 2015. These statutes are juxtaposed with the 1967 Commission's proposals and the draft bills of 2007. The conclusion circles back to 1967 to take stock of unfinished business in the 1967 Commission's terms of reference, namely, harmonising family law, and aligning it with the goal of equality between men and women.

II. The State of Family Law at Independence

At independence, Kenya's family law was a mosaic of laws: written and unwritten, substantive and procedural, religious and secular; old and older, ranging in age from the then newest statutory enactment- (the 1946 Hindu Marriage Divorce and Succession Act)- to the oldest (the 1902 Marriage Ordinance)[5], to the seemingly ageless customary law dating back to pre-colonial days. The applicable law depended largely on one's racial, ethnic or religious identity. British colonialism's policy of indirect rule had, by the turn of the 20th century, established 'traditional' institutions for the administration of African customary law.[6] Most African marriages were therefore governed by the customary laws of the various communities. The same policy gave legal recognition to the application of Islamic law, having instituted Islamic courts, known as Kadhi Courts, for that purpose.[7] Adherents of the Hindu faith were also permitted to regulate their family affairs according to Hindu law of marriage and divorce.[8]

A statutory law on marriage, the Marriage Act[9] proclaimed itself available for use by any segment of the population, but remained the preserve of a minority, as far

5 For detailed discussion of the history of the introduction of the Marriage Ordinance 1902 into East Africa and its impact on the various population groups see H.F. Morris, 'Indirect Rule and the Law of Marriage', in H.F. Morris and James Read (eds), *Indirect Rule and the Search for Justice: Essays in East African Legal History* (OUP 1972).

6 Native Courts Rules and Orders, No.2 of 1901, in *East African Protectorate Ordinances and Regulations,* Vol. III (Mombasa Government Printing Press, 1902); Village Headman Ordinance, No.22 of 1902; Native Courts Amendment Ordinance No.31 of 1902, in *East African Protectorate Ordinances and Regulations,* Vol. IV (Mombasa Government Printing Press, 1903).

7 Mohammedan Marriage and Divorce Registration Ordinance,1906; amended through the Mohammedan Marriage Divorce and Succession Ordinance, 1920.

8 Hindu Marriage Divorce and Succession Act, 1946 (later revised as Hindu Marriage and Divorce Act, 1960; repealed by the Marriage Act, 2014) [hereinafter Hindu Marriage and Divorce Act (repealed)].

9 (Chapter 150 of the Laws of Kenya) (repealed by the Marriage Act, 2014; first enacted in colonial times as the Marriage Ordinance, No. 30, 1902) [hereinafter Marriage Act Chapter 150 (repealed)].

as the African population was concerned. African converts to Christianity had the option of conducting their marital affairs under the African Christian Marriage and Divorce Act.[10] This Act derived its substantive provisions from the Marriage Act. Its aim was largely procedural: to provide a cheaper, simplified procedure by which African converts to Christianity could bypass the technical procedures of the Marriage Act and enter statutory monogamous marriages or convert their existing customary marriages into statutory monogamous marriages through a simple church ceremony.

There were, therefore, five separate substantive laws governing marriage at independence: African customary law, the Marriage Act, African Christian Marriage and Divorce Act, Islamic personal law, and Hindu personal law. African customary, Hindu and Islamic family law systems operated as both substantive and procedural. A statute known as the Matrimonial Causes Act[11] served as the procedural law for marriages celebrated under the Marriage Act, the African Christian Marriage and Divorce Act, and the Hindu Marriage, Divorce and Succession Act. Even though the stated object and purpose of the Matrimonial Causes Act did not indicate which marriages it applied to, its definition of marriage as 'the voluntary union of one man and one woman for life to the exclusion of all others'[12] restricted it to proceedings involving monogamous marriages, thus excluding Muslim and African customary marriages. Lastly, there was the Subordinate Courts (Separation and Maintenance) Act[13], whose purpose was to grant women affordable access to the magistrates' courts for remedies such as spousal and child support in extreme cases of abuse and neglect. The statute's usage of 'any woman' would suggest that women married under any system could apply for relief. However, section 15 imported the definition of marriage employed in the Matrimonial Causes Act, thus limiting remedies to women in registered monogamous marriages. This array of family law systems operating at independence is summed up in Table 1 below:[14]

10 Chapter 151 of the Laws of Kenya (repealed by the Marriage Act, 2014); first enacted in colonial times as the Native Christian Marriage Ordinance, No. 9, 1904 [hereinafter African Christian Marriage and Divorce Act Chapter 151 (repealed)].

11 Matrimonial Causes Act (Chapter 152 of the Laws of Kenya), (repealed by the Marriage Act, 2014; first enacted as the Divorce Ordinance, No. 12 of 1904) [hereinafter Matrimonial Causes Act Chapter 152 of the Laws of Kenya, (repealed)].

12 Section 2, Matrimonial Causes Act (repealed).

13 Subordinate Courts (Separation and Maintenance) Act, (Chapter 153 of the Laws of Kenya)(repealed by Marriage Act, 2014) [hereinafter 'Subordinate Courts (Separation and Maintenance) Act (Chapter 153 of the Laws of Kenya), (repealed).

14 For a summary of the state of family law at independence see also Eugene Cotran, *Kenya: The Law of Marriage and Divorce* (Restatement of African Law Series, Vol.1 London, Sweet & Maxwell, 1968) [hereinafter Cotran] ; 1967 Commission Report, [29-74].

Table 1: Summary of Family Laws Operating in Kenya at Independence (1963)

Law	Substantive?	Procedural?	To whose marriages did it apply?
African customary law	Yes	Yes	Persons of African descent resident in Kenya.
Marriage Act	Yes	Yes	All persons; any race, any religion.
African Christian Marriage and Divorce Act	No and Yes: No: it 'imported' the substantive provisions of Marriage Act (see section 4). Yes: with respect to 'protection of African widows from levirate marriage (section 13).	Yes	African Christians (or non-Christian marrying a Christian)
Matrimonial Causes Act	No	Yes	All persons married under Marriage Act, African Christian Marriage and Divorce Act, and the Hindu Marriage, Divorce and Succession Act, 1946.
Subordinate Courts (Separation and Maintenance) Act	No	Yes	Persons in monogamous marriages, married under Marriage Act, African Christian Marriage and Divorce Act, or Hindu Marriage and Divorce Act.
Mohammedan Marriage and Divorce Registration Act	No	Yes (only provides system of registration of marriages and divorces)	All Islamic marriages.
Mohammedan Marriage, Divorce and Succession Act	Yes (criminalisation of bigamy)	Yes (extending application of Islamic law in divorce proceedings).	Islamic marriages.
Hindu Marriage and Divorce Act	Yes	Yes	Adherents of Hindu religion; Indian Buddhists, Jains or Sikhs.

Note: all the Acts of Parliament listed in Table 1 were repealed by the Marriage Act of 2014 (section 96).

III. The 1967 Presidential Commission on the Law of Marriage and Divorce

Table 1 above serves as a visual aid to illustrate the fragmented and racialised nature of family law at independence. This is one of the concerns that informed the setting up of the 1967 Commission by Kenya's first president. The 1967 Commission has been lauded as the first effort by an African government in the British Commonwealth to provide a radical remedy for the social and legal problems posed by the legacy of the colonial legal system in the area of family law.[15]

The Commission marked the earliest attempt at reforming and integrating the disparate systems of family law in Kenya, four years after independence.[16] The Commission's terms of reference required it to consider the existing laws on marriage, divorce and related matters and do two things: first, '*to make recommendations for a new law providing a comprehensive and, so far as may be practicable, uniform law of marriage and divorce applicable to all persons in Kenya…'*. Secondly, the Commission was charged '*to pay particular attention to the status of women in relation to marriage and divorce in a free democratic society.*'[17] Reading the 1967 Commission's files and media accounts[18], it is clear that the Commission, informed by its interaction with the public, realised very early on that the first prong of its mandate was best understood not as the pursuit of a uniform law, but as making proposals for minimum cross-cutting standards on certain core issues, without losing sight of the diversity of personal law

15 James Read, 'Marriage and Divorce: A New Look for the Law in Kenya?' 5 *East African Law Journal* (1969)107,108; Amos Wako, 'An Assessment of the Marriage and Divorce Commission Report in Kenya' 2(2) *Journal of Denning law Society* (1969) 73 (describing the Commission's proposals as 'revolutionary').

16 Along with the Commission on the Law of Marriage and Divorce, the president also appointed a Commission on the law of succession. See Government of the Republic of Kenya, *Report of the Commission on the Law of Succession* (Government Printer,1968). The Commission's proposed bill on the law of succession was debated in Parliament in 1970, enacted in 1972, but the law did not become operational until 1981.

17 See 1967 Commission Report (n 4).

18 The author acknowledges with immense gratitude the late J.F.H. Hamilton who served as a member of the 1967 Commission for granting access to his meticulous personal collection of records, and the Kenya Law Reform Commission (KLRC) archive, when he was Chair of the KLRC in 1998/99. General disclaimer: some of the copies of newspaper reports from the period do not show page numbers clearly or at all, hence omission of page numbers in some citations.

systems.[19] Indeed, in summing up the general impressions emerging from the oral submissions made before the commission in the various towns, the commission's chair observed: 'There is practically no support for the idea of a standard civil form of marriage to replace all existing forms'.[20]

Throughout its life, nonetheless, the Commission struggled to shake off the perception that it was a threat to the existence of personal law systems. The 1967 Commission encountered stiff opposition right from the outset, which was played up to maximum effect in media reports. The Commission's proposals sought to incorporate some basic minimum standards into family law nation-wide, while still permitting people to regulate their family lives in accordance with their personal law systems. It was also concerned with the establishment of equal protection of the law, regardless of the system under which one was married. An illustration of unequal protection of the law was the exclusion of parties in polygamous or potentially polygamous marriages from accessing reliefs under the Matrimonial Causes Act, and the Subordinate Courts (Separation and Maintenance) Act, as discussed in Section 2 above.[21]

The main basic minimum standards proposed by the Commission[22] related to:

Minimum age for and consent to marriage;

Universal registration/documentation of marriages;

Child custody and provision for children irrespective of legitimacy;

Safeguarding matrimonial property rights;

19 See 'General Policy' (Notes of the commission's deliberations, dated 9th October 1967), setting out the three general courses of action open to the commission: i) no substantial change; minor reform to statutes and simply codify personal laws; ii) recommend one 'statute of national application, to the exclusion of personal law'; iii) 'recommend some sort of compromise, with a uniform law regulating certain matters considered of national importance, while leaving the individual the choice of civil, religious or customary marriage.' An overview of subsequent deliberations shows that the commission settled for the third option. Examples of views that no doubt informed this implicit shift in the Commission's interpretation of its mandate to one of discerning minimum core principles that could be cross-cutting; National Christian Council of Kenya (NCCK), 'Memorandum to the Commission on the Law of Marriage, Divorce and the Matrimonial Status of Women', October 26, 1967 ['we feel convinced that a law which does not necessarily create uniformity but which brings order and stability should be enacted and to which all people in this country will feel bound to and can have recourse to in times of need']. Interestingly, the media report headlined it as follows: 'One Marriage Law for Kenya- Call' *Daily Nation* (Nairobi, 27 October 1967) 6; See also view of G.C.S. Munoru (Lecturer in law, University College Nairobi), 'Memorandum to the Commission on the Law of Marriage and Divorce', n.d. 1967 (proposing that the commission's proposals must include a common procedure of marriage, at the very least requiring notice, compliance with minimum age and consent requirements.

20 See, Justice Spry (Commission Chair), 'Some General Impressions of the Submissions Made Orally to the Commission', n.d., 1967 (hereinafter Spry, General Impressions).

21 The Matrimonial Causes Act (repealed), s2, defined marriage in monogamous terms; Judicial precedent in England interpreted this definition's effect as barring the granting of reliefs to parties in potentially polygamous marriages (even if they actually remain monogamous) see *Sowa-v-Sowa*, [1960] 3 All ER, 196; For discussion of the case see P.R.H. Webb, 'Polygamous Marriages Again' (1961) 24(1) *Modern Law Review*, 183.

22 Popular summaries of the commission's recommendations varied in emphasis, but all covered the issues discussed here. See, for example, 'Report of the Commission on Marriage and Divorce- A Summary' *Daily Nation* (Nairobi, 4 September 1968) 21; 'New Proposals on Marriage and Divorce' *East African Standard* (Nairobi, 4 September 1968) 5.

Mainstreaming alternative justice systems in family matters;

Legal and institutional response to violence in the family.

A cursory glance at this list underlines the enduring relevance of these concerns into the present. The Commission's recommendations on each of these issues are discussed briefly below and will be picked up again in highlighting unfinished business in the concluding section.

A. Recommendations on Minimum age and consent to marry

As of 1967, the various systems of law on marriage applicable to the diverse population groups stipulated disparate ages for marriage, even divergent ages for boys and girls. Child marriage was not the exclusive preserve of customary or religious marriage systems. Even the then Marriage Act contained provisions on consent to the marriage of a minor, stating:

> *'If either party to an intended marriage, not being a widower or widow, is under eighteen years of age, no licence shall be granted or certificate issued unless there is produced…a written consent to the intended marriage signed by the person having the lawful custody of any such party.'*[23]

The Commission took the position that child marriage was 'wrong in principle and contrary to the best interests of Kenya.'[24] The Commission therefore recommended 'that the law prescribe a minimum age for marriage, to apply to all communities, of 18 for males and 16 for females.'[25] The idea of a gender-differentiated minimum age favouring a lower age for females, did not originate with the Commission.[26] The Commission adopted it based on proposals from the proponents of minimum age legislation, namely, the Young Women Christian Association (YWCA), the National Council of Women in Kenya, *Maendeleo ya Wanawake* (Kiswahili for 'the progress of women'), and the Kenya Association of University Women. While the age of 16 years amounts to sanctioning child marriage for girls, at the time it represented the

23 Marriage Act, Chapter 150 (repealed), s 19.
24 1967 Commission Report (n 4) [63].
25 1967 Commission Report (n 4) Recommendation No.2,17.
26 See Spry General Impressions (n 20).

progressive position, as the counterfactual was to have no stipulated minimum age at all.[27]

Along with the main draft Bill on the law of marriage, the Commission had also presented a draft bill to repeal and replace the then Age of Majority Act. The draft bill proposed the age of 18 as the age of majority for both men and women. However, even this would have had no legal effect on the lower age of marriage for girls because of a saving clause under section 4 of the proposed legislation.[28] When the Marriage Bill was reintroduced in parliament in 1979, the Attorney-General had amended it to make 18 the age of marriage for both men and women, in order to align with the legal age of majority.[29]

On the related issue of full and free consent to marriage, the Commission's recommendations sought to establish equality of men and women in this regard, regardless of the system of marriage. There was general consensus on the need for consent of the parties. Discussion revolved around whether consent of a parent or guardian should be mandatory, as was the case in some religious and customary marriages. Most took the view that beyond the age of 21 parental or guardian consent should not be required.[30] The Commission adopted this as its recommendation.[31]

The aspect of consent that grabbed media attention was the part of the recommendations giving a wife in a potentially polygamous marriage the right to

27 Some delegations actually proposed a higher threshold. The National Christian Council of Kenya proposed 18 for females and 20 for males; various delegations of community 'elders' in the various town meetings set similarly high thresholds. A consistent feature across the board was a lower age for females, lower still in cases of pregnancy. Muslim groups favoured leaving the issue of age to internal religious practice. The East African Ahmadiya Muslim Mission's position was that 'No hard and fast rule can be made for age, but puberty can be prescribed as a standard.' See their letter to the Chairman, Commission on the Law of Marriage and Divorce, dated 26 October, 1967; For accounts of the various contending positions on minimum age see National Christian Council of Kenya Working Party's responses to the Commission's questionnaire (25 October 1967); 'Coast Muslims Attack Marriage Law Revision', *East African Standard* (Nairobi, 22 August 1967); 'Khojas Opposed to Uniform Marriage Law', *East African Standard* (Nairobi, 23 August 1967); 'Call for Minimum Marriage age by Coast Y.W.C.A.' *East African Standard* (Nairobi 23 August 1967); Commission on the Law of Marriage and Divorce, *Minutes of Mombasa Meeting,* 21-23 August, 1967; *Minutes of Machakos Meeting*, 29 September 1967; *Minutes of Nairobi Second Meeting*, 26 and 27 October, 1967; *Minutes of Voi Meeting* August 28, 1967. The Commission adopted the resolution on minimum age at its fourth meeting; *Minutes of the Fourth Meeting,* Nairobi, State Law Office, 30 November 1967.

28 The saving clause read: 'Nothing in this Act shall affect- the provisions of any written law which expressly prescribes any age as conferring capacity for any purpose…' Draft Age of Majority (repeal) Bill (1968), s 4(1) (a).

29 *National Assembly*, 12 July 1979, column 378. A new Age of Majority Act had been enacted in 1974 (chapter 33 of the Laws of Kenya).

30 See, for example, 'Consent only for Under 21s Call by Y.W.C.A.', *East African Standard* (Nairobi 25 August 1967); 'A Statement on Christian Marriage'(submission by Members of the Mother's Union, August 1967); Letter to the Anglican Archbishop of East Africa from the Review Committee set up to respond to the 1967 Commission's questionnaire (dated 26th June 1967); 'Memorandum Presented to the Commission on the Law of Marriage and Divorce and the Matrimonial Status of Women by the Secretary of *Njuri Ncheke ya Meru*' (n.d. 1967); 'Memorandum on the Law Relating to Marriage, Divorce and Matrimonial Status of Women Presented to the Presidential Commission' by the Kenya School of Law Family Law Discussion Group, 6 October 1967. Muslim groups took exception to dispensing with parental or guardian consent. See, for example, 'Submissions to the Commission on the Law of Marriage and Divorce and the Matrimonial Status of Women', presented by the Khoja Shia Ithna-Asheri Supreme Council, Mombasa 22 August 1967.

31 1967 Commission Report (n 4) Recommendation No. 21.

give or withhold consent to her husband's taking on of an additional wife or wives. The recommendations provided a procedure whereby, at the point of giving notice of intention to marry, a couple would fill out a joint declaration stating whether they intended their union to be monogamous or polygamous.[32] If subsequently a husband in a marriage declared monogamous should desire an additional wife, the first wife had the option of raising an objection. Even a wife who had accepted the form of the marriage as polygamous could raise objection on grounds of likely financial hardship in the family, or on account of personal displeasure with the character or reputation of the intended new wife.[33] Such a wife would be entitled to a hearing before the Marriage Tribunal. If the matter could not be resolved, the first wife had grounds for divorce.[34] This recommendation on consent drew a backlash in Parliament. Media reports cemented the perception that the Commission was out to outlaw polygamy altogether, notwithstanding the Commission's express recommendation in favour of official legal recognition of polygamous and potentially polygamous marriages.[35] What was really at stake was that the Commission dared to challenge a husband's presumed unilateral prerogative to define the character of the marriage regardless of a wife's wishes.[36]

B. Recommendations on Universal registration of marriages

Registration of marriages was the one issue for which there was unanimous support. Every memorandum submitted to the Commission and every view expressed in the town hall meetings affirmed the need for a uniform system of registration that would make proof of marriage more certain.[37] Most views also advocated a decentralized administrative system of registration for accessibility.

32 1967 Commission Report (n 4) Recommendation No.11.

33 1967 Commission Report (n 4) [89].

34 1967 Commission Report (n 4) [73-89].

35 1967 Commission Report (n 4) Recommendation No.10: 'We accordingly recommend that the law should recognize two distinct types of marriage: the monogamous and the polygamous or potentially polygamous'; Recommendation No.16: 'We recommend that no statutory limit be imposed restricting the number of wives a man may take under the polygamous system.' ; For examples of the scathing media criticism that followed see an opinion by the late influential columnist Philip Ochieng, 'Unnecessary Paradox in Marital Law', *Sunday Nation* (Nairobi 6 July 1969) 6. See also 'Commission Frowns on Polygamy', *Daily Nation (Coast Edition)* (Mombasa, 4 September 1968) 1.

36 This attitude is prominent in the record of the debate in parliament. See, for instance, NA Deb (12 July 1979), columns 380 and 383 for the strong views of some Members of Parliament (MPs): an 'Arap Soi', and a Mr. Njuno. By contrast, some MPs defended the right of a wife to give consent. See, for instance, NA Deb (12 July 1979), columns 388, 403 and 841 the views of MPs such as Mr. Oduya, Mrs. Gachukia, and Mr. Oloo-Aringo who insisted that seeking consent from the existing wife is in fact consistent with tradition: 'In the traditional way, you could not just marry without asking your wife.' The issue of a wife's consent to polygamy is still an issue, and not only in Kenya. The South African Constitutional Court found itself dealing with it four decades later, in the case of *Modjadji Florah Mayelane v Mphephu Maria Ngwenyama & Minister for Home Affairs*, Constitutional Court of South Africa, Case CCT 57/12 [2013] ZACC 14. The court affirmed the requirement of a wife's consent as customary, taking the position that customary law must be interpreted in the direction of affirming the constitutional principles of dignity and equality.

37 See, Spry, General Impressions (n 20); 'Register all Marriages- Plea Made to Commission', *Daily Nation*, (Nairobi, 16 September 1967).

The 1967 Commission recommended a single nationwide indexed system for registering all marriages, including customary law marriages. No register had ever existed for customary marriages, a reality that only changed after the Marriage Act 2014 and the Marriage (Customary Marriage) Rules, 2017.[38] The Commission took the view that the absence of a registration system for customary marriages led to difficulty in proving such marriages in matrimonial proceedings.[39] Registration would take place at the time of marriage, though there was also provision for retrospective registration of subsisting unregistered marriages.

However, the Commission was emphatic that failure to register would not by itself invalidate a marriage.[40] Appreciating that there was inadequate staffing at the office of the Registrar of Marriages, the Commission proposed that the system would be decentralised by the training of administrative officers (such as chiefs) to serve as recorders of marriages. This would make registration accessible to most people, particularly in rural areas.[41]

C. Recommendations on Child custody and provision for children irrespective of legitimacy

The Commission's recommendations regarding children were motivated by a desire to see the principle of the best interests of the child become paramount in all proceedings affecting children, regardless of the system of marriage. A key concern was that no child should be denied the protection of the law by being declared illegitimate. The existing marriage law at the time did not make it clear which parent, in the event a marriage being declared void, would have custody of the children. Such children were also deemed illegitimate, which would absolve the father of the legal obligation to maintain them. Thus, the Commission recommended that such children should be deemed legitimate, and '*their mother should, subject to any agreement to the contrary and to any order that the court may make, have custody of those children, without prejudice to any obligation towards them that their father may have under any written law*.' [42] This recommendation is more radical than it appears at first glance: it delinks the child support obligation from child custody. In many

38 Progress in the implementation of the requirement to register customary marriages is discussed in Nyokabi Njogu and Gatura Wameru, 'Registration of Customary Marriages in Kenya: A Legal Solution for a Social Problem? [2025] Special Issue: Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya, East African Law Journal, 89 (hereinafter Njogu and Wameru, this volume).

39 1967 Commission Report (n 4) [44, 57].

40 1967 Commission Report (n 4) [154], Recommendation No.48.

41 1967 Commission Report (n 4) Recommendation No.40, 42; [153-158]. The function of chiefs and sub-chiefs as recorders of marriages would also mean that parties intending to contract customary marriages would file the requisite 21-day notice at these community-level offices, who would ensure that the notice would be communicated also in the places of residence of the parents of the parties; See also Recommendation No.29; The call for decentralized marriage registration services came from the public in meetings with the Commission: 'Consent only for Under 21s Call by Y.W.C.A.', *East African Standard* (Nairobi 25 August 1967); Commission on the Law of Marriage and Divorce, *Minutes of Nairobi Second Meeting*, 26 and 27 October 1967; *Minutes of Voi Meeting*, 28 August 1967; *Minutes of Malindi Meeting*, 24 August 1967.

42 1967 Commission Report (n 4) Recommendation No.143.

minds, and as is reflected in the customary laws of various communities, absence of custody absolves a father from child support obligations.[43]

It is instructive that parliament in 1969 repealed the Affiliation Act, 1959.[44] The Affiliation Act provided an avenue by which mothers could claim child support from unwed fathers upon proof of paternity. Without adoption of the commission's recommendation, such children would be left without any means of claiming child support from their fathers, unless the parents subsequently married each other, in accordance with the Legitimacy Act.[45]

The recommendations also aimed at moving Kenyan law away from a focus on the rights of parents to the best interests of the child in custody disputes. Various African customary laws, as well as Islam, have norms and practices that confer absolute rights of custody on the respective spouses at different stages of child development. Some tend to favour the mother during a child's tender years, with a strong bias in favour of the father's ultimate position as legal guardian. These absolute parental rights often prevailed without regard to the best interests of the child.[46] The Commission recommended that in the event of separation or divorce, the good of the children should be the paramount consideration 'but with the court required to have regard to the wishes of the parents and children and to local custom'. The Commission added that children below the age of seven years should be presumed to belong in the custody of their mothers 'but that such presumption should be rebuttable on the facts of any particular case' (the 'tender years' doctrine).[47]

By these and other related recommendations, the Commission sought to lay down minimum standards on custody and guardianship that would be applicable across the various family law systems.

D. Recommendations on Safeguarding Matrimonial Property Rights

The Commission observed that norms and practices on spouses' rights and obligations with respect to property in marriage varied across the family law regimes.[48] While Islamic law and English common law (applicable to Kenya via the 1882 Married Women's Property Act- MWPA) recognized married women's capacity

43 See, for instance, Cotran (n 14) 21, 33, 93.

44 See discussion in Janet Kabeberi, *The Child: Custody, Care and Maintenance* (Nairobi, Oxford University Press, 1990), 31.

45 Legitimacy Act, (Chapter 145 of the Laws of Kenya) 1930, which continues to be operational.

46 1967 Commission Report (n 4) [349]. The detrimental effect of the parents' rights approach is illustrated by the outcome in *Karuru-v-Njeri* (1968) EA 179, where young children were awarded to the father under Kikuyu custom on the basis that he had not demanded a refund of the bride price he had paid for his wife, and therefore he had absolute custody rights. The subsequent case of *Wambwa -v-Okumu* [1970] E.A. 578 departed from that precedent by applying the Guardianship of Infants Act (Chapter 141) to entrench the best interests of the child as the paramount concern.

47 1967 Commission Report (n4) Recommendation No.142. The 'tender years' doctrine was applied in the case of *Githunguri -v- Githunguri* [1982-88] K.A.R. 9, and was incorporated into the Children Act 2001, s 2. However, the doctrine is no longer applicable in Kenyan law as it did not find a place in the Children Act 2022.

48 1967 Commission Report (n 4) [177].

to own and transact in property, the position under Hindu law was uncertain, due to its joint family concept.[49] Customary law and practice varied across the various communities, but, on the whole, it gave very limited scope for a wife's ownership and control of property in marriage and following divorce. The Commission therefore recommended that the proposed law should contain a universal principle affirming a married woman's legal capacity to acquire and transact in property.[50]

The Commission grappled with the issue of harmonising the disparate norms and practices on the interests of the respective spouses to property during and at the dissolution of marriage. Islamic law is clear on this, and the 1882 Married Women's Property Act recognised a spouse's beneficial interest in property titled to the other spouse if he/she could prove contribution to its acquisition or improvement. Customary law, however, varied a great deal. Some communities recognised only a wife's entitlement to whatever she brought with her into the marriage. Others recognised her right to moveable property acquired by her during the marriage, such as livestock, but even this right was contingent and contested.[51] In virtually all communities, the idea that she might acquire interests in land does not arise, and in virtually all it was considered unthinkable that her 'industry and prudence in running the household' might translate into an interest in property.[52]

The Commission therefore saw the need for clarity on the type of matrimonial property regime applicable in Kenya. The Commission recommended that at the outset, the law should give parties freedom to enter into an agreement on how they wish to regulate property ownership in marriage. In the absence of such an agreement, a separate property regime would operate, with each spouse retaining whatever property they acquired before and during marriage. The Commission did consider the idea of community of property[53] but dismissed it as too complex and likely to prove unacceptable if it carried with it 'the possibility of land passing out of the control of the clan' to a divorced wife.[54]

In addition, the 1967 Commission sought to give special protection to the 'matrimonial home and or its curtilage'.[55] Neither spouse would have the power to transact in it during the subsistence of the marriage without the consent of the other.

49 Ibid.

50 1967 Commission Report (n 4) Recommendation No.60.

51 See, for example, the conflicting interpretations of Meru customary law at the various levels of adjudication of the case of *M'Mukindia M'Ikibuthu -v-Mparu d/o Kimuru, (*Court of Review, Case No.25 of 1964).

52 1967 Commission Report (n 4) [179].

53 Community of property refers to matrimonial property regimes that treat all property owned by the parties before marriage, as well as property acquired during the marriage as joint property to be divided equally between them. On the African continent, community of property systems exist in jurisdictions that have a Roman Dutch history, mostly in the Southern Africa region. See A. Armstrong and others, 'Uncovering Reality: Excavating Women's Rights in African Family Law' (1993), 7 *International Journal of Law and the Family,* 314.

54 1967 Commission Report (n 4) [180].

55 1967 Commission Report (n 4) Recommendation No.61. ('Curtilage' is an Anglo-Norman reference to the land surrounding or enclosing a home ('small court')) *Concise Oxford English Dictionary* (11th edn, OUP 2009, revised) 'curtilage'.

The law would recognise the right of a spouse to enter a caution or caveat to protect their interest in the matrimonial home by vetting unilateral transactions.

As the 1967 Commission's comprehensive recommendations and draft legislation were not adopted, we find the Court of Appeal in February 2007 decrying Parliament's inaction which had left "*the country shackled to a 125-year-old foreign legislation which the mother country found wanting more than 30 years ago!*" (a reference to the 1882 Married Women's Property Act of England).[56] This legislative inertia was only brought to an end in 2013 by the Matrimonial Property Act, discussed below under Section 7 of this article.

E. Mainstreaming Alternative Justice Systems (AJS) in Family Matters

From the outset, the Commission was concerned about broadening access to justice in family matters. For instance, the Commission was unhappy with the restriction of divorce jurisdiction to the High Court under the Matrimonial Causes Act, and the restricting of remedies under the Subordinate Courts (Separation and Maintenance) Act to formal/monogamous marriages only.

The Commission recommended extending jurisdiction to Magistrate's Courts of the First Class and the Kadhi's courts. This recommendation would no doubt broaden access to courts. However, more significant for access to justice was the Commission's extensive recommendations on the establishment of marriage tribunals and recognition of existing conciliatory bodies. Existing conciliatory bodies included councils organised by religious institutions authorised to conduct marriages, as well as community-based arbitrators in customary marriages.[57] The tribunals would be as localised as possible, ideally at village level, with a minimum of three and a maximum of five members, at least one of whom would be someone trained in social work. In the Commission's view, legal knowledge was not necessary '*because they [would] be concerned with human, not legal, problems, nor would it be necessary for them to be highly educated*.'[58] Tribunal members would be nominated by the District Commissioner (an administrative office) and service would be on a purely voluntary basis '*because we think a paid service might attract people not really suited to this kind of work*."[59]

Parties appearing before the marriage tribunals would not be allowed legal representation as it was felt that this risked introducing formality into a process that should ideally be kept informal. The draft law barred appeals from the marriage tribunals' decisions. However, if there was any allegation of misconduct that was 'manifestly contrary to the rules of natural justice', an application could be made to court for review.[60]

56 The words of Judges of Appeal Tunoi, O'Kubasu, Githinji, Waki and Deverell, in *Echaria -v- Echaria*, [2007] eKLR.
57 1967 Commission Report (n 4) Recommendation No.98, [255].
58 1967 Commission Report (n 4) [252].
59 Ibid.
60 Draft Law of Matrimony Act, 1968, ss 12(2) and 16.

The Commission recommended that the tribunals start out with three functions:

- Deciding on objections to marriage (including wives' objections to their husbands taking on additional wives);
- Deciding on applications by a deserted spouse seeking reconciliation;
- Offer a forum for reconciliation where divorce is contemplated (at the initiative of a party or court).[61]

Since the 1967 Commission's legislative proposals were not enacted, the integration of alternative justice systems into the resolution of family disputes followed the uneven path of judicial discretion. The basis for mainstreaming AJS into delivery of justice has now been provided by Article 159(2)(c) and 159(3) of the 2010 Constitution, and the judiciary adopted a policy on AJS in 2020.[62] While the nationwide network of marriage tribunals that the 1967 Commission envisioned has not been established, section 68 of the Marriage Act 2014 provides for conciliation in customary marriages, and Section 64 provides for mediation of disputes in Christian marriages.

F. Legal and Institutional Response to Violence in the Family

For an issue that took up such a significant portion of media coverage of the Commission's work, domestic violence surprisingly only takes up one paragraph of the report and a solitary brief recommendation:

"*We recommend that the law provide expressly that no-one has the right to inflict corporal punishment on his or her spouse.*"[63]

This recommendation was then translated into Section 74 of the draft Bill.[64]

This recommendation was necessitated by the Commission's acknowledgment that a belief existed, '*particularly in rural areas, that a husband has customarily the right to inflict corporal punishment on his wife*…'[65] Noting that the beating of wives was all too common, often with tragic consequences, the Commission took the view that 'serious blows' brought the matter within the purview of the Penal Code.[66]

The reference to 'serious blows' conveys the unfortunate impression that the Commission resigned themselves to tacit acceptance of permitted degrees of marital blows. However, given the heat generated in the public hearings and media, even daring to make domestic violence the subject of a high-profile national discourse was an act of bravery on the part of the Commission. Subsequent debate

61 1967 Commission Report (n4) Recommendation No.100 Para 254; Draft Law of Matrimony Act, 1968, s 10.
62 Judiciary of Kenya, *Alternative Justice Systems Baseline Policy* (2020);*Judiciary of Kenya, Alternative Justice Systems Framework Policy* (2020), all available at https://judiciary.go.ke/download/alternative-justice-systems-baseline-policy-and-policy-framework/ (accessed 5 June 2025).
63 1967 Commission Report (n 4) Recommendation No.56.
64 Section 74 of the draft bill stated: 'For the avoidance of doubt, it is hereby declared that, notwithstanding any custom to the contrary, no person has any right to inflict corporal punishment on his or her spouse.'
65 1967 Commission Report (n 4) [170].
66 Ibid.

in parliament confirmed that social attitudes had normalised 'acceptable levels' of domestic violence.[67] Indeed, even two decades on, when Kenya hosted the 3rd United Nations Conference on Women and Development in 1985, the issue of state accountability for violence against women within the family proved to be one of the most controversial issues to make it into the Nairobi Forward Looking Strategies – the conference's outcome document.[68]

IV. How the Middle Ground Was Lost: The Three-Decade Hiatus: 1970s-1990s

The 1970s through to the 1990s saw no progress at all in family law reform. This period is remarkable only for the protracted drama around the draft marriage bill proposed by the 1967 Commission. The Commission having completed its work, submitted a comprehensive report, attaching a draft bill. The draft Law of Matrimony Bill of 1968 was tabled in Parliament twice in 1971[69] and was defeated. Reintroduction of the bill in 1979 yielded similar results.[70] Kenya's hosting of the 3rd United Nations Conference on Women and Development built up some momentum that prompted calls for the re-tabling of the Marriage Bill in Parliament in 1985, but this did not materialise.[71] This marked the final blow to the initial post-independence optimism that shaped the family law reform agenda.

It is fair to say that there was really no substantive informed discussion of the issues.[72] Rather, the debate both in Parliament and in the media sensationalised proposals

67 See for instance, '(How can you discipline your wife if you cannot inflict corporal punishment? You should not harm her by breaking her neck or her hand but you should give light corporal punishment in order to teach her manners. That is very African. It is very normal and they need it. They always expect it and they would miss it…The inflicting of corporal punishment in a family is natural and is peaceful. It is done in the house and it is not like fighting on the road…The man is never regarded as wrong because he is in charge of the family. He is always the boss in that place.)' *National Assembly Debate* (12 July 1979), column 381-382 (Arap Soi).

68 United Nations (1985), UN *Report of the World Conference to Appraise and Review the Achievements of the United Nations Decade for Women: Equality, Development and Peace (Nairobi Forward-Looking Strategies) 1985 (A.CONF.116/28/Rev.1)*, [288].

69 See 'Njonjo ready to reintroduce Marriage Bill', *Daily Nation* (Nairobi, 22 July 1971) 5. Charles Njonjo was the then Attorney General.

70 The 1979 defeat of the bill saw the Attorney-General storm out of Parliament. The defeat came despite the fact that he had tried to appease Members of Parliament by removing the clauses that had been most vigorously opposed in the previous debate, namely, the criminalization of adultery, requiring a wife's consent for polygamy, and the prohibition of corporal punishment for a spouse. See *National Assembly deb* 12th July 1979, column 377; *National Assembly* deb26th July 1979, column 837; 'Marriage Bill shelved' *Daily Nation* (Nairobi, 27 July 1979). 'Curtains for the Marriage Bill' *Sunday Nation* (Nairobi 29 July 1979) 5; 'The Marriage Bill: What went wrong?' *Sunday Nation* (Nairobi, 29 July 1979) 6 [Editorial].

71 An address by the then Attorney-General, Matthew Muli, to a preparatory meeting ahead of the 3rd United Nations Conference on Women and Development made no mention of the Marriage Bill. He summed up the law on marriage and divorce without any suggestion that any aspect of it needed reform. See 'The Attorney-General Gives Guidance' *Daily Nation* (Nairobi, 16 July 1985) 19.

72 Some commentators took issue with the fact that legislators with legal expertise made no effort to steer the debate toward a focus on the substance. See, for example, John Joseph Ogola, 'In Defence of Marriage Bill' *Daily Nation* (Nairobi, 3 August 1979) 7.

such as the enforcement of criminal sanctions for wife beating, and the requirement of 'consent' to polygamy by wives.[73]

The only blip on the reform radar was a 1993 task force appointed by the Attorney General to review all laws affecting women.[74] This was followed in 1997 by a minor constitutional amendment to insert the word 'sex' among the grounds on which discrimination was prohibited under Section 82(1) of the independence Constitution (but left the discriminatory personal law exemption clause under Section 82(4) intact, as will be discussed below under Section 6 of this article).[75] With respect to family law, the task force's recommendations essentially reproduced the 1967 Commission's proposals. A tangible outcome of the task force's work was the creation of the Family Division of the High Court, which operated only in the capital, Nairobi.[76]

This three-decade hiatus offers a window into the contested boundaries of the legitimacy of state-initiated reform in family law. This contest acquires a peculiar sharpness[77] in a context of legal pluralism, where the sphere of family is regulated primarily through customary and religious norms, and the state's reformist role is viewed as suspect at best, and, at worst, illegitimate despite its legality. The views expressed in this contest oscillate between two ends of a pendulum: on one end is the position that valorises customary and religious norms. In this view, these norms can do no wrong, and any discrimination inherent in them or in their uneven application is rationalised away, asserting their continuity and immutability.

In the debates on the 1967 Commission's proposal, this end of the pendulum is exemplified by most of the spokesmen of the Muslim community. Every Muslim delegation that appeared before the Commission in the various town meetings

73 See Reports of the debate in Parliament in *National Assembly Report,* 12 July 1979, column 377; *National Assembly Report* 26 July 1979, column 837; A sampling of newspaper headlines: 'Let's forget about unification of marriage laws', *East African Standard* (Nairobi 15 September 1967) 18; 'Kipsigis opposed to changes in marriage law' *East African Standard* (Nairobi, 22 September 1967) '"Keep present marriage laws"-call' *Daily Nation* (Nairobi 22 September 1967; 'Don't Change Marriage Laws, Say Kisii', *Daily Nation* (Nairobi 23 September 1967) ; 'Kenya Not Yet Ready for Change in the Marriage Laws', *Daily Nation* (Nairobi 29 September 1967), 16; 'Reply to Commission attack', *Daily Nation* (Nairobi 22 September 1967) (a spirited defence of the Commission by the Attorney General).

74 'Women's Status and Rights in Kenya: Report of the Task Force for the Review of Laws Relating to Women' (Office of the Attorney General, 1998); International Federation of Women Lawyers- Kenya Chapter (FIDA-K), '"*Second Class Citizenship": The FIDA Annual Report on the Legal Status of Kenyan Women for 1996*' (FIDA-K, 1997), 15-16.

75 This minor constitutional amendment managed to slip into a package of minimal reforms agreed to by the Inter-Parties Parliamentary Group (the IPPG deal) in order for the opposition to call off a planned boycott of the 1997 elections; For a fuller account see Willy Mutunga, *Constitution-Making From the Middle: Civil Society and Transition Politics in Kenya, 1992-1997* (MWENGO: SAREAT, 1999), 21 [hereinafter Mutunga, *Constitution-Making]*.

76 See Celestine Nyamu Musembi and others, *Promoting the Human Rights of Women in Kenya: a Comparative Review of the Domestic Laws* (UNIFEM, 2010), 39 [hereinafter *UNIFEM review of laws*].

77 I borrow the phrase, 'peculiar sharpness' from Martin Chanock who uses it to characterize the contest over customary norms on property in the African colonial encounter. See Chanock, Martin, 'A Peculiar Sharpness: An Essay on Property in the History of Customary Law in Colonial Africa', 32 *Journal of African History*, 65 (1991).

stressed the immutability of Islamic law.[78] One strongly worded memorandum presented to the 1967 Commission by one Mr. Abdallah accused the government of taking a 'sledgehammer' approach, charging that change in the sphere of personal law could only emanate from within a community, otherwise it proves unattainable, let alone sustainable: '*Customs, it is said, die hard, and if the saying be extended, then marriage customs must be said to die hardest.*'[79] He further warned the commission '*to evaluate the multifarious consequences of taking a cold legal view of what is a highly involved and ignitable situation*.'[80] His views were echoed by representatives of both the Sunni and Shia sects of Islam in their response to the Commission's questionnaire.[81]

A similar response is exemplified in the views expressed in defence of African custom:

'*Any new law must recognize that Kenya is an African country, and must therefore, be based on African customs and traditions.*'[82]

On the other end of the pendulum is a position that argues against customary and religious norms on two grounds: first, that they are the embodiment of factionalism, which works against the goal of forging a unified national identity. The second ground is that customary and religious norms embody oppression, especially for women, and must therefore be supplanted by formal laws embodying equality and rights. The charge of factionalism is illustrated by sentiments such as the one below:

'*Kenya's avowed social objective is to build a united and integrated nation. Continued community identity accentuated by communal systems of law would clearly derogate from this*

78 'Muslim Women Speak on Making Marital Law Uniform', *Daily Nation*, May 12th 1967; Sunni Sect, 'Answers to the Questionnaire of the Commission on the Law of Marriage and Divorce and the Matrimonial Status of Women', (n.d. 1967); 'Submissions to the Commission on the Law of Marriage and Divorce and the Matrimonial Status of Women', presented by the Khoja Shia Ithna-Asheri Supreme Council, Mombasa August 22, 1967.

79 Mr. A. Abdallah, 'Memorandum to the Commission on Marriage and Divorce', September 7, 1967. The Commission's records indicate that Mr. Abdallah was not a religious leader, but as Assistant Governor of the Central Bank, his views were influential, and his memorandum received a lot of media attention. See Commission on the Law of Marriage and Divorce, *Minutes of Nairobi Second Meeting,* 26 and 27 October, 1967; 'Commission Appointed at Wrong Time', *East African Standard,* Wednesday September 20, 1967, 9 (extensive Report of Mr. Abdallah's memorandum to the Commission); 'Commission Defended by Mr. Njonjo', *East African Standard*, September 22, 1967 (Attorney'-General's response to Mr. Abdallah).

80 Mr. A. Abdallah, 'Memorandum to the Commission on Marriage and Divorce', September 7, 1967.

81 Sunni Sect, 'Answers to the Questionnaire of the Commission on the Law of Marriage and Divorce and the Matrimonial Status of Women', (n.d. 1967); 'Submissions to the Commission on the Law of Marriage and Divorce and the Matrimonial Status of Women', presented by the Khoja Shia Ithna-Asheri Supreme Council, Mombasa August 22, 1967; Divergent views were extremely rare, such as those of one Mr. Khan, identifying as a Sunni Muslim: ''Four Wives for Muslims' View Opposed at Malindi', *Daily Nation*, August 28th 1967.

82 Memorandum submitted by Mr. Ambala, Nairobi, second meeting, October 26/27, 1967; See similar views by Mr. Joseph Otiende, Member of Parliament, *Minutes of Kakemega Meeting*, September 12, 1967, and Reported in the *East African Standard,* September 14, 1967 .5, echoed by the Western Provincial Advisory Council who spoke in defence of Abaluhya customary law, in particular, the preservation of polygamy; See other defences of tradition: *Minutes of Kapenguria meeting*, September 19, 1967; views attributed to Kalenjin Union in *Minutes of Nairobi Second Meeting* October 26-27, 1967; See also media accounts: 'Kipsigis Opposed to Changes in Marriage Law', *East African Standard,* September 22, 1967; 'Wives Willing to Share Husband', *East African Standard,* September 14, 1967, 5; 'Bride fee "a Part of African Culture"', *East African Standard*, August 28, 1967, 5.

objective…However, …communal, tribal and religious practices should be interfered with only to the extent that they are incompatible with the overriding objective and policy of the law.'[83]

The charge of oppression is exemplified in the 1967 views that opposed practices such as child marriage, bride wealth, and polygamy.[84]

Between these two extreme ends of the pendulum are views that advocate caution, arguing for exceptions in the applicability of some aspects of the law to some communities. For instance, the *Njuri Ncheke ya Meru,* though agreeing with the Commission's proposal that payment of bride wealth should not be the determinant for validity of marriage, recommended that exceptions should be made to accommodate communities who strongly believed the opposite.[85] Other middle-ground positions advocated for an over-arching national law that could operate as a fallback law for hard cases, and as a sieve for 'weeding out bad customs', but otherwise leaving customary and religious norms in place as the primary regulators of family life.[86] Some sections of the Muslim community were willing to envisage a role for statutory intervention, justified by the need to protect women and children from '*abuses which the modern interpretation of Muslim law had introduced*', such as '*divorce without cause, failure to maintain a wife, failure to maintain children, child marriages and forced marriages*.[87] Others were emphatic that whereas Islamic law is divine, the institutions implementing it are not, and therefore statutory intervention to rectify these could be justified, as well as demonstrably beneficial reform measures such as compulsory registration of marriages and mandatory referral of parties to conciliation processes prior to divorce proceedings.[88] This middle ground, however, was pulverized in the heated contest, accounting for the three decades of inaction.

83 Memorandum on the Law Relating to Marriage, Divorce and Matrimonial Status of Women Presented to the Presidential Commission Therewith by the Kenya School of Law Family Law Discussion Group, October 6, 1967.

84 'Abolish Dowries and Forced Marriage' (letter to the editor) *East African Standard* (Nairobi, 5 April 1967); 'Call for Minimum Marriage Age by Coast Y.W.C.A.' *East African Standard* (Nairobi, 23 August1967); ''Extra Wives' Practice 'Humiliating'' *Daily Nation* (Nairobi, 23 October 1967), 11 [Reporting the views of the national umbrella body for women's organizations, *Maendeleo ya Wanawake*; ''Abolish Polygamy' Call Made to Commission', *Daily Nation*, August 12, 1967, 5 (views attributed to National Council of Women); '"Four Wives for Muslims" View Opposed at Malindi', *Daily Nation,* August 28, 1967, 3; 'Dowry, Equality don't Mix', (letter to the editor) *Daily Nation* (Nairobi, 5 November 1982) 7.

85 The *Njuri Ncheke ya Meru* is a council of elders from the Meru community and is widely recognized as the authoritative body on Meru custom. See 'Memorandum Presented to the Commission on the Law of Marriage and Divorce and the Matrimonial Status of Women by the Secretary of *Njuri Ncheke ya Meru*' (n.d. 1967).

86 A delegation of Kamba elders appearing before the Commission in Machakos, for instance, argued that traditional forums were up to the task of dealing with divorce, and had always performed that function. However, in cases where intransigent husbands maliciously refuse to accept refund of bride wealth, thereby frustrating a wife's ability to remarry, such a wife should have recourse to some legal remedy provided in a national law. Taita elders proposed that such a fallback law could be used to weed out 'bad' customs, a view echoed by a witness in Kapenguria. See Commission of the Law of Marriage and Divorce, *Minutes of Machakos Meeting*, 29 September 1967; Commission of the Law of Marriage and Divorce, *Minutes of Voi Meeting* August 28, 1967; *Minutes of Kapenguria Meeting,* September 19, 1967.

87 Commission of the Law of Marriage and Divorce, *Minutes of Malindi Meeting*, August 24, 1967; Commission of the Law of Marriage and Divorce, *Minutes of Mombasa Meeting*, August 21-23, 1967; Commission of the Law of Marriage and Divorce, *Minutes of Nairobi Meeting*, August 10-11, 1967.

88 See, for example, views of the Khoja Shia Athna-Asheri Muslim community. Commission of the Law of Marriage and Divorce, *Minutes of Mombasa Meeting,* August 21-23, 1967; *Minutes of Nairobi Meeting,* August 10-11, 1967.

One final footnote on the three-decade hiatus: Tanzania wasted no time in borrowing from the Commission's legislative proposals to develop a substantial portion of its Law of Marriage Act, 1971.[89]

V. The Kenya Law Reform Commission Draft Bills of 2007

The Kenya Law Reform Commission (KLRC) drafted three bills related to family law in 2007: Draft Marriage Bill, Draft Matrimonial Property Bill, and the Family Protection Bill, the latter dealing with domestic violence. The bills were presented before the Cabinet in late 2009/ early 2010. The plan was that they would be introduced in Parliament as government bills. The Cabinet, however, decided that the bills should be put on hold awaiting the conclusion of the then on-going constitutional review process.[90]

The KLRC's draft bills of 2007 are introduced here for chronology's sake but will not be discussed here. They will be integrated into the discussion of the statutory enactments of the post-2010 decade, since the 2007 draft bills informed these recent pieces of legislation.

VI. The 2010 Constitution: New Terms of Engagement with Pluralism?

It is no exaggeration to assert that were it not for the constitutional review exercise, driven by the Africa-wide second wave of democratization, the impetus to kick-start the family law reform agenda would not have materialised. That constitutional moment provided the tide that would lift several reform boats off the ground. [91]

Kenya's 2010 Constitution marked the first time that the Constitution explicitly addressed the institution of family, and the rights of persons in family relations. Article 45 begins by affirming the family as *'the natural and fundamental unit of society and the necessary basis of social order'* which should *'enjoy the recognition and protection of the State'*.[92] This echoes Article 18(1) of the African Charter on Human and Peoples' Rights, and Article 16(3) of the Universal Declaration of Human Rights.

Article 45(2) then goes on to state that *'every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.'* By this provision, the Constitution

89 This was acknowledged by the Tanzanian Court of Appeal in the case of *Bi Hawa Mohammed -v-Ally Sefu*, Civil Appeal No.9 of 1983 (Dar es Salaam), 19-20; However, Tanzania's adoption of the 1967 Commission's legislative proposals was not without controversy. See 'Marriage Bill "a Threat to Male Superiority"', *Daily Nation* (Nairobi, 22 January 1971) 36; 'Dar Paper Takes Marriage Bill Critics to Task' *Daily Nation* (Nairobi, 25 January 1971) 19.

90 See *UNIFEM review of laws* (n 76) 39.

91 The second wave of democratization in Africa refers to the political space that opened up in the decade following the end of the Cold War in 1989/90. Several African states formally ended single party rule and reengineered their constitutions. For an account of how constitutional reform efforts of this period buoyed broader socio-legal reforms see Duncan Okello, 'The Dynamics of Political Change and Transition: Civil Society, Governance and the Culture of Politics in Kenya' in Vera Schattan P. Coelho and Bettina von Lieres (eds), *Mobilizing for Democracy: Citizen Action and the Politics of Public Participation* (Zed Books 2010), 204; Mutunga, *Constitution-Making* (n 75), 46-51.

92 Constitution of Kenya 2010, Art 45(1).

tacitly positions marriage as the inception of family. Article 45(3) declares the equal rights of parties in a marriage, both during the subsistence of the marriage and at its dissolution.

Of particular relevance to the present discussion on the history of family law reform in Kenya's pluralistic social context is Article 45(4). This clause injuncts Parliament to enact legislation that retains the recognition of "*marriages concluded under any tradition, or system of religious, personal or family law*" ... "*to the extent that any such marriages or systems of law are consistent with this Constitution.*" Article 45(4) is backed up by Article 2(4) which states: 'Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency...'

The impact of these two clauses can only be appreciated in light of constitutional history. The independence-era Constitution prohibited discrimination under Section 82(1) in the following terms:

"*Subject to subsections (4), (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect.*"

Subsection (4) read as follows:

"*Subsection (1) shall not apply to any law so far as that law makes provision*

a) -…;

b) With respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

c) For the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons;

S82(4) of the independence Constitution did not simply recognise and make room for the application of the diverse personal law systems relating to the family matters listed under Section 82(4)(b). It went further than that to shield personal law systems (based on custom or religion) from constitutional challenge should

they have discriminatory impact on individuals.[93] This state of affairs continued to define Kenya's constitutional framework for accommodating pluralism until the 2010 Constitution came into effect. Articles 45(4) and 2(4) of the 2010 Constitution, therefore, reset the balance to ensure that the operation of personal laws based on custom and religion is not at the expense of constitutional values such as equality and dignity. Article 45(4) provides for the possibility of a framework law on family, which enables the setting of common standards in certain areas, even as it accommodates variation across the multiple family law systems, as long as those variations are consistent with the Constitution.

It bears mention that the personal law exemption clause in the independence Constitution originated from the independence bargain with the Sultan of Zanzibar, who made the protection of Islamic personal law and the operation of the Kadhi's courts throughout the republic a precondition for his ceding of sovereignty over the coastal strip and enabling Kenya to gain independence as one unified territory.[94] When the clause was eventually crafted into the independence-era Constitution, it was worded broadly to apply to all personal law systems, not just to Islamic law. It is on account of this history that the exemption that was contained in Section 82(4) survives in a very limited sense in the 2010 Constitution, only with respect to Islamic law. Article 24(4) of the 2010 Constitution provides as follows:

"*The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhi's courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.*"

The phrase 'to the extent strictly necessary' signals that it is not a blanket exemption. Rather, the clause anticipates a process of scrutiny to determine whether a qualification in interpreting the bill of rights is warranted in each specific situation.

93 For further discussion of such personal law exemption clauses see International Federation of Women Lawyers- Kenya Chapter (FIDA-K), '"*Second Class Citizenship": The FIDA Annual Report on the Legal Status of Kenyan Women for 1996*' (FIDA-K, 1997), 6-9; Cynthia Grant Bowman and Akua Kuenyehia, *Women and Law in Sub-Saharan Africa* (Sedco Publishing, 2003); Nyamu-Musembi, Celestine 'Are Local Norms and Practices Fences or Pathways? The Example of Women's Property Rights' in *Cultural Transformation and Human Rights in Africa* Abdullahi An-Na'im, (ed), (Zed Books 2002), 126-150, at 144-45. The 1967 Commission certainly took a view against Section 82(4) of the independence Constitution, opining that 'any such discriminatory provisions should be the exception and that the broad aim of the Constitution is equal rights and obligations for all men and women.' See 1967 Commission, [28].

94 The coastal strip had a special status, having hitherto been administered separately as a British protectorate separate from the Kenya Colony, on the basis of a lease agreement entered into between the Sultan and the British government in 1895. The resultant bargain as reflected in Section 82(4) was not limited to Islamic personal law. Rather, it was extended to all personal law systems, including the customary laws of the various ethnic groups in Kenya, an outcome that pleased the minority ethnic groups represented by the Kenya African Democratic Union (KADU) political party. See Yash P. Ghai and Patrick McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government From Colonial Times to the Present* (OUP 1970) 186-188. See also Moza Jadeed, Attiya Waris and Celestine Musembi, 'The Application of Islamic Inheritance Law in Independent and Contemporary Kenya: A Muslim's Right to Equality and Freedom from Discrimination', (2020) 8(1) *Africa Nazarene University Law Journal*, 30.

Secondly, the qualification is limited to specific proceedings before the Kadhi's courts.[95]

It is fair to say that Article 45(4), 2(4) and 24(4) recapture the middle ground that was lost in the fierce debate that clouded the proposals of the 1967 Commission. The success with which these constitutional provisions mediate the two extremes of the pendulum can only be proved upon repeated testing in the plural forums of justice, not just in the courts.

VII. Family Legislation in the Shadow of the 2010 Constitution

In late 2011 the Attorney General transmitted the KLRC's 2007 draft bills to the Constitution Implementation Commission, which held consultative forums on the bills. It was not until late 2013 that the Matrimonial Property Bill was introduced in parliament as a government bill and enacted as the Matrimonial Property Act (MPA 2013). The MPA 2013 received presidential assent on Christmas eve of 2013. However, it took another nine years to enact the rules needed to implement the legislation.[96] The Marriage Act, in turn, was enacted in early 2014, receiving presidential assent on 29th April 2014. The statute operated via general rules dealing mainly with the procedure for entering into civil and Christian marriages, until three years later when specific rules dealing with Customary, Hindu and Muslim marriages respectively were enacted. In 2020 rules relating to divorce proceedings were then enacted.[97]

The 2010 Constitution set out timelines for the enactment of the various laws that were required of Parliament to implement the Constitution. These timelines are stipulated in the Fifth Schedule. The law on matrimonial property anticipated under Article 68(c)(iii) fell within the category of legislation on land, which was to be enacted within 18 months. The law on marriage anticipated under Article 45(4) was to be delivered within a five-year time frame. Given the inevitable overlap in subject matter, this was something of a mismatch. The result was that when the Land Act and the Land Registration Act were enacted in 2012, provisions on matrimonial property were included. [98] These served as a placeholder and were subsequently repealed when the land laws were revised in 2016, to avoid duplication of the provisions of the of the Matrimonial Property Act which, in the intervening period, had been enacted in 2013. The Land Act, however, retained provisions relating to use of the matrimonial home as security for borrowing.[99]

95 For a different interpretation of the scope of article 24(4) of the Constitution, see Moza Jadeed, 'Developments in Islamic Law: Implications for Gender Equality and Freedom of Religion in Kenya' (2025) Special Issue: Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya, *East African Law Journal*, 156.

96 Matrimonial Property Rules, 2022.

97 Marriage (Hindu Marriage) Rules, 2017; Marriage (Customary Marriage) Rules, 2017; Marriage (Matrimonial Proceedings) Rules, 2020.

98 Land Registration Act 2012, s 93. Compare text before and after 2016 amendments.

99 See Land Act sections 78, 79, 96, 103 and 107(7).

A. Matrimonial Property Act 2013

Article 68 (c)(iii) required Parliament to enact legislation 'to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage.'

The Matrimonial Property Act 2013 fulfilled this requirement, ending the legislative silence decried by the Court of Appeal in the *Echaria* case.[100] This section sets out a broad overview of the statute, highlighting its milestone contributions, since various aspects of it will be discussed in two other articles in this Special Issue. [101]

The Matrimonial Property Act 2013 marks the first moment of definition of matrimonial property and its scope under Kenyan law.[102] It also marks the first instance of recognition of prenuptial agreements in Kenyan law.[103] The 1967 Commission had recommended recognition of parties' freedom to enter into agreements, with a separate property regime as the default in the absence of such agreement. The 1967 proposal did not restrict itself to prenuptial agreements but made general reference to 'any agreement to the contrary that the parties may make'.[104] The KLRC's 2007 draft bill similarly provided for parties' freedom to contract', explicitly going further than prenuptial agreements to recognise agreements entered into during marriage.[105] The 2013 statute only delivered on the prenuptial part. It makes no provision for recognition of agreements entered into during the marriage.

The third highlight of the MPA 2013 is that, for the first time, Kenyan law set out detailed provisions on division of matrimonial property in polygamous marriages. These are contained in Section 8, which is a verbatim rendering of what was Section 11 in the KLRC's draft Matrimonial Property Bill of 2007. In brief, property acquired before the entry of a second wife into the marriage belongs exclusively to the man and his first wife, the same principle applying to all subsequent wives. However, if it is clear that any property was acquired for the exclusive use of the man and any specific wife, then that property shall not be considered part of the common pool. This extension of the legal regulation of matrimonial property rights to polygamous marriages, and availing the attendant judicial remedies is crucial in ensuring equal protection of the law for all, regardless of the type of marriage. This is unlike the pre-2013 regime which made no rules on how matrimonial property disputes in

100 *Echaria -v- Echaria*, [2007] eKLR.

101 See 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; 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.

102 Matriminial Property Act 2013, s 2.

103 Ibid, s 6(3).

104 *The Law of Matrimony Act (1968)* (Draft) s 66.

105 *Draft Matrimonial Property Bill,* (Kenya Law Reform Commission) 2007, s 7(3).

polygamous marriages were to be resolved and, in any case, restricted judicial relief to monogamous marriages.

On this point (polygamy), the 2013 statute and its precursor, the KLRC's draft bill of 2007, went further than the 1967 Commission. The 1967 Commission's draft bill inserted this provision in the part dealing with property: "*For the avoidance of doubt, it is hereby declared that, subject to the express provisions of any written law, where a man has two or more wives they shall as such, enjoy equal rights, be subject to equal liabilities and have equal status in law.*"[106] Read together with section 71(a) on a husband's duty to maintain 'his wife or wives', the draft bill yields the interpretation that matrimonial property in polygamous marriages would be equal among the wives, but it was silent on division vis-à-vis the husband.

The fourth highlight is that the Matrimonial Property Act 2013, drawing from the KLRC's 2007 draft, also makes it possible for a spouse to seek declaration of the extent of his/her interests in matrimonial property during the subsistence of the marriage, without seeking division of such property.[107] Previously, under the English MWPA, matrimonial property was only dealt with in the context of adversarial proceedings for dissolution of a marriage, and the only relief available was division. The declaratory relief in the 2013 statute is something that even the 1967 Commission did not envision.

The Matrimonial Property Act 2013 incorporates the 1967 Commission's proposals on safeguarding the matrimonial home, in particular, the beneficial interest of a spouse whose name does not appear on the title. It requires written consent for transactions, and accords such a spouse the right to register a caution to bar transactions to which he/she has not consented. Eviction from the matrimonial home can only be by a court order.[108]

However, the 2013 legislation does not go as far as the KLRC's 2007 draft which contained a provision for equal division of property as long as it fell into the category of matrimonial property.[109] The 2013 statute makes proof of contribution the basis for entitlement, applying equal division only in cases of joint registration.[110] This approach was the subject of a constitutional challenge by the International

106 The Law of Matrimony Act (Draft) 1968, s 65.
107 See Matrimonial Property Act 2013, s 17.
108 Ibid, s 12.
109 Section 8 Draft Matrimonial Property Bill (2007): 'Ownership of matrimonial property shall be deemed to vest in the spouses in equal shares irrespective of the contribution of either of them towards the acquisition thereof, and shall be divided accordingly upon the occurrence of divorce or dissolution of the marriage...'
110 Ibid, s 14.

Federation of Women Lawyers (FIDA) Kenya, which is one of the cases discussed in the Case Review in this Special Issue.[111]

B. Marriage Act 2014

The Marriage Act (2014) is the law that was enacted pursuant to Article 45(4) of the Constitution. For the first time, all of the marriage and divorce laws in Kenya have been brought under one umbrella statute, stating explicitly that five forms of marriage exist in Kenya: Christian, Civil, Customary, Hindu and Muslim. The only system of personal law that is partially exempted from the provisions of the Marriage Act 2014 is Islamic law, but only with respect to provisions which are contrary to Islamic law.[112]

The Marriage Act 2014 and the Matrimonial Property Act 2013 mark the first official acknowledgement and regulation of polygamous marriages, in line with the recommendations made by the 1967 Commission.[113] The Marriage Act 2014 incorporates most of the key recommendations of the 1967 Commission. With regard to stipulating a universal minimum age, the Marriage Act stipulates 18 years without differentiating between males and females. This is in alignment with Article 45(2) of the 2010 Constitution which states clearly that only adults have the right to marry.[114] This stipulation was given further backing by the Children Act 2022.[115]

Concerning registration, the Marriage Act 2014 provides for registration of marriages under all five systems recognised in the statute, and avails judicial remedies across the board. It introduces for the first time a system for registering customary marriages.[116] However, the Marriage Act 2014 deviates from the recommendation of the 1967 Commission, as well as the KLRC's 2007 draft by pegging validity of marriage on registration.[117] Emphasis must be placed on the fact that the deviation

111 *Federation of Women Lawyers Kenya (FIDA-Kenya) v Attorney General & another* [2018] eKLR, discussed in 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 (hereinafter, Ndong, this volume).

112 Marriage Act, 2014 s 49(3). This section fails to qualify the Islamic law exemption to ensure that Section 4 on minimum age, for instance, is not caught in the net of provisions deemed contrary to Islamic law. For further discussion of this, see Ndong, this volume, ibid.

113 1967 Commission Report (n4) Paras 73-89.

114 Marriage Act 2014, s 4.

115 Children Act 2022, s 2 (definitions of 'child' and 'child marriage').

116 On registration of customary marriages, see Section 55, Marriage Act; and Marriage (Customary Marriage) Rules, 2017, discussed in detail in Njogu and Wameru, this volume (n 38), 89.

117 Marriage Act 2014 s 3(1) (defines a valid marriage to include registration). Section 39 requires officials who conduct marriage ceremonies to register the marriage. Section 59 sets out the elements of evidence of marriage narrowly to refer to official registration, permitting only a narrow exception (section 59(2) to accommodate documentation of marriage celebrated in a public place of worship but not required to be registered (which is in itself vague). The statute does not, on the face of it, leave room for proof of marriage by reputation or cohabitation, as is the case under the English common law presumption of marriage. In *MNKv POM* (SC Pet. No. 9 of 2021), the Supreme Court held that the presumption of marriage was still applicable, though it was on its "deathbed" and is to be applied in limited circumstances. The implications of this judgment in the post-2014 context are discussed in Ndong, this volume (n 111) and in Njogu and Wameru, this volume (n 38).

is largely a textual one, as the provision is clearly not being implemented. The only judicial decisions that have interpreted the Marriage Act as invalidating unregistered marriages have come from magistrates' courts.[118] The practical implications of implementing mandatory registration in Kenya's present reality are unimaginable, as Njogu and Wameru in this Special Issue demonstrate.[119]

Regarding mainstreaming of Alternative Justice Systems (AJS) into family law practice, the nationwide network of marriage tribunals envisioned by the 1967 Commission was not to be. In its place, the Marriage Act grants recognition to conciliation forums for customary marriage disputes (section 68) and mandates referral of disputes in Christian marriages to mediation (section 64). The Judiciary has adopted a policy on AJS, and some court decisions have affirmed the finality of decisions resulting from negotiations before AJS forums, provided parties submitted themselves to those forums voluntarily, and the proceedings did not violate human rights.[120] The degree to which AJS is interfaced with and institutionalized within the practice of the Family Division of the High Court and Magistrate's courts remains to be ascertained through empirical research.[121]

C. Protection against Domestic Violence Act, 2015

The Protection against Domestic Violence Act (PADVA) 2015 was derived from a KLRC bill by a different name- the draft Domestic Violence (Family Protection) Bill, 2007. The bill was innovative for adopting a wide definition of domestic violence to cover physical, emotional, sexual, economic or psychological abuse, including intimidation, harassment, stalking, breaking into a victim's home, and practices justified as cultural, such as child marriage, female genital mutilation and wife inheritance.[122] The 2015 statute further developed this extensive list in the bill and extended it to acts such as virginity testing and widow cleansing. The 2015 statute goes further than the 2007 bill in offering a comprehensive definition of 'domestic relationship' that goes beyond the context of marriage and parent-child relationships.[123] The 2007 bill was also innovative for providing for protection orders, including for threats of violence. It also established a fund for financial, counselling and welfare assistance for victims, albeit without specific provision for emergency shelter. All these were incorporated into the 2015 statute.

118 See *M.J.K. -v- F.M.L*, M.C.D.C. No.272 of 2019 (Chief Magistrate's Court, Milimani Commercial Court, Nairobi; delivered on 27 September 2022); *E.M.M. -v- P.M.K.*, Divorce Cause No. E023 of 2023 (Chief Magistrate's Court, Machakos; delivered on 15 May 2024).

119 Njogu and Wameru, this volume (n 38).

120 See, for example, *LWG v GBG* [2023] KEHC 26305 (KLR).

121 It appears that there has been no subsequent assessment since the one that preceded the policy. See *Alternative Justice Systems Framework Policy* (Judiciary of Kenya 2020), 8-9.

122 Draft Domestic Violence (Family Protection) Bill, 2007 s 3.

123 Protection Against Domestic Violence Act s 5.

On paper at least, the legislative initiatives of the past decade have surpassed the proposals of the 1967 Commission on the issue of domestic violence. Implementation in practice falls far short though, as Meroka-Mutua's contribution in this Special Issue demonstrates.[124]

VIII. Conclusion: Circling Back to 1967: Unfinished Business?

Taking 1967 as a critical juncture in Kenya's family law reform journey, this article analysed six key legislative proposals made by the 1967 Commission. The proposals were intended to enact minimum standards applicable across plural family law systems so as to give effect to the twin goals of harmonisation and addressing '*the status of women in relation to marriage and divorce in a free democratic society.*'[125] Those six proposals related to minimum age and consent to marry; universal registration/ documentation of marriages; entrenching the principle of the best interests of the child; safeguarding matrimonial property rights; mainstreaming alternative justice systems in family matters; and legal and institutional response to violence in the family.

This concluding section synthesises the article's discussion of the degree to which the ambition of the 1967 Commission, as expressed in these six areas, has been realised in the family law legislative agenda of the last decade.

For the most part, the legislative reforms undertaken a decade ago have gone some way in realising the twin goals of the 1967 Commission. By stipulating 18 as the minimum age for marriage regardless of one's gender, the Marriage Act 2014 surpassed the bar set by the 1967 Commission. It aligned Kenya's law with Article 6 of the Maputo Protocol and Article 21(2) of the African Charter on Rights and Welfare of the Child. The 2014 statute has also outdone the 1967 Commission on the universal registration of marriage by pegging validity of marriage on registration. This too is in line with Article 6 of the Maputo Protocol. However, as Njogu and Wameru in this Special Issue observe, this may amount to self-sabotage, as its implementation would leave the majority of Kenyan marriages without legal recognition, with likely disproportionate impact on women.[126] On the matter of registration, the law should ideally adopt a facilitative rather than prescriptive role, certainly not a punitive role.

Matters of child custody and child support have been dealt with by the Children Act 2022. For purposes of this article, it will suffice to note that the 2022 statute does finally guarantee to every child the economic support of both parents regardless of

124 Agnes Meroka-Mutua, 'Kenya's Legal Responses to Gender-based Violence: Implications for Women in the Context of Family', [2025] Special Issue: Marriage, Property and Equality: Reflecting on a Decade of Family Law Reform in Kenya, *East African Law Journal*, 183 (hereinafter Meroka-Mutua, this volume).

125 1967 Commission Report (n 4) Cover Letter.

126 Njogu and Wameru, this volume (n38). For further discussion of the disproportionate adverse impact of non-documentation of marriages on women see Janet Kabeberi-Macharia, and Celestine Nyamu, 'Marriage by Affidavit: Developing Alternative Laws on Cohabitation in Kenya', in John Eekelaar and Ronald T. Nhlapo (eds), *The Changing Family: International Perspectives on the Family and Family Law* (Hart Pub 1998).

their marital status, in line with Article 53(1)(e) of the 2010 Constitution. With respect to matrimonial property, opinion is divided on whether the MPA 2013, by basing entitlement to matrimonial property on proof of contribution, goes far enough in the direction of the marital equality guaranteed in Article 45(3) of the Constitution. It also falls short of recognition of parties' freedom to make agreements by restricting itself to prenuptial agreements. The quantification of non-monetary contribution could also benefit from specific guidelines to judicial officers and AJS forums, as is pointed out in the Case Review by Ndong in this Special Issue.[127]

The degree to which Alternative Justice Systems (AJS) have been interfaced with family law practice in the courts can only be ascertained by empirical research which, unfortunately, could not be undertaken within the scope of this Special Issue.

Kenya has made advances in legislating against domestic violence and providing civil and criminal remedies. These advances, unfortunately, have not been matched by institutional mechanisms and investment of resources for responding to violence in the family, as the contribution by Meroka-Mutua in this Special Issue demonstrates.[128]

It took the tide of constitutional overhaul in the second wave of African democratization lasting through the late 1990s and the entire 2000s to lift the boat of family law reform from the rocks of the three-decade hiatus. What will it take to advance family law reforms further to address the unfinished business highlighted here?

127 Ndong, this volume (n 111).
128 See Meroka-Mutua, this volume (n 124).

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