

GENDER RESPONSIVE LEGISLATIVE REFORM: AN ASSESSMENT OF THE MARRIAGE BILL 2007

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Introduction

It is said that we are born male and female but the society makes us men and women through socialization; and that the division of the social roles that serve to make us men and women are defined by society. The earliest unit of definition is the family; it is there that we are first taught how to behave as girls and boys and later as men and women. It is also the place where we learn or fail to learn values such as fairness, justice and equality. There is a lot more that we could learn; positive and negative. To become educated or not has its roots in the family too and whether to live below or above the poverty line is, in many cases determined here.

After age 18 we become voters and have the capacity to vote for the governance of this country. Whether we vote patriarchy or dynamism has a lot to do with the experience at the family setting. And the kind of leaders we become has a lot to do with the values we picked from home.

In brief, my proposal is that transformation of society that we are seeking so hard to get must begin with the family.

Families must therefore be made to understand the role that they play in taking this Nation forward; that unless we impart values at that point, then we have lost it. Gender equality would be much better addressed at the point of family. Later in life, patriarchy is entrenched and people who have become stake holders in it would find it difficult to agree or understand any change to the status quo.

One of the ways of supporting families is in enacting legislation that is comprehensive and accessible. A lot of conflict within family would be avoided if the laws such as those concerning financial responsibility, property, children and marital status were clearly defined and set out in a comprehensive legislation. Conflicts in such terrain take a lot of time and money to solve. Many a times the proper nurturing of the young ones is forgotten as the adults work towards putting out the marital flames.

The History of the Marriage Bill is long. In 1967, the Government appointed a Commission to consider the existing marriage laws. Members of Parliament rejected the Marriage Bill apparently because it was un-African and took no account of African customs and traditions. In 2007 The Kenya Law Reform Commission drafted the current Marriage Bill of 2007. We must engage with it and approve it as drafted or add value to

it. I only hope that we will use the standards of justice, fairness and equality in judging the Bill. The following is a summary of the highlights of the Bill.

Does the proposed Bill add any value to the existing law?

- This would be our first home grown Marriage Act; the existing Marriage Act commenced in 1902 though it was revised in 1962. All the other Acts that relate to marriages are also almost as old, with their commencement ranging from 1906 to 1929 and all of them boast of the last revision in 1962. Since we became independent and in the 10 lives of the Independent Parliament, we have not found time to legislate over our families. One could almost ask whether our independence has not just been skin deep if we have not bothered to liberate our families from dictation by such colonial relics as the family Laws. That the Bill is being debated today and that we have the long over due opportunity to infuse the Bill with our values is in itself value added. We must stop apologizing and complaining about archaic imposed foreign laws that leave many of our situations unaddressed. Old imported laws are like many an imported outfit that just does not fit, no matter the adjustments made. The original cut was simply intended for another person in another place and another time.
- The Bill proposes to consolidate all the Marriages Laws into one. There are currently seven Acts of Parliament relating to Marriage namely; **The Marriage Act, The African Christian Marriage and Divorce Act, The Matrimonial Causes Act, the Subordinate Courts (Separation and Maintenance Act), The Mohammedan Marriage and Divorce Registration Act, The Mohammedan Marriage Divorce and Succession Act and the Hindu Marriage and Divorce Act.**
- Currently one has to navigate through at least two Acts in order to understand one's marriage status, rights and responsibilities because while the formalities are contained in one Act, the rights and responsibilities are contained in the Matrimonial Causes Act. If the Bill becomes law, one will only have to look into only one Act and therein lie the formalities of marriage, the status, rights and liabilities.
- Indeed the existence of the various statutes has lead to such complications as cases being dismissed on technicalities because a certain provision in one of the Acts was not considered. Access to justice in the matter closest to society has thus been hampered.
- Finally marriage will be comprehensively defined in Kenya and it will be possible to answer a question on one's marital status with a yes or no and not with such answers that we usually give like " I am not legally married". You will either be married or not.

- The Bill also makes provision for Islamic Marriages and recognizes marriages contracted in the manner recognized by Islam or by any school or sect of that faith.
- It also recognizes Hindu marriages, marriages that are celebrated according to the rites of any faith that the Minister may authorize and Civil Marriages conducted before the Registrar.
- The Bill recognizes and allows for the registration of customary marriages. Currently, there is no Act that provides for customary marriages. Is it not strange that despite that fact that customary marriages have been with us since the beginning of our communities, there is no Act of Parliament that recognizes them? Thankfully our Courts have recognized the existence and the legitimacy of customary law marriages. However no marriage certificates exist and a person seeking to prove a customary marriage has to rely on elders and other such evidence to prove marriage. In fact many of Kenyans married under custom are not certain that the marriages are valid because, with the gaps in the law, you are not married until the Court confirms so. The need for certainty in ones marital status is crucial; and it affects not just the spouse but the children of such a union because the question of whose children they are affects even their access to basic necessities.
- The Bill provides that one does not have to pay dowry to get married and that therefore marriage is a complete contract irrespective of the status of dowry. It does not however outlaw dowry and those able and willing, still have the space to continue with the practice. However and unlike today when people file cases to recover dowry, the Bill clearly states that dowry will not be recoverable.
- Undeniably the concept of dowry has been misinterpreted to mean that a woman is a chattel for the reason that she was bought for some tangible value like other chattels. Hopefully the Bill will serve to break that yoke and allow for the recognition of marriage as a voluntary union that is intended for mutual benefit.
- The Bill recognizes marriages by cohabitation and allows for their registration. Currently no Act of Parliament provides for marriage by cohabitation. Thankfully again, Courts recognize such marriages but the standard of proof is very high. If one spouse disputes the marriage, the other spouse has to prove the marriage. Evidence usually takes on the form of evidence from family members, neighbors and photographs to prove that the couple lived together as husband and wife. In view of such difficulties many people consider themselves not legally married until the Court says so. What a life? If the Bill passes into law, and if a couple has lived together openly as husband and wife for at least two years, they will be at liberty to obtain a certificate and have a definite answer to anyone seeking to know their marital status; yes or no?

- The Bill recognizes polygamous marriages. Currently no marriage laws address polygamy and its existence is only recognized by Courts within customary marriages and the Law of Succession Act. The Bill not only recognizes polygamous unions but also provides for their registration. However, those married under Monogamous marriages cannot contract polygamous Marriages. Further a man who has chosen polygamy cannot convert to monogamous marriages unless at the time of conversion he had only had one wife.
- The Bill provides that when you apply to the Registrar of Marriages to marry you, one of the things you will have to indicate in writing is whether the marriage is intended to be polygamous or monogamous. Sisters, then do have a say on what union they want to have. Where the intended husband is already married, the form requires an indication of the names of the existing wife or wives. Is not this transparency at best!
- It also provides that marriages contracted under custom or Islamic law are polygamous or potentially polygamous. In all other cases marriages are presumed to be monogamous. Cohabitors will then have to agree to have monogamous unions.
- All marriages under the Bill will have the same legal status and will be adjudicated upon by the same Courts; Magistrates Courts. Currently marriages under the Marriage Act enjoy a more privileged status than those under the African Christian Marriage & Divorce Act. The ones under the Marriage Act and as long as both parties are not African are filed in the High Court(and enjoy such facilities like in Nairobi of a specialized Family Division) while those under the African Christian Marriage and Divorce Act are filed in the Magistrates Courts.
- Objection to marriages; Media reports on many weekends contain images of women objecting to weddings at wedding venues. Many a times such a woman will be accompanied by a child or children and the relatives of the new couple are seen chasing away the intended objector. In fact many such an objector does not even get to the alter and is roughly kept at bay. The Bill proposes that the objection should be in writing and that the Registrar, on receipt of the Notice will hear both parties and make a decision. Once issued with the Objection the Registrar cannot proceed with the marriage until the objection has been determined. Of course Courts still have power to deal with any applications objecting to such marriages. Needless to say the procedure now proposed is much more accessible in terms of cost and the formalities compared to the Court processes. However a time limit within which the objection is received should be set.
- The Bill also seeks to increase access to Marriage Registrars by providing for a Chief Registrar of Marriages , Deputy chief Registrar of Marriages, and as many Assistant Registrars as the Minister may deem fit. There shall also be a District Registrar and as many District Assistant Registrars as the Minister shall consider

necessary. A minister of religion licensed to conduct marriages and every Kadhi will be Registrars for this purpose. Thus one will not need to go to a District Headquarter or to Nairobi to register a marriage.

Rights and responsibilities:

Maintenance

The Bill provides that where the Parties are separated, either spouse shall maintain the other spouse. In the current laws, the husband has a duty to maintain a needy wife but there is no corresponding duty for the wife to maintain a needy husband. The Bill now makes it possible for the wife or the husband to maintain the other. That provision has caused some furore but the question to ask is whether it would be fair to do otherwise. If our laws are based on fairness and equality, then it must be good to provide that right/responsibility to either spouse. Fairness and equality cuts both ways, after all or do they not?

It is worthy of note that in the assessment of maintenance payable, the Court will have regard to the needs of the Parties, the degree of responsibility that the Court may apportion to the breakdown of the marriage and the capacity of the party to earn a living. It is also worthy of note that such an order ceases to have effect upon the remarriage of that party in whose favour the order is made.

Pledge Credit

The Bill allows a spouse to pledge the other's credit, to borrow or use money in her possession for purposes of purchasing necessities for the spouse and any children of the marriage requiring such necessities and so far is reasonable having regard to the other spouse's means and way of life.

However the above will only happen where the parties are living together, separated under an agreement or where the spouse has been deserted and provided that the spouse is not living in adultery.

However the right above is not automatic and is not available where the spouse was receiving sufficient maintenance or allowance or had sufficient means of their own, had a sufficient quantity of those necessities or where a spouse has acted extravagantly having regard to the other spouse's means.

Matrimonial Disputes:

- The Bill recognizes conciliatory services for couples in distress and recommends that a Court may require a couple to engage such services. It is definitely a plus because of the very nature of marriage. But perhaps the services should not be

limited to efforts to reconcile and should include counseling and like support services.

- Finally the ground of divorce known as irretrievably broken down is here but one has to show evidence of such break down which includes adultery, cruelty, neglect, separation of at least two years, desertion for at least two years etc. We are not yet at divorce by consent but I am of the view that there is no reason why that cannot be done.
- The Bill allows the Court to deal with division of matrimonial property as it deals with marriage which is different from the current practice where one has to file two different cases attracting costs and a clogging up of the Courts.
- It also allows the Court to deal with custody and maintenance of Children.
- Finally the Court has power to either give leave to remove a child from Kenya or restrain the removal of a child from Kenya.

In a nutshell, our Bill seeks to consolidate laws relating to marriage which it does to some large extent. The Bill also seeks to equate all marriages and to provide rights and responsibilities that are similar in all marriages. It is a far cry from what we have had and I hope it is far enough to simplify our lives and leave us to devote more energy to development rather than solving conflict.